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(2020)03-05ILR A1
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.05.2020

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Reference No. 04 of 2019
&
Capital Case No. 6 of 2019

Mouni ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Saghir Ahmad A/C

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

A. Evidence law- Evidence Act (1 of 1872)-Section 118 - Who may testify - Child witness - Competency - Preliminary test - it is only a rule of prudence that there should be a record of the question put & answer received during the preliminary examination - for ascertaining the competence of the child witness - If No such test made - Consequence - non recording of the questions & answers – no ground for rejecting the testimony of child witness - if it appears to be otherwise reliable (Para 46)

Held – It appears from PW 13 statement that learned trial court administered oath to him - itcan be inferred that the learned trial court must have found him capable of giving intellectual answers to the questions put to him. (Para 44, 46)

B. Criminal Law- Indian Penal Code (45 of 1860)-Section 302 - Evidence Act (1 of 1872)-Section 3 - Circumstantial evidence - Last seen theory - Applicability - Time gap between last seen and death – time gap between last seen alive and the recovery of dead body must be so small that the possibility of any person other than the accused being the author of the crime becomes impossible - last seen evidence – very important circumstantial evidence – if proved & found trustworthy – it can singularly lead to the inference of guilt. (Para 36, 40)

Accused committed rape and murder of his own 7 years old daughter – statement oflastseen given by PW13 son of the accused - stated accused to ok victim out saying that he is taking her to get medicine – same night victim dead body was recovered- Held – no delay or time gap between last seen and the discovery of the dead body - unimpeachable evidence of last seen supported by medical and FSL report - victim hymen was lacerated, vagina was bleeding, marks of injury on body, show that rape was committed- previous conduct that accused used to sexually abuse the deceased - convictionu/s 302/376(f)IPC justified.

C. Criminal Law -Indian Penal Code (45 of 1860) – Section 201, 361, 363 - Victim 7years daughter of accused – Victim mother already died-accused was only lawful guardian - ingredients ofthe offence u/s 361 not complete to constitute the offence -noevidencethat accused did anything to disappear the body - conviction u/s 363 and section 201IPC is not sustainable

D. Criminal law-Indian Penal Code (45 of 1860) , 376(2)(f) - Protection of Children From Sexual Offences Act (32 of 2012)-Sections 5(n), 5(m), S.6 - Punishment - Death sentence- Death penalty is exception to rule of life imprisonment - Aggravating and mitigating circumstances - just balance has to be struck between the aggravating and the mitigating circumstances

Held – Aggravating circumstances were accused was the father of the deceased & the deceased was only 7 years in age & he committed rape and murder - Mitigating factor is that the accused was in the habit of taking wine and drugs, whole case is based on

circumstantial evidence, murder has not been committed in an unusual and cruel manner - sentence of life imprisonment sufficient in the circumstances of the case (Para 64)

Appeal partly allowed (E-5)

List of cases cited :-

1.St. of Raj. Vs Kheraj Ram (2003)8SCC224

2.Vilas Pandurang Patil Vs St.of Mah. (2004)6SCC158

3.Arun Bhanudas Pawar Vs St. of Mah. 2008(61)ACC32(SC)

4.Vithal Eknath Adlinge Vs St. of Mah. AIR2009SC2067

5.VijayKumar Vs St. of Raj. (2014)3SCC412

6.Bhimsingh Vs St. of Uttarakhand (2015)4SCC281

7.RohtasKumar Vs St. of Har. 2013(82)ACC401 (SC)

8.Prithipal Singh Vs St. of Punj. (2012)1SCC10

9.Ashok Vs St. of Mah. (2015)4SCC 393

10.St. of Goa Vs Pandurang Mohite AIR2009SC1066

11.St.of UP Vs Satish,2005(3)SCC114

12.Sardar Khan Vs St. of Karn. (2004) 2 SCC 442

13.Niranjan Panja Vs St. of WB(2010)6SCC525

14.St. of UP Vs Satish (2005)3SCC114

15.Ravi Vs St. of Karnataka AIR2018SC2744

16.Rameshwar Vs St. of Rajasthan AIR1952SC54

17.St. of Raj. Vs Vijayram,1968Cr.LJ270

18.Suresh Vs St. of UP AIR 1981SC1122

19.Suryanarayana Vs St. of Karn. (2001)9 SCC 129

20.St. of Karn. Vs Shantappa Madivalappa Galapuji (2009)Crimes245(SC)

21.Nivrutti Pandurung Kokate (2008)12SCC565

22.Himmat Sukhdeo Wahurwagh Vs St. of Mah. (2009)2Crimes294

23.GulSingh Vs St. of MP 2015(88)ACC358 (SC)

24.Bachan Singh Vs St.of Punj. AIR1980SC898

25.Machi Singh Vs St. of Punj. (1983)3SCC470

26.Ravji Vs St. of Raj. (1996)2SCC175

27.Swamy Shraddananda (2)Vs St. of Karn.,(2008) 13SCC767

28.Aloke Nath Dutta Vs St. of WB (2007)12SCC230

29.Jayawant Dattatraya Suryarao Vs St. of Mah. (2001)10SCC109

30.Nazir Khan Vs St. of Delhi (2003)8SCC461

31.Dilip Prem Narayan Tiwari Vs St. of Mah. AIR 2010SC36

32.Sebastian Vs St. of Kerala (2010)1SCC58

33.Vikram Singh Vs St. of Punj. (2010)3 SCC 56

34.Mulla Vs St. of UP (2010)3SCC508

35.Sandeep Vs St. of UP (2012) 6 SCC 107

36.U.O.I. Vs. Sriharan @ Murugan (2016) 7 SCC 1

37.Raj Kumar Vs.St. of M.P.,(2014)5 SCC353

38.Selvam Vs State (2014)12SCC 274

39.Tattu Lodhi Vs St. of MP (2016)9SCC675

40.Parsuram Vs St. of MP (2019)8SCC382.

41. Sachin Kumar Singhraha Vs St. of MP (2019) 8 SCC 371

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

1. Heard Sri Saghir Ahmad, Senior Advocate/Amicus Curiae for the appellant and Sri Ajit Ray, learned AGA for the respondents.

2. This appeal has been filed by the appellant Mouni against the impugned judgment dated 19.09.2019, passed in Special Sessions Trial No. 624 of 2018, by Special Judge (POCSO Act)/Additional Sessions Judge, Court No. 9, Agra, arising out of Case Crime No. 605 of 2017, under Sections 363, 302, 201, 376(f) IPC and Section 5(n) read with Section 5(m)/6 of the POCSO Act, Police Station Etmadpur, District Agra by which the learned trial court had convicted the appellant Mouni for the offence under Section 302 IPC and awarded death sentence along with fine of Rs. 1 Lakh and in default of fine one year additional imprisonment, under Section 376(f) IPC for life imprisonment along with fine of Rs. 50,000/- and in default of fine six months additional imprisonment, under Section 363 IPC for seven years imprisonment along with fine of Rs. 25,000/- and in default of fine three months additional imprisonment, under Section 201 IPC for three years imprisonment along with fine of Rs. 10,000/- and in default of fine two months additional imprisonment and for the offences under Section 5(n) read with Section 5(m)/6 of the POCSO Act for 14 years rigorous imprisonment along with fine of Rs. 50,000/- and in default of fine six months additional imprisonment.

3. The Special Judge after convicting and sentencing the appellant for death sentence has submitted the record to this Court for confirmation of death sentence under Section 366 CrPC, which has been registered as Reference No. 6 of 2019.

4. The appeal and the reference both are being decided simultaneously as both relate to the same impugned judgment.

5. Briefly, the prosecution case is that accused Mouni himself lodged an oral report on 24/25.11.2017 at about 02:30 AM in the mid night with the allegation that on 24.11.2017, he and his daughter (victim) aged about 7 years, Jeete aged about 9 years were sleeping on the cot in his hut. At about 02:30 AM in the mid night, he got awakened and found that the victim was not on the cot and she was missing. He tried to search her in the surroundings but he could not trace her. The victim was wearing a red trouser and red sweater. Having failed to trace out her, he went to the police station and orally reported the matter and on that basis, the offence against unknown person was registered under Section 363 IPC. SSI Suneel Kumar started the investigation, the police tried to search out the missing child and in the night at about 03:00 AM, she was found in the naked condition in the courtyard of the building of Government Model School. She was taken to the hospital, where she was declared dead. Thereafter a written report was given by the accused Mouni to the Police Station Etmadpur stating that he was living in a hut near the Government Modal School. On 24.11.2019, when he, his daughter and his son were sleeping in the night on cot, at about 2:30 AM in the night he got awakened and found that his daughter is not there on the cot and was missing. He tried to search her and thereafter, he informed about the incident in the police station in the night itself. He and police of the local police station were searching his daughter in the Government Model School building and there in the courtyard, they found the victim in naked condition and her inner-wear (Baniyan)was

lying closer to her. There were mark of injuries on her body and bleeding was present in her private part. She was taken to the emergency of the S.N. Hospital, where she was declared dead. He suspects that some unknown person killed her after committing rape.

6. On the basis of this written report an addition of Sections 302, 201, 376 IPC and Section 3/4 POCSO Act were made and the investigation was started. The inquest report of the dead body was prepared, dead body was sealed and after preparing the necessary papers, the dead body was sent for postmortem. The investigating officer recorded the statements of the witnesses, prepared the site map of the place of occurrence, took in possession the wearings of the deceased and took swab etc. from the private part of the deceased. During investigation, prima-facie the offence was made out against the accused Mouni, the informant himself. Charge-sheet was submitted for the aforesaid offence and charges were framed against the accused person.

7. The prosecution has examined as many as 16 witnesses in support. They are PW-1 Kartal, PW-2 Servesh, PW-3 Johny, PW-4 Dr. Udit Kumar, PW-5 Lajja Ram, PW-6 Shailendra Yadav, PW-7 Shammi Kapoor, PW-8 Rahul, PW-9 Ramchandra, PW-10 Constable Sandeep Singh, PW-11 SI Vinod Kumar, PW-12 Sonu, PW-13 Jeete, PW-14 Constable Harendra Singh, PW-15 SO Fateh Bahadur Singh Bhadauria and PW-16 SI Suneel Kumar.

8. The witnesses have proved the incident and the documents such as written report Ext. Ka-1, postmortem report Ext. Ka-2, chik FIR Ext. Ka-3, GD reports Exts. Ka-4 & Ka-5, panchnama Ext. KA-6, 12 & 13, photo nash Exts, Ka-7 &14, charge sheet Ext. Ka-8, site plan Ext. Ka-9, letter to RI Ext. Ka-10, sample seal Ext. Ka-11, form-13 Ext. Ka-15, report of forensic science laboratory Ext. Ka-16, spot investigation/DNA report Exts. Ka-17/1 & 17/2, letter to CMO Ext. Ka-18, application for video-graphy Ext. Ka-19, recovery memo of clothes of deceased Ext. Ka-20, recovery memo of clothes of the accused Ext. K-21 and envelope, swab of the private part of the deceased, hair of the deceased and the accused, clothes etc. material Exts. 1 to 26.

9. The statement of the accused was recorded under Section 313 CrPC, wherein he has denied the prosecution version and has stated the evidence of the witnesses to be false and given due to enmity. He has been falsely implicated in the present case. However, the accused did not produce any evidence in his defence.

10. After perusing the evidence available on record, the learned trial court has passed the aforesaid impugned judgment convicting and sentencing the accused-appellant by awarding death sentence and other punishments.

11. Feeling aggrieved by the impugned judgment, the present appeal from jail has been filed challenging the impugned judgment on the ground that the impugned judgment is against the facts, evidence and law. The sentence awarded is excessive and the prosecution has failed to prove the case against him. No case is made out and the benefit of doubt has not been given to him, hence, the impugned judgment is liable to be set aside and the accused-appellant is entitled for acquittal.

12. The learned trial court has also submitted the record of the case for confirmation of the death sentence.

13. Before proceeding to analyze and examine the evidence on record, it appears necessary to first go through the evidence which has been produced by prosecution in support of case. PW-1 Kartal has stated that at the time of incident, he was living near Government Model School in a hut constructed by him. Besides his hut there is hut of Rajendra. About ten months ago in the mid night at about 03:30 AM, the police team came and awakened him. Mouni was accompanying the police team who told that his daughter is missing. The police along with Mouni started searching the deceased in the building of Government Model School. Sarvesh was also accompanying. After some times, the appellant came with the deceased who was unconscious. She was taken to the Government Hospital. Thereafter, he came to know that Mouni committed rape and killed her. His statement was taken by the police.

14. PW-2 Sarvesh has stated that his hut is in front of the hut of Mouni, wherein he lives with his family. Ten months before at about 03:30 AM in the mid night, the police jeep came and he was awakened. The police was accompanied by Mouni who told that his daughter is missing. They all started searching his daughter. The police went to search the victim in the garden of the school and in the left side of the building, Mouni went and he told that his daughter is lying in the courtyard. The witness has stated that he saw that the victim was lying naked in the school's courtyard. The victim was taken to the S.N. Medical College. Subsequently, he came to know that Mouni has committed murder of his daughter after committing rape on her. His statement was taken by the police.

15. PW-3 Johny has stated that about ten months before Mouni got the report scribed by him and has the proved the written report. He has also stated about the incident as narrated to him by the accused.

16. PW-4 Dr. Udit Kumar, Medical Officer, CHC, Kheragarh, Agra has stated that on 25.11.2017, Constable Harendra Singh of Police Station Etmadpur had brought the sealed dead body of the daughter of Mouni for postmortem. The dead body was unsealed. The height of the deceased was 3 feet and 10 inches and her weight was about 15 Kg. In the external examination, it was found that her mouth and eyes were closed and the white portion of the eyes were congested. The following ante-mortem injuries were found on the body of the deceased-

(I) Teeth bite 4 cm. X 3 cm. on the on face.

(ii) Teeth bite 4 cm. X 3 cm. on chest at nipple.

(iii) Teeth bite 4 cm. X 3 cm. near the umbilical area.

(iv) Abrasion and contusion was present on the left side of the forehead.

(v) Abrasion 2 cm. X 2 cm. on the front of the nose.

(vi) Lacerated wound 0.5 cm. X 0.5 cm. on the lower lips.

(vii) Abrasion and contusion 9 cm. X 2 cm. on the left side of the neck.

In the internal examination, nothing was found in the head. The brain and its membranes were congested. Lungs were found congested. Heart was empty. Half digested food was present in the stomach. Fecal matter and gas was present in the large intestine. In the small intestine digested food and gas was present. Liver was congested and gall bladder was half full. Kidney was congested. Urinary bladder was empty. Hymen was torn. Bleeding was present in the vagina. Uterus was non gravid. Larynx and Vocqal cords were congested. Trachea was also congested and the hyoid bone was intact.

The reason of death was asphyxia. In the cross examination, the doctor has stated that no clear opinion can be given with regard to commission of rape. Postmortem has been conducted on 25.11.2017 at 5.20 PM and according to doctor, death must have been caused ¾ days before on the same day.

17. PW-5 Lajja Ram has stated that about one year before he was passing with Shailendra Yadav through the Government Model School, Etmadpur, where many persons were gathered. On inquiry, he came to know that accused Mouni has committed sexual assault with his 6-7 years old daughter and at that time, he was in a drunk condition. The people of the locality were scolding him. Accused Mouni sought apology and promised not to repeat such thing. He was in the habit of drinking and he committed the offence on her daughter. In the cross-examination, he has stated that he knew the accused.

18. PW-6 Shailendra Yadav has stated the same thing what was stated by PW-5 Lajja Ram.

19. PW-7 Shammi Kapoor has stated that he was living near the Government Model School, Etmadpur in a hut where accused Mouni was also living in a hut with his family. On 24/25.11.2017 at about 03:30 AM in the mid night, police came on jeep with Mouni for searching the victim. Thereafter, the victim was found in the school and he saw that she was in unconscious state. Mouni was carrying his daughter on his shoulder. She was taken to the hospital, where she was declared dead. Mouni was in the habit of taking drugs and wine. Prior to this incident, there was a complaint that he committed sexual assault with his daughter about 5-6 months before. People of the locality scolded him and he sought apology for the same and promised not to repeat such kind of act.

20. PW-8 Rahul has stated that he used to live near the Government Model School, Etmadpur with his family near the hut of Mouni. One year before, at about 03:30 AM in the mid night, police jeep came and got the nearby people awakened. Mouni was also accompanying the police who said that his daughter was missing. On search, the naked body of the daughter of Mouni was found and taken to the hospital where she was declared dead. Mouni was in the habit of taking wine and drugs and used to sexually assault his daughter.

21. PW-9 Ram Chandra has stated that on the next day of the death of deceased, he reached on the spot and inquest report was prepared by the police and he signed on the inquest report.

22. PW-10 Constable Sandeep Singh has stated that on 25.11.2017, he was on night duty in the police station. At about 03:05 AM, Mouni came and informed that on 24.11.2017 in the mid night, his daughter aged about 7 years and his son aged about 9 years were sleeping with him on a cot and at 02:30 AM in the night, when he got awakened, he found that his daughter is missing. He searched but could not trace her. He gave an oral information in the police station. On the basis of which Crime No. 605 of 2017, under Section 363 IPC was registered. Thereafter, on 25.11.2017, at about 06:10 AM, he gave the written report about the rape and murder of his daughter and on that basis the offence was modified by adding Sections 302, 201, 376 IPC and section ¾ POCSO Act. The entry was made in the corresponding GD.

23. PW-11 SI Vinod Kumar has prepared the inquest report.

24. PW-12 Sonu aged about 12 years is son of accused Mouni who has stated that his sister was killed about one year before by his father Mouni, who used to commit sexual assault and rape with her. He had drinking habit and used to take drugs. He could do anything with anyone. He has however accepted that he did not see the accused committing the offence.

25. PW-13 Jeete aged about 8 years is also son of Mouni. He has stated that his sister was killed by his father in the fateful night when she was sleeping with him and his father. In the night she was weeping and she said that she is feeling pain. His father took her out saying that he is going to get medicine for her.

26. PW-14 Constable Harendra Singh had taken the dead body of the deceased for postmortem and he submitted the postmortem report in the police station.

27. PW-15 Fateh Bahadur Singh Bhadauria, incharge police station and IO of the case has stated that during the course of investigation he also recorded the statement of some witnesses and on the basis of collected evidence, the name of Mouni came into light as accused. He also submitted charge sheet against him.

28. PW-16 SI Suneel Kumar traced out the deceased in the Government Model School with the accused and has stated that when they were searching the deceased in the school, the accused went to the left side and came carrying the deceased on his shoulder and said that he has traced his daughter and he found her in the courtyard of the school. He went there and found that there was blood on the place. The deceased was taken to the district hospital where she was declared dead. Accordingly the addition of other offences were made. During investigation, this fact was brought into the knowledge that 5-6 months before also, he committed the same kind of act with the deceased under the influence of wine and drugs. The local people got him scolded. He has also stated that during investigation, Jeete told him about the incident and said that in the night the deceased was weeping and she said that she was feeling pain in her thigh and chest. Mouni got her drink water and took her out for medicine. He has further stated that his father can do anything as he used to take wine and drugs. During investigation Sonu who is also son of the accused has also stated the similar facts. On the above facts and circumstances he arrested the accused Mouni on 27.11.2017. After being arrested, the accused confessed and at his instance, certain incriminatory things such as black Jarkin, jeans and school coat of deceased from the hedges of school which according to accused the victim was wearing at the time of incident, were recovered of which memo Ext. Ka-20 was prepared and the recovered articles were sealed. Similarly, keeping in view the possibility of availability of blood and semen on the clothes of accused he was wearing at the time of accident, the clothes of accused, underwear, shirt, lower and a round neck T-shirt was taken into possession, sealed and memo Ext. Ka-21 was prepared. After recording the statements of relevant witnesses, he prepared the site map and proved the same as Ext. Ka-9. He also prepared the papers prepared for postmortem. He also sent the aforesaid articles and blood samples of the accused and victim to FSL with other items taken from spot during investigation such as one

cigarette, half burnt matchstick, one button, black thread and red thread, blood swab, blood/sperm swab from the spot, hair of deceased found on dead body and bed sheet, piece of bed sheet for comparison, swab and hair from the private part of the accused, Hair recovered from the clothes of victim found in hedges and from spot, hair of the accused for comparison. FSL report is on record and sent items have been produced and proved by the witness.

29. The submission of learned counsel for the appellant is that the whole case is based on circumstantial evidence and there is no evidence of rape being committed by the appellant. The first information report was lodged by the appellant himself and he was falsely implicated and made accused in the case. The further submission is that the age of the victim at the time of incident was 6-7 years and the medical evidence shows that she died out of asphyxia and definite opinion with regards to commission of rape has not been given by the doctor conducting postmortem. It has been further submitted that none of the fact witnesses has seen the incident and they have not been able to say that the accused caused the death of deceased or he committed rape. PW-12 Sonu and PW-13 Jeete who are sons of the accused are child witnesses but their intellectual capacity has not been tested by the learned trial court and their testimony cannot be relied upon nor conviction can be based on their testimony. The learned trial court has committed error in concluding that the case of the accused is covered under the rarest of rare cases and, therefore, the death sentence awarded is not legally justified.

30. Learned AGA has submitted that there was sufficient evidence to prove the charge against the accused-appellant and the learned trial court finding the evidence given by the prosecution reliable and trustworthy passed the finding of conviction and considering the fact that the accused was found to be guilty of committing rape and murder of his own 7 years old daughter, the death sentence awarded by the learned trial court is absolutely justified.

31. From perusal of the first information report, it appears that the accused appellant orally informed the police of Police Station Etmadpur regarding his 7 years old daughter got missing in the mid night of 24.11.2017 when he, his son and the victim were sleeping on a cot in his hut. He got awakened at 02:30 AM in the mid night and found the victim missing. He searched her in the surrounding but could not get her. The information has been given at 03:05 AM in the mid night and the case was registered for the offence under Section 363 IPC against unknown person. On his oral report, the police went with him to his residence and made a search and in Government Model School building, in the courtyard, the victim was found in naked condition with her inner-wear close to her body. She was taken to the hospital and she was found to have died. Thereafter, the accused himself gave a written application to the SO stating this version and making allegations that some unknown person has committed rape and murder. Theefore, Sections 302, 201, 376 IPC and 5(n) read with Section 5(m)/6 of the POCSO Act were added. On the basis of statements recorded by the investigating officer, under Section 161 CrPC of witnesses, the name of the accused appellant came in light and he was charge sheeted for the aforesaid offences.

32. The case of the accused-appellant as disclosed from his statement under Section 313 CrPC and in the manner the

defence has conducted cross-examination of the prosecution witnesses is of complete denial and he has alleged that he has been wrongly and falsely framed in the case and the whole case is based on false incident. The accused, however, did not give any evidence in his defence.

33. PW-1 Kartal lives near the hut of accused and close to the Government Model School. He has stated that in the fateful night, the victim was found in the government Model School building. She was unconscious and subsequently found dead by the doctor. This witness has stated during cross-examination that he does not know who committed rape and murder of the victim. He was sleeping when he was awakened. He did not see the victim nor he entered in the exercise of her search. He has also stated that he cannot say when she was found in the late mid night. Similar is the statement of the PW-2 Sarvesh with the difference that with police the accused also searched the victim and he saw that victim was lying in the courtyard of Government Model School in the naked condition. He was told by the accused himself that the victim is lying in the courtyard, then he saw her. The accused did not call the police and said that the victim has been traced. In the cross-examination, he has stated that he cannot say who committed rape and killed the victim. PW-3 Johny is only scriber of the written report and he did not see the incident nor he has any knowledge about it. PW-5 has stated that he cannot say how the victim died and whether the rape was committed on her or not. He has stated that a year before, he had seen the accused committing sexual assault on the victim who was 6-7 years old. Similar is the statement of PW-6 Shailendra Yadav and both these witnesses have stated that because of this incident, the crowd collected in front of the house of the accused and all scolded him. PW-7 Shammi Kapoor has also stated in similar manner but he has stated that he did not see the accused doing sexual assault on his daughter and he was told by others. PW-8 Rahul has stated that the accused was edict of wine and drugs and under that affect, he used to commit sexual assault with the victim. Thus, all these witnesses have either stated about the recovery of dead body or about the fact that the accused was in the habit of committing sexual assault on victim and when seen and scolded by people of the locality, he apologized before them. This fact got further affirmed by the statement of PW-12 Sonu who is son of the accused and has also stated that his sister was killed by the accused who used to sexually assault her. He was edict of wine and drugs and he can do anything with anyone. We find that all the fact witnesses except PW-13 Jeete have stated about earlier conduct of the accused who was in the habit of taking wine and also in the habit of committing sexual assault with the victim and he was seen by the persons of that locality. Thus, all these witnesses have stated the background leading to the commission of offence and the sexual perversion of the accused which is one circumstance indicating towards guilt.

34. The statement of PW-13 Jeete has to be seen in the backdrop of the statement given by other witnesses. PW-13 has stated that he was with his father and victim in the fateful night. The victim was sleeping with him and his father. He got awakened in the night as the victim was weeping and she told that she is in pain. Whereupon his father took her out of the hut saying that he is going to take medicine for her and thereafter, she was not seen alive and her dead body was recovered. This also goes to

show that the son of the accused himself has proved the fact that he saw his father taking away the victim from the house and prior to that she was weeping and complaining that she is feeling pain. Thus, it is clear that the accused was the person who was last seen with the deceased taking her away out from the house.

35. Learned counsel for appellant has submitted that PW-12 Sonu has also stated that his father never took wine and the drugs before him. This is not relevant. The submission of the learned counsel is that all these witnesses have not stated with conformity regarding the involvement of the accused in the crime. As regards the statement PW-13 Jeete, it has been submitted that he is 8-9 years old and he did not possess that intellectual capacity to give answer to the questions put to him. His intellectual capacity was not tested by the learned trial court and it was not legal on the part of the court to place reliance on his evidence.

36. It is true that there is no evidence of any witness who might have seen the accused committing rape and causing death of the victim and the prosecution case is based on circumstantial evidence of "last seen together" and only PW-13 has been examined to prove this fact. The statement of PW-13 Jeete is significant as an evidence of the circumstance of last seen. The last seen evidence is very important circumstantial evidence and if proved and found trustworthy, it can singularly lead to the inference of guilt. In **State of Rajasthan v Kheraj Ram, (2003) 8 SCC 224, Vilas Pandurang Patil v State of Maharashtra, (2004) 6 SCC 158, Arun Bhanudas Pawar v State of Maharashtra, 2008 (61) ACC 32 (SC) Vithal Eknath Adlinge v State of Maharashtra, AIR 2009 SC 2067 and Vijay Kumar v State of Rajasthan, (2014) 3 SCC 412,** the Supreme Court has laid down that circumstantial evidence, in order to be relied on, must satisfy the following tests :

1. Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

2. Those circumstances must be of a definite tendency unerringly pointing towards guilt of the accused.

3. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from conclusion that within all human probability the crime was committed by the accused and none else.

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused but should be inconsistent with his innocence- in other words, the circumstances should exclude every possible hypothesis except the one to be proved.

37. In **Bhimsingh v State of Uttarakhand, (2015) 4 SCC 281**, it was laid down that when the conviction is to be based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances. If there is a snap in the chain, the accused in entitled to benefit of doubt. If some of the circumstances in the chain can be explained by any other reasonable hypothesis, then also the accused is entitled to the benefit of doubt. But in assessing the evidence, imaginary

possibilities have no place. The court considers ordinary human probabilities.

38. In **Rohtas Kumar v State of Haryana, 2013 (82) ACC 401 (SC), Prithipal Singh v State of Punjab, (2012) 1 SCC 10,** it has been further laid down that The doctrine of "last seen together" shifts the burden of proof on the accused requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard would give rise to a very strong presumption against him.

39. Further, in **Ashok v State of Maharashtra, (2015) 4 SCC 393**, it was explained by the Supreme Court that initial burden of proof is on prosecution to adduce sufficient evidence pointing towards guilt of accused. However, in case it is established that accused was last seen together with the deceased, prosecution is exempted to prove exact happening of incident as accused himself would have special knowledge of incident and thus would have burden of proof as per Section 106, Evidence Act. But last seen together itself is not conclusive proof but along with other circumstances surrounding the incident like relations between accused and deceased, enmity between them, previous history of hostility, recovery of weapon from accused, etc. non-explanation of death of deceased, etc. may lead to a presumption of guilt of accused.

40. In **State of Goa v Pandurang Mohite, AIR 2009 SC 1066, State of UP v Satish, 2005 (3) SCC 114 and Sardar Khan v State of Karnataka, (2004) 2 SCC 442,** it has been remarked that circumstances of "last seen together" do not by themselves and necessarily lead to the inference that it was accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. The time gap between last seen alive and the recovery of dead body must be so small that the possibility of any person other than the accused being the author of the crime becomes impossible.

41. In **Niranjan Panja v State of WB, (2010) 6 SCC 525 and State of UP v Satish, (2005) 3 SCC 114,** it has been further affirmed by the Supreme Court that the last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists.

42. Recently, in **Ravi v State of Karnataka, AIR 2018 SC 2744**, reversing the conviction based on "last seen together" where there was a time gap of four days between last seen and recovery of dead body and as per postmortem report the death must have occurred 30 hours ago, the Supreme Court held that the time gap was considerably large and no corroboration was forthcoming, and therefore, in absence of any other circumstance which could connect the accused with crime, reasonable doubt as to involvement of accused is created and in such situation, the burden would not shift under section 106 of the Evidence Act. Following the judgment in **Mohibur Rahman vs State of Assam, (2002) 6 SCC 715** and **Malleshappa vs State of Karnataka, (2007) 13 SCC 399,** the court held:

"'Last seen together' is certainly a strong piece of circumstantial evidence against an accused. However, as it has been held in numerous pronouncements of this Court, the time lag between the occurrence of the death and when the accused was last seen in the company of the deceased has to be reasonably close to permit an inference of guilt to be drawn. When the time lag is considerably large,....., it would be safer for the court to look for corroboration."

43. In this instant case, PW-13 Jeete is the son of the accused and the FIR version is that he was sleeping on the same cot with the victim and accused. The incident took place in the post midnight. He was only 8-9 years in age and therefore, the presence of the witness is very natural at the time of last seen. The victim was weeping and she said that she is feeling pain and the accused took her out saying that he is taking her to get medicine. In the same night, her dead body was recovered from the courtyard of the school which situates close to the hut. Seemingly, there is no delay or time-gap between last seen and the discovery of the dead body. The witness is of very tender age and is own son of the accused-appellant and there is no reason to even think that he would give false or even tutored evidence. Therefore, he has been rightly relied by the learned trial court.

44. So far as not testing the intellectual capacity of the PW-13 is concerned, this procedure has been provided to determine whether oath can be administered or not. It appears from his statement that learned trial court has administered oath to him and therefore, it can be inferred that the learned trial court must have found him capable of giving intellectual answers to the questions put to him. Merely because the learned trial court has not entered into preliminary inquiry to test the competence of witness, it cannot be said that the witness was incapable of understanding the nature of questions put to him and was not capable to give rational reply to them. Section 118 of the Evidence Act provides the need for a witness to be competent and the courts may enter into an inquiry to determine competency of a witness if it is required so that oath can be administered. In **Rameshwar v State of Rajasthan, AIR 1952 SC 54**, on preliminary inquiry, the trial court did not find the child to be competent to be testified, even then the court proceeded to examine the child without administering oath. The Supreme Court held that even then the evidence of the child can be relied upon.

45. In **State of Rajasthan v Vijayram, 1968 Cr.LJ 270**, it has been held that the child witness despite being not subjected to preliminary examination and despite no finding recorded about his competency by the trial court, if he is found to have given rational answers, his evidence is admissible. **In Suresh v State of UP, AIR 1981 SC 1122,** the Supreme Court accepted the evidence of five years child who was sole witness and held that conviction can be based on it's testimony.

46. It is only a rule of prudence that there should be a record of the question put and answer received during the preliminary examination for ascertaining the competence of the child witness. But, non-recording of the questions and answers is no ground for rejecting the testimony of child witness if on close scrutiny, it appears to be otherwise reliable. In **Suryanarayana v State of Karnatak, (2001) 9 SCC 129**

and State of Karnatak v Shantappa Madivalappa Galapuji, (2009) Crimes 245 (SC), it has been held that the court can base conviction on being convinced about the quality of the evidence as the competency of a child witness is not considered in relation to his age, but on his ability to understand the question and to give rational answer. The law, as laid down in **Nivrutti Pandurung Kokate, (2008) 12 SCC 565 and Himmat Sukhdeo Wahurwagh v State of Maharashtra, (2009) 2 Crimes 294,** is that all persons are competent to testify unless the court thinks otherwise. Thus, unless the court feels that the witness suffers from some disability and incapable of understanding the questions put and to give rational answer, there is no need to enter into preliminary inquiry to ascertain his competence. In **Gul Singh Vs. State of MP, 2015 (88) ACC 358 (SC)**, it has been held that the testimony of a child witness cannot be rejected unless found unreliable & tutored. In view of the law discussed above, we do not find force in the argument of the learned Amicus Curiae /Senior Advocate on this point.

47. The evidence of last seen is further corroborated by medical evidence which shows that at the time of postmortem, hymen of victim was found lacerated and her vagina was bleeding. It is also clear from the postmortem that on her face there was teeth bite. Abrasion and contusion was also there on her forehead and there was abrasion on breast and nose and her lips were lacerated. It is strange that despite ample evidence of sexual assault and rape, the doctor has not given specific opinion on rape. The fact that her hymen was lacerated and vagina was bleeding and there was abrasion and other marks of injury on her body, amply goes to show that rape was committed on her. The FSL report and DNA report also supports this as rightly concluded by the learned trial court. The doctor has stated that the deceased died out of asphyxia and it also shows that she was caused to death by the accused.

48. As many as 17 items were picked either from spot or taken from the accused for chemical examination and DNA test. The report of FSL is Ext. Ka-16. According to the report, on item 3 jacket, item- 4 coat and item-5 blood/swab and items-8 piece of bed sheet, item-9 swab, item-10 hair, item-11 hair and item-12 hair, partial DNA profile was generated. The DNA profile of material item-15 lower, item-16 underwear and item-17 sample blood were found same. On that basis, the learned trial court has rightly concluded that on comparison of the said items of the victim and accused, the DNA of the accused Mouni was found matched. After a close scrutiny of the evidence given by PW-13 and medical evidence, the learned trial court has rightly concluded that the accused committed rape on the victim and caused her death by closing her mouth or by throttling which resulted in asphyxia. It was also noted down by the learned trial court that just to save himself, the accused demonstrated that he was indulged in searching the deceased and when he came with the police and other witnessed, he himself traced her out from the courtyard of the government Model School.

49. Once it is established that it was the accused who took the victim out of the house, it was on the accused to explain what happened thereafter. He was under legal liability under section 106 of the Evidence Act to explain how her private parts was lacerated and why such injuries

were found on her body which could not have been caused except by way of sexual assault and in the course of commission of rape on her. In such cases, the POCSO Act and the Evidence Act, both require the accused to show that he was innocent and did not commit rape. On the contrary, the accused made report to the police that when he got awakened, he found his daughter missing which is fabricated and incorrect in view of the statement of PW-13. The incident took place after midnight and the learned trial court has rightly concluded that at that point of time normally people living around his house must have been in a deep sleep. This also find support from the statement of the witnesses that they were awakened by the police and the accused in the mid night to search the victim. The learned trial court has also rightly concluded that the nature of crime is such that if somebody would have seen the accused committing it, such incident could not have taken place. The accused has alleged that he was falsely implicated, but, there appears to be no reason for his false implication nor there is any reason why the people of that locality would give evidence about his drinking habit and sexually sick and perverted behavior. Had it been so as alleged by accused, there is no reason why his own sons would give evidence against him. We find that there is no force in the argument of the defence regarding false implication of the accused. The previous conduct which has been stated by the witnesses that he used to sexually abuse the deceased, also supports the version of the prosecution and if read in conjunction with the statement of last seen given by PW-13, medical evidence and previous conduct of the accused conclusively indicate the hypothesis that it was he and only he who committed rape and murder of the deceased.

50. In view of the above discussion, we find that the conclusion of the learned trial court that the prosecution successfully established that the accused committed rape and murder of the victim is based on unimpeachable evidence of last seen supported by medical and FSL report and the conduct of the accused himself prior to the incident and soon after the incident. The conviction of accused for the offence under section 302/376(f) IPC is legal and justified.

51. The learned trial court has also convicted the accused under section 363 and 201 IPC for the offence of kidnapping from lawful guardianship and for causing disappearance of the evidence of offence. So far as the offence under section 363 is concerned, it is admitted fact that the victim was 6-7 years daughter of accused. Her mother had already died and the age of her brother residing in the hut was only 8-9 years. The accused was the only lawful guardian at the time of incident. Hence, the ingredients of the offence as defined under section 361 and punishable under section 363 were not complete to constitute the offence and as such, not only that the charge-sheet should not have been submitted by police, even the learned trial court was not required to frame charge for the offence under section 363 IPC. Similarly, the accused allegedly took out the victim under the pretext of getting medicine for her and admittedly she was alive at that point of time as she was weeping. The school from where the body of deceased was recovered is close to the hut of the accused. The circumstances are such that the offence might have been committed in the hut or in the courtyard of school or partly in the hut and partly in the school. Thereafter, there is no evidence given by prosecution that he did anything

to disappear the body or evidence as the inner-wear of victim was found close to her body and the clothings were also in the hedges of the school. Therefore, the conviction for the offence under section 363 and section 201 is misconceived, unwarranted and illegal and is liable to be set aside.

52. It appears that the accused has been convicted under section 376(f) IPC (it should be section 376(2))(f)) and also for the offence under section 5(n) read with 5(m)/6 of the POCSO Act. Section 376(f) is attracted when rape has been committed by relative, guardian etc for which minimum ten years imprisonment which may extend to life imprisonment is provided which may continue for the remainder of that person's natural life. Section 6 of the POCSO Act provides punishment for aggravated penetrative assault on a girl below the age of 18 years which shall not be less than 10 years and which may extend to life imprisonment. Section 42 of the POCSO Act provides that where the offence is punishable under this Act and also under section 376 etc IPC, the offender found guilty of such offence shall be liable to punishment under POCSO Act or under the IPC providing greater punishment in degree. We find that section 376 IPC provides punishment which is greater in degree as life imprisonment under section 376(2) may extend to remainder natural life of the accused. Therefore, the learned trial court should have awarded punishment only for the offence punishable under section 376(2)(f) read with section 6 of the POCSO Act and not under section 6 separately. Hence, the separate sentence under section 5(n) read with 5(m)/6 is neither legally required nor justified and the separate sentence is modified and set aside as above.

53. Now, the question is whether the case is covered under the "rarest of the rare case" and the death sentence is justified. In **Bachan Singh vs. State of Punjab, AIR 1980 SC 898**, the Supreme Court upheld the constitutional validity of death sentence with the rider that it must be imposed in "rarest of the rare" cases and before awarding the death sentence, the following questions may be asked and answered :

1. Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

2. Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the Offender?

54. If upon taking an overall view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the cases are such that death sentence is warranted, the court would proceed to do so. In **Machi Singh vs. State of Punjab (1983) 3 SCC 470** the Supreme Court tried to explain, define and identify the meaning of "rarest of the rare' dictum as propounded by **Bachan Singh (supra)** in the following manner-

1. When the murder is committed in an extremely brutal, grotesque diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (i) when the house of the victim is set aflame with the end in view to roast him alive in the house, (ii) when the victim is subjected to inhuman acts of torture or

cruelty in order to bring about his or her death, (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

2. When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland.

3. When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them or, make them with a view to reverse past injustices and in order to restore the social balance.

4. In cases of "bride burning' and what are known as "dowry-deaths' or when murder is committed in order to remarry for the take of extracting dowry once again or to marry another woman on account of infatuation.

5. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

6. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder, (b) a helpless woman or a person rendered helpless by old age or infirmity, (c) a person vis-à-vis whom the murderer is in a position of domination or trust, (d) a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similarly reasons other than personal reasons.

55. In **Ravji vs. State of Rajasthan (1996) 2 SCC 175**, where the Supreme Court held that it is only characteristics relating to crime, and not to criminal, which are relevant for sentencing. The Court observed as follows:

"The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry to justice against the criminal'."

56. In **Swamy Shraddananda (2) vs. State of Karnataka, (2008) 13 SCC 767** the Supreme Court observed:

"The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the

Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court is giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system."

57. In this case the appellant was convicted for the offense of murder and was awarded death sentence by the Session Judge and the death sentence was confirmed by the Karnataka High Court. The matter came before the Supreme Court in appeal where a bench of two Judges unanimously upheld the conviction but expressed a different view on the punishment. The matter came for consideration before the larger Bench of the Supreme Court. The Supreme Court referred to **Bachan Singh (supra) and Machhi Singh (supra)** to hold that death sentence could only be awarded in "rarest of the rare case' on recording special reasons and in doing so the court should put itself in the position of the "community' whose collective conscience is so shocked that it will expect the court exercising judicial power to inflict death penalty. **Machhi Singh (supra)** very carefully crafted the categories of murder in which the society may demand death sentence. The Supreme Court however made it clear that **Machhi Singh** criteria even though useful but looking to the long gap passed after that judgment, it can not be absolute or inflexible. Referring to **Aloke Nath Dutta v State of WB, (2007) 12 SCC 230** and other cases took the view that the most glaring deficiency of the criminal justice system is the lack of consistency in the sentencing process. The Court also referred **Jayawant Dattatraya Suryarao vs. State of Maharasthra, (2001) 10 SCC 109** and **Nazir Khan vs. State of Delhi (2003) 8 SCC 461** and observed:

"..... this Court modified the death sentence to imprisonment for life or in some cases imprisonment for a term of twenty years with the further direction that the convict must not be released from prison for the rest of his life or before actually serving out the term of twenty years, as the case may be, mainly on two premises; one, an imprisonment for life, in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for the rest of life of the prisoner and two, a convict undergoing life imprisonment has no right to claim remission."

58. Emphasizing that there is no law on the basis of which a sentence for life imprisonment can be automatically treated as a sentence for a definite period and without any formal remission by appropriate government it will mean an imprisonment for the whole of the natural life of the convicted person, the Court further observed:

".....the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission."

59. The Supreme Court pointed out that the issue of sentencing has two aspects.

A sentence may be excessive and unduly harsh or it may be highly disproportionate and inadequate. Some times the court may feel that the case falls short of the rarest of the rare category and death sentence should not be confirmed. But at the same time, considering the nature of the crime, a sentence of life imprisonment for a term of only fourteen years would be grossly inadequate and will amount to no punishment at all. Endorsing the life sentence to mean a sentence for whole natural life, the Court remarked:

".....the formalization of special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution bench decision in Bachan Singh, besides being in accordance with the modern trends in penology."

60. In **Dilip Prem Narayan Tiwari vs. State of Maharastra, AIR 2010 SC 36**, the Supreme Court, reducing the sentence to that of life imprisonment for 25 years clearly held that multiple murder itself would not be sufficient for imposing death sentence and selecting the sentence the nature of crime, background of criminal, his mind set in the commission of offence and social status are relevant factors. Subsequent decisions show that the Supreme Court has followed the **Shradhanand** pattern and has substituted life imprisonment for rest of life. For instance, in **Sebastian vs. State of Kerala, (2010) 1 SCC 58** where the accused was previously convicted for the offence u/s 354 and further for the offence u/s 363, 376, 379, 302 and 201 IPC for rape and murder of young child and was awarded life imprisonment and he was facing trial for the murder of several children, was awarded death sentence and his sentence was reduced to life imprisonment for rest of life on the ground that the case was based on circumstantial evidence and the accused was a young man of 24 years at the time of incident. In **Vikram Singh v State of Punjab, (2010) 3 SCC 56** three accused persons were awarded death sentence for kidnapping and murder for ransom. The Supreme Court upheld the sentence in respect of two accused persons but converted the sentence into life for the third accused.

61. In **Mulla v State of UP, (2010) 3 SCC 508** the Supreme Court emphasized that the sentence should be proportionate and befitting to crime and capable of deterring other potential offenders. Finding that the accused persons belonged to extremely poor background and even though they committed murder of five innocent persons for ransom, the Court remarked that criminals who commit crimes due to economic backwardness are most likely to be reformed and therefore converted the death sentence to life sentence for rest of life. The Supreme Court made it clear that death sentence should be awarded only when no other option is available and in such cases the brutality aspect should be considered along with other mitigating factors. He also pointed out that where death sentence has been substituted by life sentence, the courts are free to extend the sentence to rest of life.

62. In **Sandeep v State of UP, (2012) 6 SCC 107**, the accused was sentenced with death penalty which was upheld by the Allahabad High Court. The Supreme Court,

while upholding the conviction of the accused Sandeep, converted the death sentence to life imprisonment with the condition that the main culprit Sandeep would serve minimum imprisonment for 30 years without remissions during the said period. The co-accused was ordered to serve imprisonment for minimum 20 years without remission. Again, in **Union of India v V. Sriharan alias Murugan, (2016) 7 SCC 1**, the **Shradhanand** pattern was affirmed on a Reference made by the Court in **Union of India v V. Sriharan alias Murugan, 2014 (11) SCC 1** in respect of remission the state was inclined to grant and release the assailants of Rajiv Gandhi. The Court endorsing the judicial power so innovated by the Court and it was remarked that the High Court or Supreme Court may convert the death sentence or impose life imprisonment for the remainder life of the convict. It was remarked that the Court may *"alter the said punishment (death sentence) with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed."*

63. Similarly, **Raj Kumar v. State of Madhya Pradesh, (2014) 5 SCC 353**, a case concerning the rape and murder of a 14 years old girl, the Court directed the appellant therein to serve a minimum of 35 years in jail without remission. In **Selvam v. State, (2014) 12 SCC 274**, the Court imposed a sentence of 30 years in jail without remission in a case concerning the rape of a 9yearold girl. In **Tattu Lodhi v. State of MP, (2016) 9 SCC 675,** where the accused was found guilty of committing the murder of a minor girl aged 7 years, the Court imposed the sentence of imprisonment for life with a direction not to release the accused from prison till he completed the period of 25 years of imprisonment. Similar approach has been adopted in **Parsuram v State of MP, (2019) 8 SCC 382. Recently, in Sachin Kumar Singhraha v State of MP, (2019) 8 SCC 371,** where the accused was sentenced capital punishment for the offence of rape and murder of 5 years girl, the Supreme Court converted the sentence into life imprisonment for 25 years without remission and has observed:

"Life imprisonment is the rule to which the death penalty is the exception. The death sentence must be imposed only when life imprisonment appears to be an altogether inappropriate punishment, having regard to the relevant facts and circumstances of the crime."

64. We find that the aggravating circumstances in this case is that the accused was the father of the deceased and the deceased was only 7 years in age and he committed rape and murder. The mitigating factor is that the accused was in the habit of taking wine and drugs, his wife was not alive and the whole case is based on circumstantial evidence and the murder has not been committed in an unusual and cruel manner. In the facts and circumstances of this case and on the basis of the law discussed above, we are of the view that the learned trial court was not justified in awarding death sentence and the sentence of life imprisonment could have been sufficient in the circumstances of the case. The conviction under section 376(2)(f) IPC and under section 5(n) read with 5(m)/6 of the POCSO Act is upheld but the separate punishment under section section 5(n) read with 5(m)/6 of the POCSO Act is not sustainable in view of section 42 of the POCSO Act and is set aside.

65. The conviction and sentence of accused **Mouni** for the offence under section 363 and section 201 IPC is not sustainable under law and is set aside and consequently, he is acquitted from the said charge.

66. In view of above, affirming the conviction, we modify the death sentence awarded for the offence under section 302 IPC to accused **Mouni** into life imprisonment with the direction that the life imprisonment shall continue for the whole span of natural life of accused and could not be less than 25 years rigorous imprisonment without remission. The sentence of fine is modified to Rs. 50000/-, and in default, for 6 months additional imprisonment. The sentence awarded under section 376(2)(f) IPC would mean a sentence of life imprisonment for the offence under 376(2)(f) IPC read with section 5(n) read with 5(m)/6 of the POCSO Act and the sentence of fine is modified to Rs. 25000/- and in default, 4 months additional imprisonment. Both the sentences shall run concurrently.

67. With the above modification, the Criminal Appeal and Reference are finally disposed of.

68. The Senior Advocate Shri Saghir Ahmad shall be given Rs. 15000/- for his work as Amicus Curiae and legal assistance to the Court.

69. Office is directed to send the certified copy of this judgment along with lower court record to the court concerned for information and compliance.

(2020)03-05ILR A20

APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DEEPAK VERMA, J.

Criminal Appeal No. 05 of 1996

Sher Singh & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri U.N. Sharma, Sri R.S. Prasad, Sri Anoop Trivedi, Sri Abhishek Shukla

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

Criminal Law - Indian Penal Code (45 of 1860)-Section 302 - Murder - Motive - Previous enmity as a motive of murder mentioned in FIR - enmity is a two-edged sword - It may be a reason for murder or a reason for false implication of the accused persons - Held - In view of the proof of enmity between the first informant and the accused party, material contradictions/omissions in the first report drawn by PW-1 become much more important. (Para 23)

Evidence law-Evidence Act (1 of 1872)-Section 134 - Murder - Solitary witness - Conviction on evidence of single witness - oral testimony of a single witness can be classified into three categories namely, (i) Wholly reliable, (ii) Wholly unreliable, (iii) Neither wholly reliable nor wholly unreliable - Where the single witness is neither wholly reliable nor wholly unreliable - the Court should look for corroboration in material particulars by reliable testimony, direct or circumstantial before acting upon the testimony of the single witness - On any suspicion about the truthfulness of the solitary witness, his testimony has to be discarded (Para 24)
Evidence Law-Evidence Act (1 of 1872) - Section 3, Section 45— Inconsistency

between ocular and medical evidence - Ocular evidence has primacy - Unless completely ruled out by medical evidence - when the contradiction between medical and ocular evidence is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved - where the oral evidence is totally irreconcilable with the medical evidence, it becomes obligatory for the prosecution to clarify the discrepancy - In case, the prosecution fails to do so, benefit has to go to the accused (Para 28)

Entire prosecution case rests on the evidence of solitary witness, PW-1, brother of deceased - In the FIR informant PW1(brother of deceased) did not mention that he was present on the spot or had seen the incident- no mention of the weapons carried by the accused persons or their roles in the assault - No detail as to how incident had occurred - For the first time, in his deposition before the Court, PW-1 gives detail narration of the incident - testimony of solitary witness PW1 full of contradictions, material improvements - Held - prosecution failed to explain material improvement in the evidence of PW-1 - It was obligatory for the prosecution to have clarified the discrepancy between the medical evidence and the oral evidence - Prosecution not been able to prove its case beyond all reasonable doubts – Conviction set aside – Appeal allowed

Appeal Allowed (E-5)

List of cases cited :

1.Darbara Singh Vs St. Of Punjab 2012 (10) SCC 476

2.Moti Vs St. of U.P. 2003 (9) SCC 444

3.St. of U.P. Vs Ashok Kumar & anr., 1979 (3) SCC 1

4.St. of Raj. Vs Bhola Singh & anr. AIR 1994 SC 542

5.Lallu Manjhi & anr. Vs St. of Jharkhand 2003 (2) SCC 401

6.Munna @ Pooran Yadav Vs St. of M.P. 2009 (1) SCC 202

7.Takdir Samsuddin Sheikh Vs St. of Guj. & anr AIR 2012 SC 37

8.St. of U.P. vs. Punni & ors. 2008 (11) SCC 153

9.Babu & ors. vs. St. of U.P. AIR 1983 SC 308

10.Atmaram & anr Vs St. of M.P. 2012 (3) Supreme 593

11.Hiralal Pandey & ors. Vs St. of U.P. 2012 (3) Supreme 1

12.St. of U.P. v. Naresh 2011 (4) SCC 324

13.Darshan Singh @ Bhasuri & ors. Vs St. Of Punj. AIR 1983 SC 554

14.Eqbal Baig Vs St. Of a.P. AIR 1987 SC 923

15.Rohtash Vs St. of Raj. 2006 (12) SCC 64

16.Animireddy Venkata Ramana & ors. Vs Public Prosecutor, High Court of AP 2008 (5) SCC 368

17.Ranjit Singh & ors. Vs St. of MP 2011 (4) SCC 336

18.Yudhisthir vs. St. of M.P. 1971 (3) SCC 436

19.St. Of U.P. vs. M.K. Anthony 1985 (1) SCC 505

20.Vadivelu Thevar vs. St. of Madras AIR 1957 SC 614

21.St. of U.P. v. Hari Chand 2009 (13) SCC 542

22.Bhajan Lal @ Harbhajan Singh and ors. v. St. of Haryana 2009 (13) SCC 542

23.Jayabalan vs. U.T. of Pondicherry 2010 (1) SCC 199

24.Dalip Singh Vs St. of Punjab AIR 1953 SC 364

25.Raju @ Balachandran & ors. Vs St. of Tamil Nadu 2012 (12) SCC 701

26.St. of U.P. Vs Samman Dass AIR 1972 SC 677

27.Yogesh Singh Vs Mahabeer Singh & ors., 2017 (11) SCC 195

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Deepak Verma, J.)

1. Heard Sri Anoop Trivedi learned Senior Advocate assisted by Sri Abhishek Shukla, learned Advocate for the appellants and Sri Jai Narayan learned A.G.A.-I, for the State-respondent.

2. This appeal is directed against the judgment and order dated 22.12.1995 passed by the Additional Sessions Judge, Muzaffarnagar in Sessions Trial No. 51 of 1993 (State vs. Sher Singh and others) for offence under Section 302 readwith Section 34 IPC, registered at the Police Station Kandhala, District Muzaffarnagar. Four appellants herein have been convicted and sentenced for life for the offences under Section 302 readwith Section 34 IPC, out of whom one appellant no. 3 (Sadhu) had died during pendency of the present appeal.

3. A written report dated 12.8.1992 was filed by Jaiveer Singh son of Neturam, resident of village Garhi Ram Kaur, Police Station Kandhala, District Muzaffarnagar at about 9:45 AM, stating therein that, at about 8:00 AM, while his brother Ramesh was going to the field from his house carrying 'Bogie' 'Jhhota' and food, as soon as he reached at the 'Chak Road' in front of the field of Jai Singh son of Multan, four accused persons named in the FIR had murdered him by firearms. The name of the accused persons indicated in the first information report are Sher Singh son of Ram Singh, Sahendra son of Ram Singh, Sadhu son of Swarup and Gulab son of Malkhan. It is averred therein that the incident was witnessed by Atar Singh son of Chhota, Sahi Ram son of Chhajju and Others. The motive to commit the crime as indicated therein was the litigation going on between the parties and the resultant animosity. The written report was scribed by Brijpal Singh son of Prakash Chand, resident of the same village.

4. As the prosecution story unfolded, police had reached the spot and recovery memos were prepared of the blood stained and plain earth; one steel glass, a bowl and a box of Aluminum with lid and a rubber slipper (Relaxo No. 7); an empty cartridge 12 Bore Red Colour at the bottom of which KF Special 12 Indian Ordinance Factory was written and another empty cartridge 315 Bore Brass at the bottom of which 8MM KF91 was written, all items found besides the dead body. They are marked as Exhibits 'Ka-10', 'Ka-11' and 'Ka-12'. The inquest report marked as Exhibit 'Ka-7' mentioned the time of its commencement as 10:15 AM on 12.8.1992 and completion at about 11:15 AM. There is also a mention therein of the recovered empty cartridges and articles from besides the dead body as kept in the recovery memos mentioned above.

5. A careful reading of the inquest report indicates that the dead body of Ramesh Singh was sealed in a black blanket and handed over on 12.8.1992 to the Constables Kishori Lal and Vijay Pal and that they moved to the Sadar Hospital, Muzaffarnagar alongwith relevant papers for postmortem. The postmortem was, however, conducted on 13.8.1992 at about 10:15 AM. It is mentioned in the postmortem report that the body brought by Constables Kishori Lal and Vijay Pal was received in 'Sealed' state. The estimated time of death mentioned therein is about one day.

6. The external condition of the dead body as described therein is as under:-

"Average built body, Rigor Mortis present in upper and lower extremities. Adbomen distended , greenish discolouration present over lower part of abdomen, face bloated, bloody mucous coming out from nostrils, genital organ slightly swollen, Surgical dressing present over left little finger over a leeking wound.

Ante-mortem injuries are:-

"(i) Gunshot wound of entrance present on right side face just in front of ear, margins are irregular & inverted. With blackening present, direction from right below to left upwards. Right temporal bone, Right middle cranial fossa fractured underneath.

(ii) Gunshot wound of entrance 2c.m. x 1½c.m. x muscle present on right Lateral aspect of neck 8c.m. below from right ear lobe, margins of the wound are irregular & inverted, blackening present, direction form right side to left side back & below.

(iii) Gunshot wound of exit 7 c.m. x 4 c.m. x through its rough with injury no. (ii) present on back of left chest upper part 2 c.m. below & left of 7th cerebral spine, margins of the wound are irregular & inverted.

(iv) Gunshot wound of entrance 4½ c.m. x 3½ c.m. x chest and abdomen cavity deep present on posterior lateral aspect of right chest lower part, 12 c.m. below from inferior angle of right scapula & 14 c.m. away from mid line, margins of the wound are irregular & inverted, blackening, scorching and tattooing present, direction from right back to left front, 7th & 8th right ribs fractured underneath. Right dome of diaphragm, right lower to lope of right lung, liver lacerated body underneath."

On internal examination, it was found that:-

"brain and membranes of the skull were lacerated at places, Right middle cranial fossa fractured, Rt. lacerated under injury of chest, Rt. pleural cavity containing one point of blood. Rt. lungs lacerated. Heart membrane lacerated at places, cavity containing 50 ml. blood. Abdomen membrane lacerated at places, cavity containing 2 point of blood, stomach empty, small intestine containing gases and large intestine containing gases & faecal matter. Liver lacerated.

Few pellets, bullets were taken out from the body of deceased and were sealed.

Cause of death is due to shock & Hemorrhage as a result of ante-mortem injuries noted above. The estimated time of death is about one day ago.

7. The prosecution produced two witnesses of fact namely Jaiveer Singh, the first informant as PW-1 and Sahi Ram son of Nain Singh as PW-2 being eye-witnesses of the incident. Amongst formal witnesses, PW-3 Dr. M.M. Sharma, who had conducted postmortem, proved his report as Exhibit 'Ka-2'. In cross-examination, PW-3 stated that all papers pertaining to the postmortem were received in the Mortuary on 13.8.1992 at about 10:00 AM, and the said fact had been mentioned in the Challan Lash Paper No. 14/8. When confronted, PW-3 stated that since gases and faecal matter were present in the Large Intestine, it was possible that death was caused on 12.8.1992 in the morning between 5-6 AM before deceased went to ease himself. On a suggestion, he replied that in the event of having meal, stomach would be empty within 5 to 6 hours. As to the nature of injuries, he replied that injury no. 4 might have been caused from a distance of about 3 to 4 ft.

The Investigating Officer had appeared in the witness box as PW-4 and proved that the site plan was prepared in his handwriting and signature, exhibited as Exhibit 'Ka-3'. The accused Sher Singh was arrested on 21.8.1992. The statements of the eye-witnesses Sahi Ram son of Chhajju, Achpal and another Sahi Ram son of Nain Singh were recorded on 23.8.1992. The statement of other accused persons, namely Sahendra was recorded after he surrendered in the Court of the Chief Judicial Magistrate, and of Sadhu and Gulab Singh were recorded in the District Jail after they surrendered. The charge sheet was submitted in the Court on 20.9.1992 and was proved being his handwriting and signature as Exhibit 'Ka-4'.

PW-5 is the Head Constable Sridatt Tyagi who had proved the Chik FIR and GD entry of about 9:45 AM of the registration of the first information report being in his handwriting and signature as Exhibit 'Ka-5' and 'Ka-6'. He has denied the suggestion of the FIR being lodged after deliberations with the Investigating Officer. PW-6 Constable Chetram proved the recovery memos and inquest report being in his handwriting and signature (Exhibits 'Ka-8' to 'Ka-13'). On being confronted about overwriting in the inquest report, he explained that the same had occurred because of fault of the pen. He denied suggestion of preparation of inquest without the existence of first information report of the incident. Constable Kishori Lal appeared in the witness-box as PW-7 and proved that the dead body was handed over to them for postmortem and it was sealed after the inquest. They received the dead body on 12.8.1992 at about 11:15 AM and took it to the Mortuary through tractor, which was about 65-70 kms. from the place of the incident. They reached back to the police station on the next day. The first informant was not accompanying them whereas other family members were with them.

By reading the statement of PW-7, learned Senior Advocate appearing for the appellants pointed out that PW-7 had deposed that the dead body was handed over to him after inquest in the Jungle of Gram Garhi Ram Kaur. The submission, thus, is that the statement of the first informant in the written report that his brother was done to death at the Chak Road in front of the field of Jai Singh is wrong. The place of incident mentioned in the Chik FIR is also the Jungle of Gram Garhi Ram Kaur located at a distance of about 6 kms. towards South-East of the police station. The place of incident being the Chak Road has neither been mentioned in the first information report nor there is any evidence on record to prove the same. Further, the Investigating Officer though collected blood stained and plain earth allegedly from the place of incident but the same was not sent for chemical examination so as to ascertain the place of occurrence or that the blood collected by the police from the site was in fact human blood. There is no recovery of weapons of offence allegedly committed by four persons and as such there was no question of tallying two empty cartridges (one of 12 Bore and another of 315 Bore) recovered from the spot. The submission, thus, is that the accused persons could not be connected with the crime-in-question by bringing any cogent evidence.

8. As far as the eye-witness account is concerned, it is vehemently urged that the statement of the first informant as PW-1 in the Court that he was also going to the field on foot behind the 'Bogie' is nothing but a material improvement in the narration made by him. The said fact is

conspicuously missing in the first information report. By reading the written report submitted by PW-1, it is contended that in his earliest account of the incident, he did not even mention that he was present on the spot or had seen the incident. His narration in the first information report gives a clear indication that the incident was seen by other villagers namely Atar Singh, Sahi Ram and some more persons (unnamed). That means the report of the incident was made by him on the information received about the occurrence from other alleged witnesses. For the first time, in his deposition before the Court, PW-1 gives detail narration of the incident, which as urged by the learned counsel for the appellants, is nothing but an improvement.

9. The submission is that PW-1 was not present at the place of incident, inasmuch as, deceased Ramesh Singh was killed in the late night or early hours of the morning on 12.8.1992. No one had actually seen the incident and for this reason the names of eye-witnesses have been vaguely indicated in the written report lodged by PW-1, whereas he did not mention himself as an eye-witness. The names of other two witnesses who were related to him was introduced in his deposition in the Court for the first time, whereas two others, whose names have been mentioned in the first information report, were also related to the first informant, all being members of the immediate extended family. A suggestion in this regard has been given to PW-1 in the cross-examination but all questions pertaining to his relation with the witnesses were answered in an evasive manner. It, however, became clear that Atar Singh, Achpal, Sahi Ram son of Chhajju and another Sahi Ram son of Nain Singh, all the alleged witnesses were related to him. Further, it was admitted by PW-1 in the cross-examination that accused Sher Singh contested election of Pradhan against Jaipal and PW-1 was supporter of Jaipal. It has also come up in the deposition of PW-1 that his brother Munna was an accused in the murder of brother of Gulab (one of the accused). On a suggestion given by the defence that no independent witness had been examined, PW-1 averred that Sahi Ram and Atra were working at about 100 paces towards North from the place of incident. PW-1 was also confronted on the fact that he did not mention himself as an eye-witness in the first information report, in reply he states that he dictated the said fact but it was not known as to why it was not written there.

10. Learned Senior Advocate for the appellants further pointed out from the deposition of PW-1 in the cross-examination that according to him, deceased had his meal at about 8:00 AM, i.e. before he proceeded to the field. PW-1 states that the place of incident was about 1½ kms. of the village and the first informant was about 100 paces behind the deceased. The written report was scribed at the place of incident by Brij Pal who brought papers from his Boring. They then went to the police station between 9:00 to 09:15 AM through motorcycle. PW-1 states that his brother was dragged to the ground and was not killed on the 'Bogie'. He states that the blood scattered on the ground was not collected by the Investigating Officer; two empty cartridges were, however, collected from the spot and all papers were prepared on the spot itself.

Placing the above extract of the statement of PW-1, it is vehemently argued by the learned counsel for the appellants that PW-1 cannot be said to be an eye-

witness of the incident. His testimony in this regard is wholly unbelievable for the simple fact that according to him, deceased proceeded to the field after having his meal which included Dal and Roti. It is urged that according to the written report dictated by PW-1, his brother deceased Ramesh Singh left his home at 8:00 AM and was murdered within 15 minutes thereafter, at about 8:15 AM. On internal examination of the dead body, as indicated in the postmortem report, both Stomach and Small Intestine of deceased were found empty whereas gases and faecal matter were present in the Large Intestine. This condition of the dead body clearly reveals that deceased was murdered before he defecated. It is, thus, argued that looking to the improvement in the deposition of PW-1 in the Court and inherent improbability of the prosecution story about the time of occurrence of the incident as is evident from the medical report, it cannot be accepted that PW-1 was an eye-witness of the incident. There is a serious doubt about the time and place of occurrence of the incident. The improvements and inconsistencies in the deposition of PW-1 are material and go to the root of the matter to shake the version of the prosecution about PW-1 being an eye-witness. The testimony of PW-1, as such, is to be discarded as a whole. Reliance is placed on the decisions of the Apex Court in **Darbara Singh vs State Of Punjab1, Moti vs. State of U.P.2 and State of U.P. vs. Ashok Kumar and another3** to assert that where the oral evidence is totally irreconcilable with the medical evidence, it becomes obligatory for the prosecution to clarify the discrepancy. In case, the prosecution fails to do so, benefit has to go to the accused.

11. It is further contended that another eye-witness PW-2 Sahi Ram son of Nain Singh though stated that he reached the spot of occurrence after hearing the sound of gunshot and saw that Ramesh Singh was hit by the firearm and that Jaiveer his brother was present on the spot, but he has refused to identify the assailants by saying that he had seen them only fleeing away from the spot. And for this reason, this witness was declared hostile and was cross-examined by the prosecution. However, on confrontation with his statement under Section 161 Cr.P.C., he categorically stated that he did not mention the name of the assailants to the Investigating Officer but he did not know as to how their names were mentioned in his statement. He further denied suggestion of being won over by the accused persons.

The submission is that other witnesses who allegedly had seen the occurrence have not been produced by the prosecution nor any independent person who was owner of the surrounding fields had appeared in the witness-box to corroborate either the time or the place of occurrence. The testimony of PW-2 in his examination-in-chief that he reached at the place of occurrence and had seen the first informant being present on the spot, is unbelievable, inasmuch as, his own presence on the spot does not seen to be natural. It is pointed out that PW-2 was not named as witness in the FIR. PW-2 stated that he was going alongwith Achpal another villager and had reached at the place of occurrence, i.e. at the Chak Road near the field of Jai Singh by chance, on hearing the sound of gunshot. Even if, this part of his testimony is believed to be true, at the best, he can be said to be a Chance witness. Nothing has been brought by the prosecution to prove that the presence of PW-2 at the scene of occurrence was natural and it was possible for him to reach the spot in the natural course of events. PW-2 is a hostile witness, according to the learned counsel for the appellants, even this part of his testimony in the examination-in-

chief is not to be taken of any assistance to the case of the prosecution. In that event, the entire prosecution case rests on the evidence of solitary witness, PW-1, who happens to be brother of deceased. It is contended that the testimony of solitary witness has to be examined with great care and circumspection and cannot be made basis for conviction unless wholly reliable. On any suspicion about the truthfulness of the solitary witness, his testimony has to be discarded.

Reliance is placed on the decisions of the Apex Court in **State of Rajasthan vs. Bhola Singh and another4, Lallu Manjhi and another vs. State of Jharkhand5, Munna alias Pooran Yadav vs. State of Madhya Pradesh6 and Takdir Samsuddin Sheikh vs. State of Gujarat and another7** to assail the same.

12. It is contended that moreover, the presence of enmity between the solitary witness (PW-1) and the accused persons is proved from the cross-examination of PW-1 itself. The alleged eye-witness, thus, is not only a related witness but also an interested one. His testimony has to be discarded for this reason also. In any case, it was incumbent on the prosecution to produce independent witness/persons who were occupying the adjoining fields, as according to the alleged eye-witness, the incident had occurred during day time on the Chak Road. No one whose presence was natural at the scene of occurrence had been produced. Adverse inference, therefore, has to be drawn against the prosecution and the benefit has to go to the accused persons. Reliance is placed on the decision of the Apex Court in **State of Uttar Pradesh vs. Punni and others8.**

Lastly, placing decisions in **Babu and others vs. State of Uttar Pradesh9** and **Takdir Samsuddin Sheikh7,** it is contended that substantial improvement in the version of eye-witness before the Court and contradiction between oral testimony and medical evidence prove fatal to the whole prosecution case. The trial court has erred in basing conviction on the shaky version of the sole eye-witness ignoring all the above inconsistencies and discrepancies inherent in it. The judgment of conviction of the appellants, therefore, deserved to be set aside and the appeal may be allowed.

13. Learned A.G.A., on the other hand, urged that the incident-in-question is a broad day-light incident. It had occurred at about 8:15 AM and the first information report was promptly lodged at 9:45 AM.

The place of incident indicated in the Chik FIR is the Jungle of Gram Garhi. Jungle of a village or field near the village in the local language is one and the same place. It cannot be assumed that the incident had occurred in a Jungle or a forest away from the village as there is nothing on record to believe so. The first informant is the brother of the deceased. His narration of accompanying the deceased to the field is natural. There are four accused persons whose names were clearly indicated in the first information report being the assailants. The FIR discloses not only the names of two persons as witnesses but indicates that apart from them, others had also seen the occurrence. The empty cartridges of 12 Bore and 315 Bore recovered from the spot support the deposition of PW-1 in the Court regarding weapons in the hands of the assailants. The inquest was done on the same day and soon after it was completed at 11:15 AM, body was sent for postmortem from the place of incident itself. The distance of the Mortuary from the place of incident being 65-70 kms. is clearly mentioned in the deposition of PW-

7 Kishori Lal. In the said scenario, if the postmortem was done on the next day i.e. 13.8.1992 in the morning at 10:15 AM, that would not be a factor to create any dent in the story of the prosecution being immaterial. Moreso, when PW-7 categorically proved that he took the dead body to the Mortuary straight way from the place of incident and handed over to the doctor in sealed condition.

Lastly, it is contended that presence of the first informant Jaiveer at the place of incident was also proved by PW-2 Sahi Ram in his deposition in the examination-in-chief, who also belong to the same village. And PW-1 in his deposition in the Court categorically stated that the incident was witnessed by PW-2 Sahi Ram son of Nain Singh. The presence of PW-1 at the place of occurrence, therefore, is corroborated by another eye-witness. Even though PW-2 was declared hostile but this part of his testimony has to be taken as consistent to accept that he had seen PW-1 at the relevant time on the spot of occurrence.

14. In the above scenario, the trial court on appreciation of the entire evidence cumulatively has rightly accepted the prosecution version to base the conviction on the evidence led by it. There is no infirmity in the decision of the trial court. The appeal deserves to be dismissed being devoid of merits.

Reliance is placed on the decisions of the Apex Court in **Atmaram and others vs. State of Madhya Pradesh10 and Hiralal Pandey and others vs. State of U.P.11.**

15. We have considered the rival submissions made by the learned counsels for the parties and perused the record. The first information report was registered on a written report filed by the brother of deceased. Noticeable is the fact that in the written report which was the first/earliest account of the incident, there is not even a whisper that the first informant was present or had seen the occurrence. The report rather suggests that two named witnesses therein including some other persons had seen the occurrence. The averments of the first information report are in the nature of information given to the police about the murder of Ramesh Singh, brother of the first informant, based on the knowledge gathered by the first informant which seems to be hearsay. There is no mention of the weapons carried by the accused persons (four in number) or their roles in the assault. Virtually no detail as to how incident had occurred has been given, though motive of previous litigation with the accused persons has been clearly indicated in the first information report. For the first time in his deposition before the Court, PW-1 narrates the whole account of the incident while mentioning himself as an eye-witness accompanying deceased to the field. No doubt, FIR need not be an encyclopedia. Each and every detail need not be stated in it. It may not and need not contain all the details of the incident.

It was considered in **State of U.P. v. Naresh12** that not naming of the accused in the FIR cannot be a ground to doubt the contents thereof, in case, the statement of the witnesses is found to be trustworthy. It may be that because the informant fully acquainted with the facts lacks necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, missing facts in the FIR cannot be taken as a ground to tilt the balance of the case in favour of the accused.

Reference may also be made, in this regard, to the decisions of the Apex

Court in **Darshan Singh @ Bhasuri & Ors vs. State Of Punjab13, Eqbal Baig vs State Of Andhra Pradesh14, Rohtash vs. State of Rajasthan15, Animireddy Venkata Ramana & Ors vs. Public Prosecutor, High Court of Andhra Pradesh16** and **Ranjit Singh and others Vs. State of Madhya Pradesh17.**

However, there cannot be a quarrel that prompt report of the incident with all its vivid details gives an assurance regarding truth of its version and that the allegations may not be an afterthought or having a colourable version of the incident.

It has been held in **Yudhisthir vs. State of M.P.18** that any fact if not disclosed in the FIR or during investigation and stated for the first time in trial, that statement would amount to an improvement and may not be relied upon. However, it all depends upon the credibility of witnesses produced by the prosecution to support its story.

It is also a settled legal proposition that minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. Minor variations in the statements of a witness cannot be dubbed as improvements as the same may be elaboration of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witnesses liable to be discredited.

The Apex Court in the **State Of U.P. vs. M.K. Anthony19** has laid down the principle as to what approach should be adopted by the Court, in a case, where there are some discrepancies and improvements in the statement of the witnesses.

Relevant observations in paragraph '10' of the said report are to be noted as under:-

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole.

.....xxxxxxxxxxxxx.....xxxxxxxxxxxx..... Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer. .....xxxxxxxxxxxxxxx....."

16. The crux is that it is the totality of the circumstances, which has to be culled out after careful scrutiny and assessment of prosecution evidence and which is to be

taken note of. Difference in some minor details which do not otherwise affect core of the prosecution case, even if present, that itself would not prompt the Court to discard the evidence.

17. Keeping this principle in mind, when we carefully appreciate the evidence before us, we find that the first informant, brother of deceased in his statement before the Court, for the first time, gave details of the occurrence. In his examination-in-chief, the first informant (PW-1) stated that his brother was going to the field in a 'Bogie' carrying food for his father. Four accused persons named as Sahendra, Sher Singh, Gulab and Sadhu met him on the way. They stopped the 'Bogie' and dragged deceased to the ground and at that time Shadu exhorted by yelling "मारो साले को गोली", thereafter, Gulab, Sahendra and Sher Singh opened fires from the country-made pistols and gun in their hands. Country-made pistols have been assigned to accused Sahendra and Sher Singh whereas Gulab was carrying gun according to the first informant. All three fires hit the deceased. PW-1 raised cries. Hearing the same, four witnesses Atra, Sahi Ram and another Sahi Ram and Achpal came on the spot. Seeing them, accused persons ran away in the field towards East. After narrating the above, PW-1 states that he was also going to the field on foot behind the 'Bogie'. The above narration of PW-1 in his deposition in the Court has been termed as a material improvement in his testimony by the learned Senior Counsel for the appellants as every such detail is missing in the FIR.

18. It is contended that PW-1 was not present at the scene of occurrence and as such he did not give any detail in the first informant report as he was not sure about the manner of death of his brother. According to the learned Senior Counsel, deceased was assaulted in the late night hours and in the early hours of morning, on the fateful day and no one had seen the occurrence. The entire story was cooked up after the medical evidence were brought in, in consultation with the expert. Not a single fact as noted above from the deposition of PW-1 can be found in the first information report except the names of four accused persons and the alleged motive. It is contended that after postmortem was conducted and the prosecution became sure that three fires hit the deceased, three accused persons were assigned firearms and forth one was given the role of exhortation in the testimony before the Court.

19. Considering the above arguments, we find that crucial question before us, in the instant case, is to ascertain the presence of PW-1, i.e. the first informant on the spot. While doing the same, we may also note that in the margin notes of the site plan, the Investigating Officer indicated that four accused persons came to the spot from opposite directions. As per the description in Note no. 3 of the Margin in the site plan, two accused persons namely Sher Singh and Gulab came out from the field of Jai Singh whereas other two persons namely Sadhu and Sahendra reached at the spot from the field of Nakli and both the fields are opposite to each other. The site plan was prepared at the pointing of the first informant as deposed by him as PW-1 after the inquest was completed as is clear from the description at Note no. 4 in the Margin of place "x", i.e. the place where deceased was assaulted by the accused. The above noted details, surprisingly, are completely missing in the statement of PW-1. He simply stated that all four accused met the deceased on the Chak Road.

20. Amongst other evidences about the presence of PW-1, we further find that PW-2 has been produced in the witness-box to support/corroborate the version of PW-1 projected as an eye-witness of the occurrence though he has not been mentioned as a witness in the first information report. In his deposition before the Court, PW-2 states that he was going to the village alongwith Achpal (another alleged eye-witness) and when they reached in the Jungle near the field of Jai Singh on the Chak Road, he heard the sound of gunshot and upon reaching on the spot, he saw the deceased having been hit by fires while brother of the deceased namely Jaiveer being present on the spot. He then states that he did not identify the assailants as he had only seen them fleeing away from the spot. At this juncture, this witness was declared hostile by the prosecution. Nothing much can be elicited from his cross-examination wherein he simply stated that he did not mention the names of assailants to the Investigating Officer and as to how it was written in his statement under Section 161 Cr.P.C. was not known to him.

21. Having carefully sifted the testimony of this witness (PW-2), keeping in mind that he was declared hostile by the prosecution, we find that he was merely a Chance witness. PW-2 in a casual manner though stated that he was passing the way with Achpal but did not disclose anything more than that, i.e. the reason for his presence near the place of occurrence. Another witness Achpal who was allegedly accompanying him had not been produced in the witness-box, though he has also been mentioned as an eye-witness in the testimony of PW-1 (the first informant). The testimony of PW-2 regarding the presence of PW-1 at the spot of occurrence, therefore, does not carry any weight. We may also note that PW-2 does not state that he reached at the place of occurrence hearing the cries of PW-1 nor he states that other two witnesses namely Atra and Sahi Ram son of Chhajju had also reached or had seen the occurrence. PW-2 as such cannot but be said to be a 'Chance witness' and his testimony in the examination-in-chief, by all standards, cannot be taken as a proof of presence of the first informant PW-1 on the spot.

22. We are, thus, left with the testimony of solitary witness namely PW-1 which is also full of contradictions, improvements and embellishments and as such this witness cannot be categorised as wholly reliable. The material improvements in the deposition of PW-1 (the first informant) have already been noted above. We may further note that in the examination-in-chief, PW-1 stated that he dictated the written report to Brij Pal who scribed the same and readover it to him and thereafter the same report was given by him in the police station to register the case. In the cross-examination, when his attention was drawn to the fact that he did not mention himself as an eye-witness therein, he casually replied that he dictated the said fact but did not know the reason as to why it was not written. This explanation of PW-1 is not acceptable for the reason that in his examination-in-chief he categorically stated that the written report was readover to him after it was transcribed by Brij Pal on his dictation. To our minds, the prosecution has failed to explain this material improvement in the evidence of PW-1.

Further PW-1 was confronted on his relationship with the four witnesses mentioned in his deposition in the Court. Though he evaded answer to all the

questions in this regard but from his cross-examination, it can be clearly culled out that PW-1 and four witnesses of the occurrence (mentioned in his deposition) are all family members (belonging to one extended family). According to PW-1, the incident-in-question had occurred in the broad day-light at about 8:15 AM when normally the villagers are working in their fields. No independent witness or owner of the adjoining field who may have reached the spot or had seen the occurrence had been produced by the prosecution nor there is any whisper in the entire evidence that other villagers, apart from four witnesses, had also seen the occurrence. The Investigating Officer admitted in the cross-examination that he did not investigate Jai Singh and Nakli whose fields were adjoining to the place of occurrence. He, however, deposed that the statement of witness Atar Singh was recorded at the place of occurrence but he has not been produced in the witness-box to prove the occurrence. From the deposition of the Investigating Officer (PW-4), it further transpires that statement of other three alleged eye-witnesses namely Sahi Ram son of Nain Singh, another Sahi Ram son of Chhajju and Achpal were recorded only on 23.8.1992.

23. It has also come in evidence that the first informant and accused persons were harbouring ill-will against each other. A suggestion was given to PW-1 in the cross-examination that Sher Singh contested election for the post of Pradhan against Jaipal and PW-1 was supporter of Jaipal. As against other accused persons, it has come up that Munna brother of PW-1 (Jaiveer) was a named accused in the murder of brother of Gulab Singh and Sadhu (another accused) was a witness in that case. Some litigation was also going on between the first informant and accused Sahendra in a proceeding drawn by later. Previous enmity as a result of litigation between the rival parties is also mentioned as a motive of murder in the first information report itself. We cannot loose sight of the fact that enmity is a two-edged sword. It may be a reason for murder or a reason for false implication of the accused persons. In view of the proof of enmity between the first informant and the accused party, material contradictions/omissions in the first report drawn by PW-1 become much more important. One more circumstance, which has been brought before us from the inquest report is that the dead body was sealed in a black blanket. The Investigating Officer as also the Constables who were entrusted the dead body for taking it to Mortuary for the postmortem have deposed that the body was sealed on the spot after inquest was completed and straightway sent to the Mortuary for postmortem. PW-7 proved that the dead body remained in his custody and supervision after it was handed over to him at the place of occurrence till it was handed over to the Doctor for postmortem. PW-7 also states that the first informant was not accompanying him to the Mortuary. Whereas, PW-1 in cross, deposed that the body was taken to the police station from the place of occurrence by the Investigating Officer after inquest was completed and he also accompanied them. He states that it was kept in the police station for two hours and was sealed therein only, the entire process took about 1½ hours, though he denied the suggestion that the report was drawn after the dead body was sealed. From the above conspectus of facts, a doubt arises in the minds of the Court about the truthfulness of the prosecution story. At least, it can be seen that PW-1 is not a truthful witness, wholly reliable one.

24. Giving a word of caution about the appreciation of testimony of single

witness, the Apex Court in **Vadivelu Thevar vs. State of Madras20** has observed that when faced with the testimony of a single witness, the Court may classify the oral testimony into three categories namely, (i) Wholly reliable, (ii) Wholly unreliable, (iii) Neither wholly reliable nor wholly unreliable.

It is said therein that there may not be any difficulty in accepting or discarding the testimony of the single witness in the first two categories. The difficulty arises in the third category of cases. Where the single witness is found to be in the category of neither wholly reliable nor wholly unreliable, the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial before acting upon the testimony of the single witness.

25. In the case at hand, having categorized PW-1 as a witness whose testimony can neither be wholly reliable nor wholly unreliable, we are proceeding to look for other material particulars brought on record by the prosecution. In this process, we found another very material aspect of the matter. According to the medico-legal report, in the internal examination, the Doctor PW-3 found that the stomach of deceased was empty. His Small Intestine was also empty whereas Large Intestine contained gases and faecal matter. It is vehemently contended on behalf of the appellants that the above referred narration fully fortifies their stand that the murder took place in the late night hours or in the early morning before the deceased went to ease himself.

26. Having noticed the discrepancies, improvements and inconsistencies in the oral evidence in the foregoing paragraphs of this judgment, we find that the above-mentioned circumstance almost clinches the issue. PW-1 was cross-examined on the above aspect and he categorically deposed that deceased had his meal in the morning before he left the house at about 8:00 AM and that he ate Dal and Roti. The place of incident was about ½ km from the village. The deceased was shot within 15 minutes of leaving his house. In the examination-in-chief, PW-1 also stated that deceased was carrying food for his father. While considering the above categorical statement, we may also note that normally villagers have their meal in the morning before going to the field and if the above evidence of PW-1 is believed to be true, then the same itself is completely demolished by the medical evidence, which shows that both the Stomach and Small Intestine were empty. This condition of the dead body would indicate that at or before the time of murder, the deceased had not taken his meal and the murder must have taken place at least 4-5 hours after he had his last meal. The Doctor on a suggestion of the defence had stated that it takes about 5-6 hours in digestion of 'Roti' and Stomach becoming empty. We cannot doubt or dispute this version of the Doctor. It is, thus, possible that the deceased was done to death much after his night meal and much before his morning meal. This circumstance raises a serious dispute as to the actual time of the incident which is a very much important factor in this matter in finding out whether the case presented by the prosecution is true or not. This discrepancy also materially affects the credibility of evidence of eye-witnesses because if the incident had occurred in the early hours of the morning or late night, a doubt is created in our minds as to the presence of the eye-witnesses. The eye-

witness (PW-1) is real brother of deceased and he categorically stated that deceased left the house after having his meal and he was carrying food in the tiffin for his father. We have no reason to doubt the statement of PW-1 about the timing when deceased took his last meal. The prosecution has utterly failed to explain this material discrepancy found in the oral version and medical evidence. The trial court surprisingly, has completely ignored this aspect of the matter.

27. Thus, in the instant case, in view of the shaky version of the sole eye-witness and the surrounding circumstances, time of death becomes a material factor to verify the presence of the eye-witnesses. It was obligatory for the prosecution to have clarified the discrepancy between the medical evidence and the oral evidence. The prosecution having failed to do so, in our opinion, in view of the serious doubt as to the time of incident, the presence of eye-witnesses at the place of occurrence and his narration of the incident also become doubtful.

28. In so far as the issue of inconsistency between medical evidence and ocular evidence is concerned, the law is fairly well settled, that unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. And in the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence and only when medical evidence makes the oral testimony wholly improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved. Reference **State of U.P. v. Hari Chand21, Bhajan Lal @ Harbhajan Singh and Ors. v. State of Haryana22 and Darbara Singh vs State Of Punjab1.**

29. Proceeding further, we may also note that there are various defects in the investigation. No effort appears to have been made by the Investigating Officer to recover the weapons of offence. The blood stained earth and plain earth though collected but not sent for chemical examination. The place of incident though narrated as the Chak Road in front of the field of Jai Singh but the same is mentioned as Jungle Gram Garhi of Village Rampur in the Chik FIR, a place at a distance of about 6 kms. from the police station. There is no reference of 'Bogie' in the site plan or in the entire prosecution case on which deceased was allegedly going to the field. The recovery memo Exhibit 'Ka-11' records recovery of one steel bowl, glass and an aluminum box with lid which were lying besides the dead body. In the deposition of PW-1, it has come up that deceased was carrying food for his father. The food in the aluminum tiffin box found besides the dead body is completely missing in evidence. It is not indicated in the recovery memo as to whether the aluminum box with lid was filled with the food or was empty or food was scattered besides the dead body. There is complete silence about the presence of father of deceased in the field or else where at the time of incident. How the

dead body was sealed in black blanket? The Court is just left in doubt guessing whether the deposition of sole eye-witness is true or not.

30. The genesis or root cause of the incident though is narrated as previous enmity between the parties on account of litigation, but when seen from another angle, it can be said to be a reason for false implication of four accused persons. Sole eye-witness is found to be an interested witness on account of his relationship with the deceased and also being inimical to the accused party. His version is full of discrepancies in material particulars and could not be corroborated by the medical and other evidence on record. The ocular version of PW-1 in the Court is a substantial improvement from his earliest version of the incident as contained in the FIR.

31. On cumulative appreciation of evidence brought by the prosecution, we find that the defects in the investigation becomes irrecoverable in view of inherent improbabilities, omission and material contradictions found in the testimony of sole eye-witness who is not only an interested witness but is also partisan or inimical to the accused persons.

32. We are, therefore, afraid to place reliance on the sole testimony of PW-1 for the purpose of recording conviction of all the accused persons.

At this juncture, we may note the observations of the Apex Court in **Jayabalan vs. Union Territory of Pondicherry23,** wherein it is said that the Court must be cautious in appreciating and accepting the evidence given by the interested witnesses. Though the approach of the Court, while appreciating the evidence of such witnesses must not be pedantic and the Court must not be suspicious of such evidence but be cautious. The primary endeavour of the Court must be to look for consistency.

In **Dalip Singh Vs. State of Punjab24,** the Apex Court has observed that in case of enmity, there may be a tendency to drag in an innocent person as an accused against whom a witness has a grudge. A witness who is normally to be considered independent may likely to be tainted. This observation, however, has been clarified to have been made as a general rule of prudence and not as a rule of law. It is further clarified that each case must be judged on its facts and must be limited and be governed by its own fact.

In **Raju alias Balachandran and others vs. State of Tamil Nadu25** after appreciation of long line of decisions on the issue of evidence of related or interested witness, it is said that evidence of such a witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. But it would again be only a rule of prudence and not one of law.

33. Applying the rule of caution and prudence in appreciating the evidence of interested and partisan sole eye-witness, in the instant case, we find that possibility of death having been caused in the late night or in the early hours of the morning before deceased had defecated seems more probable. In a criminal trial, cardinal rules of criminal jurisprudence which have to be kept in mind are that there is a presumption of innocence in favour of the accused. The

burden is on the prosecution to prove the guilty beyond all reasonable doubts. If two views of the matter are reasonably possible, golden thread of rule which runs through the web of administration of justice in criminal cases is that the view which is favourable to the accused should be adopted. The accused is entitled to the benefit of doubt. The doubt should, however, be reasonable and should be such which rational thinking men will reasonably, honestly and conscientiously entertain and not a timid mind which fights shy - though unwittingly it may be - or is afraid of the logical consequences, if that benefit was not given. It other words, it is "not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism". The rule does not warrant acquittal of the accused by resorting to surmises and conjunctures or fanciful considerations. [See **The State of U.P. vs. Samman Dass26 and Yogesh Singh vs. Mahabeer Singh and others27]**

34. Having carefully scrutinized/sifted the entire evidence produced in this case and the surrounding circumstances, we are satisfied that the prosecution had not been able to prove its case beyond all reasonable doubts, arose in the minds of the Court as discussed in the preceding paragraphs of this judgment. The prosecution evidence is not such which would bring home the guilty persons. The benefit of doubt certainly has to go to the accused persons. The three (3) surviving accused persons are, therefore, entitled to be acquitted of all the offences of which they were charged. Their conviction is liable to be set aside.

35. Accordingly, the judgment and order dated 22.12.1995 passed by the Additional Sessions Judge, Muzaffarnagar in Sessions Trial No. 51 of 1993 (State vs. Sher Singh and others) convicting and sentencing the accused-appellants namely Sher Singh (appellant no. 1), Sahendra (appellant no. 2) and Gulab (appellant no. 4) for offence under Section 302 readwith Section 34 IPC, registered at Police Station Kandhala, District Muzaffarnagar, is set aside.

The appeal is hereby **allowed.**

The appellants are on bail. Their sureties shall stand discharged.

The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary action.

The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad.

(2020)03-05ILR A36
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.05.2020

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No. 14 of 1985

Awadhesh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Ram Naresh Singh, Abhishek Audichya, Amit Kumar Awasthi, Nagendra Mohan, Vinod Misra

Counsel for the Respondent:
G.A., Dheeraj Srivastava, Girijesh Sharan Srivastav, Munni Lal Yadav, Rajesh Kumar Gupta, Shivendra Pratap Singh

A. Criminal law-Code of Criminal Procedure, 1973- Section 154-F.I.R- Every minute detail is not required to be mentioned in the FIR as the FIR is only an information given to the police regarding occurrence of a crime and the person giving the said information may not be in his best frame of mind to give all details of the occurrence while submitting the report to the police.

Settled law that F.I.R is not an encyclopaedia of facts and absence of all details in the F.I.R will not dent the case of the prosecution.

B. Evidence law- Indian Evidence Act, 1872 - Section 3- Section 118- Testimony of related witnesses- It is settled proposition of law that the testimony of a prosecution witness cannot be merely rejected on the ground that he was a relative of the deceased. However, the Court is required to be cautious and careful while examining the evidence of such a witness. Non-production of an independent witness by the prosecution would not weaken the case of the prosecution in case testimony of the prosecution witness produced by the prosecution, may be relative of the deceased, is consistent and trustworthy.

The testimony of a related witness, if he is a natural witness, can be relied upon by the Court provided the evidence is credible and trustworthy and non-examination of independent witnesses will not dent the case of the prosecution.

C. Criminal law- Indian Penal Code, 1860 - Section 149 - In case an offence is committed by any member of an unlawful assembly in prosecution of the common object and such members of that assembly knew the purpose with which they had assembly; then, every person present at the time of committing of that offence is a member of that assembly and is guilty of that offence. The common object of unlawful assembly to cause death of the deceased was well established. There was nexus between common object and the offence committed and, as such, every accused-appellants were liable for the same

Indian Penal Code, Section 1860- Section 149- Section 149 of the IPC fixes the vicarious liability of each member of the unlawful assembly participating in the commission of the offence with a common object of doing the said act.

The act of accused appellants collectively amounts to culpable homicide amounting to murder and punishable under Section 302 IPC bringing all of them under joint liability of the offence. The conviction and sentence of appellants under Section 302/149 is confirmed. (Para 43, 47, 56, 65,66)

Criminal Appeal dismissed. (E-3)

List of case cited:-

1. Gurmail Singh Vs. St. of Punj. & anr., (2013) 4 SCC 228

2. Chanakya Dhibar (dead) Vs. St. of W.B & ors., (2004) 12 SCC 398

3. Jivan Lal and ors Vs. St. of M.P., (1997) 9 SCC 119

4. Yakub Ismailbhai Patel Vs. St. of Guj., (2004) 12 SCC 229

5. Main Pal Vs. St. of Har., (2004) 10 SCC 692

6. Animireddy Venkatramana Vs. Public Prosecutor High Court A.P., (2008) 5 SCC 368 (f&d)

7. Betal Singh Vs. St. of M.P., 1996 Crl.J. Page 4006 (SC)

8. Babu Singh Vs. St. of Punj., 1996 (33) ACC 474 SC

9. Baldev Singh Vs. St. of Punj., 1995 ACC 752 (SC)

10. Bijay Singh Vs. St. of Bih., 2003 SCC (Crl.) 1093

11. St. of U.P. Vs. Sheo Sanehi, (2004) 12 SCC 347

12. St. of Raj. Vs. Hanuman, AIR 2001 SC 282

13. Banti @ Guddu Vs. St. of M.P, AIR 2004 SC 261

14. Yogesh Singh Vs. Mahabeer Singh, (2017) 11 SCC 195

15. Vijendra Singh Vs. St. of U.P., (2017) 11 SCC 129

16. Dev Karan Vs. St. of Har., (2019) 8 SCC 596

17. Shambhu Nath Singh & ors. Vs. St. of Bih., AIR 1960 SC 725 : MANU/SC/0214/1959

(Delivered by Hon'ble Ritu Raj Awasthi, J.)

1. Heard Mr. Nagendra Mohan, learned counsel for appellant as well as Mr. Pankaj Kumar Tiwari, learned Additional Government Advocate on behalf of State and perused the record including lower Court records.

2. This Criminal Appeal has been filed under Section 374 (2) Code of Criminal Procedure against the judgment and order dated 09.01.1985 passed by the Ist Additional Sessions Judge, Sitapur in Sessions Trial No. 117 of 1982 arising out of case Crime No. 152 of 1981, under Sections 147, 148, 149, 302, 201 Indian Penal Code, Police Station Laharpur, District Sitapur, whereby the accused-appellants, Avadhesh Kumar, Patrakhan, Sheo Poojan, Uma Shanker alias Dalla and Kalloo have been convicted and sentenced to undergo rigorous imprisonment for life under Section 302/149 Indian Penal Code. They have been further convicted and sentenced to undergo rigorous imprisonment for one year under Section 147 Indian Penal Code. The accused-appellants, Avadhesh Kumar, Patrakhan, Sheo Poojan have been convicted and sentenced to undergo rigorous imprisonment for two years under Section 148 Indian Penal Code. The accused-appellants, Avadhesh Kumar and Sheo Poojan have been further convicted and sentenced to undergo rigorous imprisonment for two years under Section 201 Indian Penal Code. All the sentenced are directed to run concurrently. Accused, Purushottam and Pankaj Kumar have been acquitted giving them benefit of doubt.

3. The prosecution case, in brief, is that Mahadeo who was grandfather of the informant, Jagdish (PW-1) had two sons, namely Ram Dayal and Ram Asrey. Ram Dayal had one son, namely, Sri Sarjoo Prasad whereas Ram Asrey had three sons, namely, Roop Narain, Jagdish and Chhail Behari. Sarjoo Prasad was murdered and Roop Narain had lodged the report in that connection in which Gokaran and Ram Mitra were also named as accused along with others. The said case ended in acquittal. Muneshwar was the grandfather of Gokaran. Muneshwar had two sons Misri Lal and Mewa Lal. Gokaran and Patrakhan were the sons of Mishri Lal and he had also one daughter Maya. Maya was married to Chukki alias Pankaj who is an accused in this case. Shyam Murari and Avadhesh were the sons of Gokaran who had also one daughter Rajpati. Rajpati is the wife of accused Sheo Poojan. Avadhesh is also accused. The daughter of Mewa Lal, namely, Bishuna was married to Ram Mitra who was also an accused in the murder of Sarjoo Prasad. Kalloo, Mahesh Prasad and Uma Shanker alias Dalla are also accused in the present case. All the accused persons were on friendly terms with each other. It is alleged that the whereabouts of Gokaran were unknown and a report about his disappearance was lodged by Mishri Lal and in that report Jagdish (PW-1) and

Chhail Behari were named as accused. No prosecution was launched on the basis of the said report, therefore, the accused persons were displeased. The wife of Gokaran used to say that she would not take off her bangles for 12 years. The accused Avadhesh and Patrakhan (sons of Gokaran) used to say that they would wreck vengeance. It is alleged that on 15.7.1981 at about 6PM the informant PW-1 (Jagdish) had gone to shahpur market. Deceased, Roop Narain (brother of Jagdish), had also gone to the said market for purchasing goods and selling food-grains. Roop Narain had sold some of his food-grains while he was yet to dispose of his remaining food-grains, Purushottam alias Khattoo fired at him, at that time the deceased Roop Narain was seated and he was hit by the shot. Thereafter Patrakhan fired from half-gun as a result of which Roop Narain fell down. Thereafter the accused persons, Kalloo, Sheo Poojan, Dalla, Avadhesh and Pankaj assaulted the deceased Roop Narain. Kalloo and Dalla were armed with lathi, Sheo Poojan and Avadhesh were armed with Banka while Pankaj was armed with a Chhuri. Patrakhan took out the spent cartridge and kept the same in his pocket and thereafter he fired second shot. The accused Patrakhan also said that he was avenging the murder of his brother and if anyone would advance then he would also be killed. The accused persons lifted Roop Narain and after covering a distance of ten steps the accused Sheo Poojan and Avadhesh severed his head and went away towards the west.

3. The report of the occurrence Ext.Ka-1 was written by Indra Prakash on the dictates of PW-1 (Jagdish Prasad). Gokaran, Indra Prakash, Chhabi Nath and others had also witnessed the said occurrence. The case was registered against accused persons at G.D. No. 27, Ext.Ka-3 on the same day at 8.45PM and the special report was also sent on 15.7.1981 vide GD report No. 23 at 10.05PM.

4. PW-5, Jagdish Prasad Sharma took up the investigation of the case. He recorded the statements of the witnesses and started for the place of occurrence. On account of night, he stayed and on next day he prepared the inquest report of the body of the deceased Roop Narain Ext.Ka-7 along with photo of dead-body, challan dead-body, specimen seal etc. Exts.Ka-8 to Ka-12. He also prepared the site plan Ext.Ka-5 of the place of occurrence. Sri Jagdish Prasad Sharma (PW-5) also took possession of plain earth and blood stained earth in separate containers from the spot which were sealed and memo Ext.Ka-6 was prepared in that connection. The dead body of Roop Narain was sent for postmortem examination in a sealed condition. After completion of investigation, the accused were charge-sheeted. The accused persons did not plead guilty to the charges framed against them and prayed for trial.

5. The prosecution examined PW-1 Jagdish the informant, PW-2 Indra Prakash, PW-3 Gokaran, PW-4 Constable Sri Sipte Hasan, PW-5 Sri Jagdish Prasad Sharma, Investigating Officer and PW-6 Dr. P.C. Pandey to prove the prosecution case.

6. The autopsy of the deceased Roop Narain was performed by Dr.P.C.Pandey on 16.07.1981 at 5PM and he had found the following ante-mortem injuries on the body of the deceased vide postmortem examination report Ext.Ka-12:

i. Multiple gunshot wound on the anterior lateral end of the right thigh, lower portion in an area of 8 cm x 7 cm

each measuring 0.3 cm x 0.3 cm x muscle deep. Six gunshot recovered.

ii. Multiple gunshot would o the other part of the axilla in an area of 8 cm x 9 cm each measuring 0.3 cm x 0.3 cm x muscle deep. Seven gunshot recovered.

iii. Incised wound 12 cm x 12 cm x through and through 3 cm in circumference at the level of the 5th cervical vertebra. A portion of the 5th cervical vertebra is also cut away. Jags of chin present and the wound (at the margin) of the wound.

iv. Incised wound 4 cm x ½ cm x muscle deep, about the mid portion of left clavicle.

v. Two incised wound both placed transversally, 5 cm x 1½ cm cavity deep, 12 cm right to the muscle end, second would is 3 cm behind the first wound size 3 cm x ½ cm x muscle deep.

vi. Incised wound 8 cm x 1 cm x muscle deep, on the right axillery line, 12 cm below the
right axilla.

vii. Incised wound 6 cm x 2 cm x muscle deep on the posterior side of the right upper arm mid-portion.

viii. Incised wound 1½ cm x ½ cm x muscle deep on the front side of the right upper arm mid-portion.

ix. Incised wound 2 cm x 1 cm x muscle deep on the back of the right forearm, mid-portion.

x. Incised wound 1 cm x ½ cm x muscle deep on the back of right wrist.

xi. Incised wound on the left side back lower portion, 3 cm x 1 cm x muscle deep.

xii. Abrasion on the middle of back 3 cm x 3 cm in eye.

7. Dr. P.C. Pandey, PW-6, who had performed the postmortem of the deceased opined that the antemortem injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death, that the injuries no. 1 and 2 were gun-shot injuries while injuries no. 3 to 11 were caused by sharp edged weapon while injury no. 12 was possibly caused by friction against some hard blunt objection such as banka. The injuries could have possibly been inflicted on 15.7.1981 at 6PM.

8. The Trial Court of learned Additional Sessions Judge, Sitapur framed charges against the appellants for offences punishable under Sections 147, 148, 149, 302, 201 IPC. The accused-appellants pleaded not guilty and claimed trial. The Trial Court recorded the statement of prosecution witnesses as well as statements of appellants under Section 313 Cr.P.C.

9. The accused-Avadhesh alleged that he has been implicated on account of his uncle. The accused-Patrakhan alleged his implication on account of his enmity with Jagdish. The accused Sheo Poojan alleged that he had enmity with Putti Lal and Ram Dhani, there was enmity between them and his grandfather, Jagdish is his Samadhi so he has been implicated.

10. The accused-Uma Shanker alleged that his brother-in-law Pahari used to live in village Gursariya, that Indra Prakash had opened an outlet for the flow of water from his nala as a result of which a quarrel took place between them, he with the help of 5 to 10 persons had closed the said outlet so he has been falsely implicated.

11. The acused-Purushotam alleged that the village Pradhan Ram Pal had murdered his real brother Sri Ram, the Village Pradhan was in the party of the

informant so he has been falsely implicated. The accused-Kalloo alleged that his sister was married with Pahari in Gursariya village, he had helped his brother-in-law Indra Prakash in connection with a nala so he has been implicated.

12. The accused-Pankaj alleged that he had gone to village Umariya, Jhabboo had agreed to purchase his bullock and the deal was struck at Rs. 1000/-, he had also paid Rs. 100/- as advance. Jhabboo did not purchase his bullock so he demanded Rs. 100/- back from him as a result of which an altercation had taken place so he has been implicated.

13. PW-1, Jagdish had explained the relationship between his family and that of accused persons. According to which there was old enmity between them. There is no evidence to contradict the same. PW-1, Jagdish stated that Sarjoo Prasad son of Ram Dayal was murdered nearly 25-26 years back regarding which a complaint was lodged by his deceased brother, Roop Narain. When Gokaran son of Mishir Lal disappeared about 12-13 years back and his whereabouts were not known, Mishri Lal had lodged a report with the police in which he and his brother Chhail Behari were named as accused persons, however, no prosecution was launched due to lack of evidence, as such, the accused-persons were annoyed and the wife of Gokaran used to say that she would not remove her bangles for 12 years and she would avenge for the disappearance of Gokaran. In fact, the accused persons used to say that they would take revenge for the same. He further stated that nearly two and half years back at about 6PM he had gone to Shahpur market, deceased Roop Narain had also gone there for selling food-grains, that he had disposed of some of his food-grains but some quantity remained. He had also gone to purchase certain goods after selling food-grains. Purushottam alias Khattoo fired at Roop Narain and at that time Roop Narain was seated. The time was 6 PM. On being hit by shot Roop Narain moved one or two steps and at that time Patrakhan fired from his half gun and Roop Narain fell down, that thereafter the accused-persons, Kalloo, Sheo Poojan alias Dalld, Avadhesh Kumar and Pankaj started assaulting the deceased. Kalloo and Dalla were armed with Lathi, Sheo Poojan and Avadhesh Kumar were armed with banka and Pankaj was armed with knife. The accused Patrakhan took out the spent cartridge from the gun and kept in his pocket and he again fired second shot and also said that if anyone would come forward; then, he would also be killed. It was also said that he was avenging for his brother. Thereafter, the accused persons lifted Roop Narain and after covering a distance of 10 steps, Sheo Poojan and Avadhesh Kumar severed the head of Roop Narain. He also stated that the report of the occurrence was written by Indra Prakash on his dictates. PW-1 Jagdish proved the FIR (Ext. Ka-1).

14. PW-1 Jagdish also stated that on account of fear he did not wish to go to the police station so he handed over the written report to the village Chowkidar. He also stated that he had mentioned in the report that Patrakhan had fired in the air. He, however, could not assign any reason as to why the said fact was not noted in the FIR. He also stated that he did not visit village Chandasuwa and according to his memory he had not visited the said village. He had known the name of 2-4 persons resident of village Chandasuwa. He had known the village Pradhan Jagdish and his brother Bishal, Shyam Pandey, Rampal, Pooran

Kumhar and the accused persons. He also stated that the villagers had told him the name of Khattoo as Purushottam. That after murder of Roop Narain he had enquired about the name of Khattoo and someone from the persons in the village had told the name of Khattoo as Purushottam.

15. From the statement of PW-1 Jagdish it appears that he had not known the accused person Purushottam who was resident of Chandasuwa. Some persons present in the market had disclosed the name of Purushottam.

16. PW-2 Indra Prakash was the scribe of FIR lodged by the PW-1. He had stated that three years back his father-in-law (deceased) was murdered in his village but thereafter he added that he was murdered in village Umariya. Village Umariya was at a distance of one kilometer from his village Gursariya. He had stated that Roop Narain (deceased) was his father-in-law. Shahpur market was at a distance of 2 kilometer from village Muriya towards the south. In the evening of 15.7.1981 at about 6PM his father-in-law Roop Narain was murdered in Shahpur market, his father-in-law had gone there to sell Masoori (Pulse) and rice for meeting out his household expenses. He further stated that he had reached Shahpur market at about 5PM and thereafter he added that he reached there at about 4.30PM. He had gone there to take medicine for his ailing mother. When he reached Shahpur market he had talks with his father-in-law Roop Narain who was selling food-grains. Raghunath and Putwa Mishra were also selling food-grains there and Jagdish was selling food-grains towards east, that when after talking with his father-in-law he had started walking and gone 2-3 steps Khattoo fired at his father-in-law by his country-made pistol. Khattoo was also known by the name Purushottam. His father-in-law (deceased) ran towards north for 2 to 3 steps, that Patrakhan had also fired from his half gun. Purushottam alias Khattoo was the resident of village Chandasuwa. His father-in-law after being hit by shots fell down, that Patrakhan took out the spent cartridge from his barrel and again filled his gun with another cartridge. That Kalloo alias Daya Shanker, Dalla alias Uma Shanker, Sheo Poojan, Avadhesh, Pankaj Kumar alias Chukki started assaulting Roop Narain. Kalloo and Dalla were armed with lathi, Avadhesh and Shop Poojan were armed with banka and Chukki alias Pankaj Kumar was armed with a knife. That thereafter all the accused person lifted Roop Narain and took him upto a distance of 5-6 steps where Sheo Poojan and Avadhesh severed the head of Roop Narain and kept the same in their bag. Patrakhan was also saying that if anyone would advance; then, he would also be killed. He had also fired in the air. He also stated that he had scribed the FIR on the dictates of Jagdish (PW-1).

17. Another eye-witness of the occurrence in question is PW-3 Gokaran, who stated that nearly 3 years back Roop Narain was murdered in Shahpur market at about 6PM. That on that day he had gone from his village to purchase vegetables, etc. from the said market. After purchasing some goods he went towards the place where food-grains were kept for sale. That Khattoo had fired at Roop Narain. When Roop Narain wanted to run then Patrakhan also fired at Roop Narain with his half gun. He had also fired second time, this time Roop Narain fell down and then other accused persons Chukki, Avadhesh, Kalloo, Dalla ad Sheo Poojan assaulted him. The accused Chukki had a knife, Sheo Poojan

and Avadhesh had banka while accused Kalloo and Dalla had lathi in their hands. The accused persons also lifted Roop Narain and after going 10 steps Sheo Poojan and Avadhesh severed the head of Roop Narain and went away with their bag. He stated that Shahpur market was at a distance of three miles from his village. He also stated that he had started from his village at 4PM and reached market about 5PM. He further stated that 8-10 more shopkeepers were also seated at the place where Roop Narain was seated. He further stated that none of his relations lived in village Chandasuwa which is at a distance of 2 kilometer from his village. He had no talks with the residents of village Chandasuwa. He had also not enquired about the names of the accused persons from the residents of village Chandasuwa. He further stated that he had merely known Khattoo. He also stated that he had said before the Investigating Officer that the accused had severed the head of the deceased and kept that in a bag. However, PW-5, Jagdish Prasad Sharma who was Investigating Officer in the case in his cross-examination stated the PW-3 Gokaran had not given any such statement before him. PW-3 Gokaran also did not assign any reason as to why Investigating Officer had not recorded the aforesaid statement.

18. PW-5, Jagdish Prasad Sharma (Investigating Officer), in his statement has stated that he had FIR in his possession when the inquest report was prepared. He also stated that Police Sub Inspector, S.K. Singh had prepared the inquest report on his dictation. In column no. 3 of the inquest report (Ext.Ka-7) the date and time are mentioned as 15.7.1981 and 7.30AM or 7.30PM, however, there is some typographical error as the FIR was lodged on 15.7.1981 at 8.45PM, therefore, the time 7.30AM or 7.30PM mentioned in column no. 3 of the inquest report was not correct and that could be due to human error and sheer inadvertence and oversight. In the end of the signature of the SI the numeral 15 of the date 15.7.1981 has been corrected. Below the signature of the IO the date 16.7.1981 is mentioned. Similarly, time 7.30AM is clearly mentioned below the signature of the Sub-Inspector so discrepancy in column no. 3 of the inquest report (Ext.Ka-7) has totally become insignificant.

19. The prosecution had also produced PW-4, Constable Sibte Hasan who had recorded the FIR (Ext.Ka-2) on the basis of written report (Ka-1). He had confirmed the report no. 27 in the GD and the FIR (Ka-2). He has denied that the said report was lodged on the information given by the Chowkidar. The prosecution had also produced Dr. P.C. Pandey, who had conducted the postmortem of the body of deceased Roop Narain and has confirmed the same. The prosecution in order to prove its case had produced certain documentary evidence such as written report (Ka-1), FIR (Ka-2), copy of GD report no. 27 (Ka-3), Site plan (Ka-5) Recovery memo (Ka-6), Inquest report (Ka-7) and Postmortem report (Ka-12) in addition to the witnesses as noted above.

20. Learned counsel for appellants has vehemently argued that there were strong contradictions in the statement of PW-1 as well as PW-2 and they are not trustworthy. In this regard, it has been argued that PW-1 Jagdish in his statement had stated that due to fear he did not wish to go to the police station to lodge the FIR. He also stated that he had handed over the written report to the Chowkidar.

21. It is submitted that the FIR in this case was not registered on the basis of the compliant submitted by PW-1 as PW-1 has himself submitted that he did not wish to go to police station to lodge the FIR and handed over the written complaint to Chowkidar to take it to the police station. This contradiction in the statement of PW-1 is a material contradiction which creates doubt about the veracity of the FIR itself, as such, the entire prosecution case appears to be on falsehood. It is also contended that PW-2 in his statement has stated that the deceased Roop Narain was murdered in his village but thereafter has added that he was murdered in village Umariya, however, subsequently at a later stage, he has stated that Roop Narain was murdered in Shahpur market. The statement of PW-2, as such, was not reliable and the prosecution has failed to prove its case beyond reasonable doubt.

22. It has further been argued that PW-1 Jagdish in his statement has said that he had gone to his house in the night, after lodging of the FIR and reached the place where the dead body of Roop Narain was lying for preparation of inquest report next day, that in normal circumstance one whose brother has been murdered would not have slept and it was an unnatural conduct of PW-1 Jagdish which creates doubt about his presence at the time of occurrence.

23. It has further been argued by the learned counsel for the appellants that as per PW-1, Patrakhan had fired twice and he had also fired in the air, however, the police had not recovered any empty cartridge from the place of occurrence.

24. It has also been argued by learned counsel for appellants that the alleged offence said to have been committed in the market area where several persons were present, however, the prosecution has not produced any independent witness to support its case. PW-1 and PW-2 are relatives of deceased whereas PW-3 was known to the deceased, as such, an interested witnesse. In fact, no one had witnessed the crime.

25. Learned AGA appearing for the State, on the other hand while rebutting the arguments of appellants' counsel has submitted that the incident had happened in the course of the day when there was sufficient day light, at 6 in the evening on 15.7.1981. In the month of July, there is sufficient sunlight at 6PM, as such, there was no difficulty for the witnesses to identify the accused persons. The witnesses could have faced no difficulty in properly seeing the incidence taking place and identifying the accused persons. They did so with all certainty. The accused were named in the FIR as they were well known to the witnesses of facts. He further submitted that the First Information Report was lodged promptly by the police on receiving written complaint from the informant, Jagdish (PW-1). In this regard, he read over the relevant paragraph-extract of the statement recorded by the Trial Court of PW-1 and other witnesses like Investigating Officer and Head Moharrir as well as another witnesses of facts who were present at the place of occurrence to explain the gap of time between the time of occurrence and lodging of FIR in the police station. There was no delay in lodging of FIR.

26. Learned AGA vehemently denied the arguments of appellants with regard to lodging of FIR by the informant, PW-1. It was submitted that the FIR was lodged on the basis of written complaint submitted by

PW-1 himself. The written complaint and the FIR have been verified by the PW-1 and PW-4. He further submitted that after lodging of FIR, the police party moved to the spot where the dead body of the deceased, Roop Narain was lying in Shahpur market. Since it became dark due to night, as such, the Investigating Officer waited for the next day morning for getting the inquest of the deceased done and prepare the inquest report. The inquest proceedings before the witnesses of inquest were performed and inquest report was prepared. It is submitted that the overwriting in the column No. 3 of the inquest report was a human error and it was corrected by the Investigating Officer while signing the inquest report. After signature of the IO in the inquest report, the date and time have been mentioned which clarify the position. It is submitted that after completion of inquest proceedings, the dead body was sent for postmortem. The inquest report contained the case crime no. and relevant sections. It is very much clear that the inquest was done after lodging of FIR. It is also submitted that even memo along with dead body prepared for sending it for the postmortem bears the said case crime number. All these documents have been duly proved, therefore, the statement with regard to registration of FIR, its time and date stand proved and sufficiently corroborated by documents.

27. It has been argued by the learned AGA that in the FIR the informant had given the names of the accused persons and there was no room for any consultation or dictation on the part of the Investigating Officer.

28. Learned AGA has argued that specific role has been assigned to respective accused-persons, weapons used by them, time of occurrence and the presence of ocular witnesses all are proved by the witnesses of facts without any contradiction, inconsistency and doubt. Further, the narration of factual aspect of the incidence stated by the witnesses find support with the independent corroborative evidence like postmortem report, site plan and other formal witnesses.

29. It has been argued by the learned AGA that every minutest detail is not required to be mentioned in the FIR and in case any relevant facts which have come in light in the statement of the prosecution witnesses which were not mentioned in the FIR, the same cannot be rejected simply for the reason that they were not mentioned in the FIR. FIR is simple an information to the police regarding commission of any crime and all the relevant material facts come to the light either during course of investigation by the police or in the statement of prosecution witnesses. The opportunity of cross-examination is provided to the accused-persons and the Court has to decide about the veracity of said facts on the basis of evidence on record. It has also been argued that the accused-persons have been charged under Section 302 read with Section 149 IPC. The presence of accused persons at the place of occurrence was duly proved by the prosecution, as such, they have been rightly convicted under the aforesaid Sections.

30. Learned AGA countering the arguments of learned counsel for appellants submitted that the murder of deceased, no doubt, took place in the market area of Shahpur where several persons may have witnessed the crime, however, looking to the nature of crime when the head of the deceased was severed in broad day light by the accused persons and the head of the

deceased was taken away in a bag by them, no person could have come forward to give any evidence against the accused persons. It is also submitted that it is the discretion of the prosecution to produce its witnesses and the defence cannot take advantage in case only three witnesses of facts have been produced by the prosecution.

31. Learned AGA further argued that the worthiness of the testimony of prosecution witnesses cannot be rejected simply because PW-1 and PW-2 are the real brother and son-in-law, respectively of the deceased and PW-3 was known to the deceased. The prosecution witnesses have given the details of the manner in which the crime was committed by the accused persons, also giving the specific role and the specific weapons used by them in the commission of murder of the deceased including the place, date and time of occurrence which clearly goes to establish their presence at the place of occurrence and, as such, the evidence of ocular witnesses was fully trustworthy of credence.

32. Learned AGA submitted that the prosecution has successfully proved its case on the basis of witnesses, material produced and proved before the Court beyond all reasonable doubts. There was sufficient evidence and corroborative material before the learned Trial Court for recording conviction of appellants. The learned Trial Court has rightly convicted the accused-appellants under Section 302/149 IPC. Accordingly, the sentence of life imprisonment imposed by the learned Trial Court is just and proper and there is no error in law or fact and same deserves to be confirmed.

33. After conclusion of arguments, learned AGA in support of his contentions cited certain cases laws. He gave reference of judgment of the Apex Court in the case of ***Gurmail Singh vs. State of Punjab and another1,*** where the scope of constructive liability under Section 149 IPC has been explained. It was held in that case that murder of deceased was the common object of the unlawful assembly. It was also clear from nature and number of injuries stated in postmortem report. Injuries on deceased were severe enough to lead to a reasonable conclusion that common object of unlawful assembly was murder of deceased. Hence, totality of facts and circumstances led to compelling inference that attack on deceased was with object of killing him. The accused were liable to convicted under Section 302/149 IPC.

34. Learned AGA also relied on the judgment of the Apex Court in the case of ***Chanakya Dhibar (dead) vs. State of West Bengal and others2***, where the Apex Court set aside the acquittal of the accused persons by the High Court and confirmed the conviction of the accused awarded by the Trial Court under Section 304 Part I/149 and 148 IPC. It was held that even if only one of the accused persons used the weapon and definite role of all the accused persons were not assigned, it cannot be accepted that Section 149 would not be applicable.

35. Learned AGA has also placed reliance on the judgment of the Apex Court in the case of ***Jivan Lal and others vs. State of M.P.3***, where the conviction was upheld on a solitary evidence. It was held that it is a settled law that conviction can be based on the sole testimony of an eyewitness provided that the said testimony is found to be wholly reliable. Prudence requires that corroboration of the testimony of that witness should be sought for from independent sources to base the conviction.

36. Learned AGA also relies on the judgment of the Apex Court in the case of ***Yakub Ismailbhai Patel vs. State of Gujrat4,*** where the Apex Court held that the conviction can be based on the testimony of a solitary witness in case the said testimony inspires confidence. The Court should be cautious while examining such evidence. Corroboration of other evidence can be sought.

37. We have considered the arguments advanced by learned counsel for appellants as well as learned AGA.

38. It is to be noted that PW-1 Jagdish had stated that he had gone to police station along with Chowkidar. It has also come in the statement of PW-1 that on account of fear he did not desire to go to police station and he had given the FIR to village Chowkidar. However, from the statement of PW-1 Jagdish it cannot, at all, be concluded that he did not go to the police station to lodge the FIR. He may have apprehended danger so did not wish to go to police station in the night, however, from the statement of other prosecution witnesses such as PW-2, PW-3 and PW-4, it clearly goes to establish that the written report regarding the occurrence was submitted by PW-1 at the police station on the basis of which FIR regarding crime was registered.

39. It is to be noted that PW-1 Jagdish stated that after lodging FIR he had gone home and stayed at home. It is also stated that on 16.7.1981 he went to Shahpur market at 11AM, he had stayed at his house because several persons including relatives had started reaching his house after hearing about the occurrence. The deceased Roop Narain was murdered in Shahpur market and the informant Jagdish after submitting written report at the police station regarding the occurrence of the crime could have gone to his house and had again returned to the place of occurrence next day on 16.7.1981 at 11AM where the body of Roop Narain was lying. It cannot be said that there was any unnatural conduct of PW-1 Jagdish in this regard.

40. In the case of ***Main Pal v. State of Haryana5*** the Apex Court in paragraphs 10 and 11 has held as under:

10. On a bare perusal of the trial court's judgment one thing is patently noticeable. The trial court has merely referred to the arguments advanced and has then come to abrupt conclusions without even indicating any plausible or relevant reasons therefor. Merely coming to a conclusion without any objective analysis relating to acceptability or otherwise of the rival stands does not serve any useful purpose in adjudicating a case. The trial court was required to analyse the evidence, consider the submissions and then come to an independent decision after analysing the evidence, the submissions and the materials on record. Since the trial court had not pragmatically analysed the evidence, and had given abrupt conclusions, that itself made the judgment vulnerable. Further, several aspects which the trial court found to be of significance were really arrived at hypothetically and on surmises. Merely because the evidence of PW 2 shows that he acted in an unnatural manner, that per se would not be a determinative factor to throw out the otherwise cogent prosecution evidence. The High Court on the other hand has considered in great detail the evidence of the witnesses. It has come to a positive finding that PW 1 was in a position to identify the accused persons. Some of the pleas now advanced were also not taken up before the courts below, for example, non-

examination of the pellets/wads by the Forensic Science Laboratory. On considering the evidence on record, pragmatically one thing is clear that the High Court after analysing the evidence in great detail, was justified in treating the trial court's judgment to be practically unreasoned.

11. Though PWs 1 and 2 were related to the deceased, that does not in any manner affect the credibility of their evidence. When a person is shown to be the relative of an accused, it is open to the courts to critically analyse his evidence with caution and then come to a conclusion whether the same is credible and cogent. Though the conduct of PW 2 may appear to some to be somewhat unusual, as rightly noted by the High Court, every person cannot act or react in a particular or very same way and it would depend upon the mental set-up of the person concerned and the extent and nature of fear generated and consequently on the spot his reaction in a particular way has to be viewed on the totality of all such circumstances. The hypothetical discrepancy regarding the height from which the gun was shot is one aspect which needs to be noted, only to be rejected. If the eyewitnesses' version, even though of the relatives, is found to be truthful and credible after deep scrutiny the opinionative evidence of the doctor cannot wipe out the effect of eyewitnesses' evidence. The opinion of the doctor cannot have any binding force and cannot be said to be the last word on what he deposes or meant for implicit acceptance. On the other hand, his evidence is liable to be sifted, analysed and tested, in the same manner as that of any other witness, keeping in view only the fact that he has some experience and training in the nature of the functions discharged by him.

41. So far as non-recovery of any empty cartridge from the place of occurrence is concerned, Ext. Ka-6 indicates that the police had taken the blood stained earth and plain wet earth in two separate samples from the place of occurrence. It is to be noted that as per statement of PW-1, Patrakhan had removed the empty cartridge from the barrel of his half gun and kept it in his pocket and thereafter had again filled the gun and fired in the air, as such, the police during investigation may not have got any empty cartridge from the place of occurrence.

42. Learned counsel for appellants tried to emphasize that in the statement given before the Court PW-1 has stated that Patrakhan had fired in the air, however, the same fact has not been mentioned in the FIR.

43. It is needless to observe that every minute detail is not required to be mentioned in the FIR as the FIR is only an information given to the police regarding occurrence of a crime and the person giving the said information may not be in his best frame of mind to give all details of the occurrence while submitting the report to the police.

44. In the case of ***Animireddy Venkatramana Vs. Public Prosecutor High Court A.P.6,*** the Apex Court has held that discrepancies in FIR merely because case against some accused named in it could not be established or some inquiries were made to ascertain truth of incident prosecution case cannot be discarded. FIR need not be encyclopedic, each and every detail need not to be stated in it. Court has to ascertain about possibility of false implication of accused. It is also observed

that probable, physical and mental condition of informant is relevant.

45. In the case of ***Betal Singh Vs. State of M.P.7, Babu Singh Vs. State of Punjab8, Baldev Singh Vs. State of Punjab9*** and ***Bijay Singh Vs. State of Bihar10,*** the Apex Court in these cases has held that mention of few facts or vague facts or if detailed particulars of occurrence are not mentioned in the FIR, then minute details of occurrence is not required as FIR is not encyclopedia of occurrence. In case of ***Bijay Singh*** (supra), it is also held that FIR is not substantive piece of evidence of occurrence.

46. So far as the argument of learned counsel for appellants that no one had seen the occurrence of crime is concerned, this argument is not tenable for the reason that when the occurrence of crime of such magnitude where the head of the deceased was severed by the accused persons after firing at him take place, the people present may have run helter-shelter and they would shudder and avoid to be witness. The appellants have not been able to create any doubt about the presence of PW-1 Jagdish at the time of occurrence and, as such, we are of the considered view that the testimony of PW-1 is trustworthy and cannot be rejected merely on presumptions.

47. It is settled proposition of law that the testimony of a prosecution witness cannot be merely rejected on the ground that he was a relative of the deceased. However, the Court is required to be cautious and careful while examining the evidence of such a witness. Non-production of an independent witness by the prosecution would not weaken the case of the prosecution in case testimony of the prosecution witness produced by the prosecution, may be relative of the deceased, is consistent and trustworthy.

48. In the case of ***State of U.P. v. Sheo Sanehi11,*** the Apex Court in paragraph 18 regarding related witness has held as under:

18. So far as PWs 3 and 4 are concerned, PW 3 is nephew of deceased Devi Din whereas PW 4 is widow of the said deceased, as such they are natural witnesses and their presence at the alleged place of occurrence cannot be doubted. The names of these two witnesses were disclosed in the first information report itself and they supported the prosecution case in all material particulars in their statements made before the police as well as in court and no infirmity could be pointed out in their evidence, excepting that they were related to the deceased persons and inimical to the accused. It is well settled that merely because a witness is related to the prosecution party and inimical to the accused persons, his evidence cannot be discarded if the same is otherwise trustworthy. In the case on hand, we do not find any infirmity whatsoever in the evidence of PWs 1, 3 and 4, as such it is not possible to disbelieve them, especially in view of the fact that their evidence is supported by medical evidence as well as objective findings of the investigating officer, but the High Court has committed a serious error in discarding their testimonies on this score.

49. In the case of ***State of Rajasthan Vs. Hanuman12***, the Apex Court has held as under:-

The position is well settled that evidence of eye-witnesses cannot be discarded merely on the ground that they

are relatives of the deceased. Normally close relatives of the deceased are not likely to falsely implicate a person in the incident leading to the death of the relative unless there are very strong and cogent reasons to accept such criticism."

50. In the case of ***Banti @ Guddu vs. State of Madhya Pradesh13***, the Apex Court has held as under:-

"...Coming to the plea that the presence of PWs 1 and 2 at the spot of occurrence is doubtful, it is to be noticed that both PWs 1 and 2 were cross-examined at length. Nothing Infirm has been elicited to cast doubt on their veracity. If the lack of motive as pleaded by the accused appellants is a factor, at the same time it cannot be lost sight of that, there is no reason as to why PW-1 would falsely implicate the accused persons. There was no suggestion of any motive for such alleged false implication. Merely because PW-1 is a relation of the deceased, and PW-2 was known to him, that per se cannot be a ground to discard their evidence. Careful scrutiny has been done of their evidence and it has been found acceptable by both the trial Court and the High Court. We find no reason to take a different view."

51. Learned counsel for appellants has argued that PW-2 in his statement has stated that the deceased Roop Narain who was said to be his father-in-law was murdered in his village and then added that he was murdered in Umariya which is one kilometer from his village. He has also stated that he had gone to Shahpur market as his mother was unwell, however, no such statement was given to the Investigating Officer. It is also argued that PW-2 in his statement has stated that he had informed that the accused had kept the severed head of deceased Roop Narain in the bag, however, the Investigating Officer in his statement has denied the same which clearly goes to show that the statement of PW-2 is not reliable.

52. So far as the evidence of PW-2 is concerned, it is to be noted that there is no doubt that PW-2 at one place has stated that the deceased was murdered in his village and then added that he was murdered in village Umariya which is one kilometer from his village while at another place he has stated that the deceased was murdered in Shahpur market while selling food-grains such as Mansoori (pulse) and rice. There are certain contradictions in his statement which have not been properly explained by him. The learned Trial Court has, therefore, held that the evidence of PW-2 is not worthy of credence. We have no reason to disagree with the findings of the learned Trial Court in this regard.

53. Another eye-witness in question is PW-3 Gokaran, who stated that nearly three years back Roop Narain was murdered in Shahpur market on 15.7.1981 at about 6PM. That on that day he had gone from his village to purchase vegetables, etc. from the said market. After purchasing some goods he went towards the place where food-grains were kept for sale. It is stated that Khattoo had fired at Roop Narain and when Roop Narain wanted to run away then Patrakhan also fired at Roop Narain with his half gun. He had also fired second time. Roop Narain fell down and then other accused persons Chukki, Avadhesh, Kalloo, Dalla ad Sheo Poojan assaulted him. The accused Chukki had a knife, Sheo Poojan and Avadhesh had banka while accused Kalloo and Dalla had lathi in their hands. The accused persons also lifted Roop Narain and after going 10 steps Sheo

Poojan and Avadhesh severed the head of Roop Narain and went away with their bag. He stated that Shahpur market was at a distance of three miles from his village. He also stated that he had started from his village at 4PM and reached market about 5PM. The description of crime by PW-3 Gokaran appears to be natural and correct.

54. Learned counsel for appellants tried to submit that Roop Narain had stood a surety for PW-3 Gokaran vide document Ext. Kha-1 on record 13.7.1981. The occurrence in question took place on 15.7.1981. PW-3 Gokaran in his statement has stated that he did not know whether the deceased Roop Narain had stood a surety for him or not is unbelievable, he was released on bail 2 to 3 days back before the occurrence, the testimony of PW-3 Gokaran is therefore not trustworthy.

55. In this regard, it is to be noted that after his release from jail PW-3 might have gone away to his house and since the occurrence in question took place within two days since his release from jail i.e., soon after Roop Narain stood surety for him so there is a possibility that he might not have come to know the name of Roop Narain as a surety for him. At the time of presentation of bail bonds, the presence of accused is not necessary and the bail bonds are also not submitted in the presence of the accused person, as such, the argument of learned counsel for appellants in this regard is not very much material.

56. PW-3 had given details of the occurrence, specific role of each accused persons, the weapons used by them and the description of the manner in which crime was committed by the accused persons. The presence of PW-3 at the time of occurrence is as such without any doubt.

57. In the case of ***Yogesh Singh v. Mahabeer Singh14,*** the Apex Court has observed as under:

24. On the issue of appreciation of evidence of interested witnesses, Dalip Singh v.State of Punjab [Dalip Singh v. State of Punjab, AIR 1953 SC 364 : 1954 SCR 145 : 1953 Cri LJ 1465] is one of the earliest cases on the point. In that case, it was held as follows: (AIR p. 366, para 26)

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

25. Similarly, in Piara Singh v. State of Punjab [Piara Singh v. State of Punjab, (1977) 4 SCC 452 : 1977 SCC (Cri) 614] , this Court held: (SCC p. 455, para 4)

"4. ... It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the

evidence is creditworthy there is no bar in the Court relying on the said evidence."

26. In Hari Obula Reddy v. State of A.P. [Hari Obula Reddy v. State of A.P., (1981) 3 SCC 675 : 1981 SCC (Cri) 795] , a three-Judge Bench of this Court observed: (SCC pp. 683-84, para 13)

"13. ... it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

27. Again, in Ramashish Rai v. Jagdish Singh [Ramashish Rai v. Jagdish Singh, (2005) 10 SCC 498 : 2005 SCC (Cri) 1611] , the following observations were made by this Court: (SCC p. 501, para 7)

"7. ... The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

28. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witness is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai v. State of Bihar[Anil Rai v. State of Bihar, (2001) 7 SCC 318 : 2001 SCC (Cri) 1009] , State of U.P. v.Jagdeo [State of U.P. v. Jagdeo, (2003) 1 SCC 456 : 2003 SCC (Cri) 351] , Bhagaloo Lodh v. State of U.P.[Bhagaloo Lodh v. State of U.P., (2011) 13 SCC 206 : (2012) 1 SCC (Cri) 813] , Dahari v. State of U.P. [Dahari v. State of U.P., (2012) 10 SCC 256 : (2013) 1 SCC (Cri) 22] , Raju v. State of T.N. [Raju v. State of T.N., (2012) 12 SCC 701 : (2012) 4 SCC (Cri) 184] , Gangabhavani v. Rayapati Venkat Reddy[Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC 298 : (2014) 6 SCC (Cri) 182] and Jodhan v. State of M.P. [Jodhan v. State of M.P., (2015) 11 SCC 52 : (2015) 4 SCC (Cri) 275])

58. The Supreme Court in the case of ***Vijendra Singh v. State of U.P.15***, has observed as follows:

30. It is next contended by Mr Giri, learned counsel for the appellants that all the eyewitnesses are related to the deceased Badan Pal and they being interested witnesses, their version requires scrutiny with care, caution and circumspection and when their evidence is scanned with the said parameters, it does not withstand the said test for which the case set forth by the prosecution gets corroded and the principle of beyond reasonable doubt gets shattered. The aforesaid submission, as we perceive, has

no legs to stand upon, for PWs 1 to 3 have deposed in detail about the previous enmity between the parties, their presence at the spot, the weapons the accused persons carried, their proximity to the shed and establishment of the identity of all the four accused. They have also testified as regards the deceased lying in a pool of blood. There is no reason why they would implicate the appellants for the murder of their relation leaving behind the real culprit. That apart, nothing has been elicited in the cross-examination for which their testimony can be discredited.

31. In this regard reference to a passage from Hari Obula Reddy v. State of A.P.[Hari Obula Reddy v. State of A.P., (1981) 3 SCC 675 : 1981 SCC (Cri) 795] would be fruitful. In the said case, a three-Judge Bench has ruled that: (SCC pp. 683-84, para 13)

"[it cannot] be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

It is worthy to note that there is a distinction between a witness who is related and an interested witness. A relative is a natural witness. The Court in Kartik Malhar v.State of Bihar [Kartik Malhar v. State of Bihar, (1996) 1 SCC 614 : 1996 SCC (Cri) 188] has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

59. Thus, from the statement of PW-1, Jagdish and PW-3, Gokaran who are said to be eye-witnesses to the crime, it is very much established that they are not involved or indulged in falsehood or telling lie, their testimony is trustworthy.

60. It is also established that the written report Ext. Ka-1 was lodged at the police station by PW-1 Jagdish. The scribe of FIR is PW-2 Indra Prakash. Merely because the FIR was lodged by Indra Prakash at the dictates of PW-1 it does not become suspicious document. The FIR was lodged at 8.45PM on 15.7.1981. The distance of place of occurrence and police station is 7 miles. PW-2 Indra Prakash is resident of village Gursariya which is at a distance of two and half kilometer from Shahpur market. It may be that PW-2 Indra Prakash may have reached there after the occurrence. FIR, thus, does not become suspicious document.

61. Learned counsel for appellants has argued that the head of the deceased was not recovered by the police and, as such, there was doubt about the identity of the headless body found at the place of occurrence which was said to be of deceased, Roop Narain. In this regard, it is to be noted that since we have found the statements of PW-1 and PW-3 to be trustworthy and they are said to be eye-witnesses to the crime and, as such, even if the head of the deceased was not recovered by the police, it does not in any manner creates any doubt about identity of the deceased who was said to have been put to death by the accused persons.

62. Now, we have to examine the conviction of appellants Avadhesh Kumar, ,Patrakhan, Sheo Poojan, Uma Shanker alias Dalla and Kalloo under Section 302 with the aid of Section 149 IPC. Section 149 IPC, for convenience, is reproduced below:

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.--*If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."*

63. It has been argued by the learned counsel for appellants that as per the prosecution case Purushottam @ Khattoo had fired at the deceased. The fire had hit the deceased, Roop Narain when he was seated. Roop Narain tried to run and when he moved for 2 or 3 steps. Patrakhan had fired from his half gun as a result of which Roop Narain fell down. Thereafter. The accused appellants, Avadhesh Kumar, Kalloo, Sheo Poojan, Dalla and Pankaj assaulted the deceased Roop Narain with their weapons. Avadhesh and Sheo Poojan were armed with banka, Kalloo and Dalla were armed with lathi while Pankaj was armed with knife (chhuri). It has been argued that from the postmortem examination report it is evident that the body of the deceased was having gun shot injuries and incised wounds. Injury no. 12 was an abrasion injury. There was no lacerated wound, as such, it cannot be said that the deceased was hit by lathi. The incised wounds could have been caused by sharp edged weapon but no such injury could be attributed to knife (chhuri). The contention is that no such occurrence took place in the manner as alleged by the prosecution.

64. In this connection, it may be pointed out that the headless body of the deceased was recovered. The deceased was assaulted by seven persons out of whom Kalloo and Uma Shanker @ Dalla assaulted the deceased with lathi. There is possibility that the deceased may have sustained lathi blow on his head which was severed and, therefore, in the postmortem examination report the presence of injuries caused by lathi were no mentioned. Moreover, in view of large number of persons assaulting the deceased, it cannot be said that the persons wielding lathis continued to assault the deceased. There is, thus, no contradiction between the ocular evidence and the medical evidence in the present case.

65. In case an offence is committed by any member of an unlawful assembly in prosecution of the common object and such members of that assembly knew the purpose with which they had assembly; then, every person present at the time of committing of that offence is a member of that assembly and is guilty of that offence.

66. In the present case, the presence of the accused-appellants at the place of occurrence and their participation in the crime has been established by the prosecution. The ocular witnesses have clearly stated the specific role and the weapon used by the accused-appellants in murdering the deceased, Roop Narain, severing his head and keeping it in a bag to cause disappearance of evidence of offence. The common object of unlawful assembly

to cause death of the deceased was well established. There was nexus between common object and the offence committed and, as such, every accused-appellants were liable for the same.

67. The Apex Court in the case of ***Gurmail Singh (supra)***, which has been relied by learned AGA, has explained the constructive liability under Section 149. Relevant paragraph 29 is reproduced below:

29. However, with regard to the constitution of an unlawful assembly, the High Court disagreed with the trial court. It was held that the presence of eight persons armed with guns and gandasas with a motive to wreak vengeance on Gurdail Singh and his family clearly pointed to the existence of an unlawful assembly having a common object. That Gurdial Singh was the target is clear from the number and nature of injuries received by him, which subsequently resulted in his death. Alternatively, it was held that the members of the unlawful assembly knew that an offence against Gurdail Singh was likely to be committed. As such, the ingredients of Section 149 IPC were made out.

68. In the case of ***Chanakya Dhibar (dead)*** (supra), which has been relied by the learned AGA, it has been held by the Apex Court that even if one of the accused persons used the weapon and definite role of all the accused persons were not assigned, it cannot be accepted that Section 149 IPC would not be applicable. Relevant paragraph 19 is reproduced below:

"19. All the accused persons were armed. Their conduct before, during and after the occurrence clearly brings about the object. The assembly was patently unlawful. It is inconceivable that persons armed would surround the persons without any criminal object in mind. Mere fact that only one of them used the weapon does not really rule out application of Section 149 IPC. Learned counsel for the accused persons submitted that contrary to the evidence of PWs 3 and 5 there was only one injury found by the doctor. PWs 3 and 5 have stated about assaults and if five persons were really assaulting the result would not have been only one injury. The definition of "assault" as given in Section 351 IPC makes the plea unacceptable. The trial Court had rightly and in proper legal perspective convicted the accused-respondents under Section 148 and 304 Part I read with Section 149 IPC. The High Court's judgment suffers from serious infirmities making it indefensible and is therefore, set aside. The judgment of the trial Court recording conviction and imposing sentences is restored. The appeal is allowed."

69. In a recent judgment in the case of ***Dev Karan vs. State of Haryana16,*** the Apex Court has considered the applicability of Section 149 IPC in such cases and has held that where an unlawful assembly as a result of which an offence was committed by the common object is established specific attribution of injuries caused by each individual was not required to be considered. As long as the necessary ingredients of an unlawful assembly are set out and proved, as enunciated in Section 141 IPC, it would suffice the invocation of Section 149 IPC. Relevant paragraph 19, 20 and 21 are reproduced below:

19. Thereafter, it has been opined that if charges framed against the appellant contain all the necessary ingredients to

bring home to each of the member of the unlawful assembly, the offence, with aid of Section 149 of the IPC, and the prosecution proves the existence of an unlawful assembly with a common object, which is the offence, as also the 8(1966) 1 SCR 18 membership of each appellant, nothing more is necessary. The effect of these observations is that Section 141 of the IPC only defines what is an unlawful assembly and in what manner the unlawful assembly conducts itself, and in what cases the common object would make the assembly unlawful is specified in the Sections thereafter, inviting the consequences of the appropriate punishment in the context of Section 149 of the IPC.

20. In KuldipYadav v. State of Bihar; (2011) 5 SCC 324, it has been opined in para 36 that a clear finding regarding the nature of the common object of the assembly must be given and the evidence discussed must show not only the common object, but also that the object was unlawful, before recording a conviction under Section 149 of the IPC. What is required is that the essential ingredients of Section 141 of the IPC must be established.

21. On examination of the aforesaid aspect, we are unable to come to a conclusion that there was any fatal flaw in the non-inclusion of Section 141 of the IPC while framing charges, as would render the complete trial illegal, or that it can result in a finding that there would be no occasion to invoke Section 149 of the IPC. Learned counsel appears not to have appreciated the judicial pronouncements in the correct perspective, as what is necessary for invoking Section 149 of the IPC has been set out in these judgments. It has nowhere been said that Section 141 of the IPC should be specifically invoked or else the consequences would be fatal. As long as the necessary ingredients of an unlawful assembly are set out and proved, as enunciated in Section 141 of the IPC, it would suffice. The actions of an unlawful assembly and the punishment thereafter are set out in the subsequent provisions, after Section 141 of the IPC, and as long as those ingredients are met, Section 149 of the IPC can be invoked.

70. In the case of ***Shambhu Nath Singh and others vs. State of Bihar17,*** it was held by the Apex Court that there is vicarious liability of every member of an unlawful assembly who were assembled with a common object to commit the offence. The conviction of an offence may be recorded against the members of unlawful assembly even if it be established that the offence of murder was committed by a member of that assembly. Relevant paragraph 7 is reproduced below:

7. Therefore a conviction for an offence under Section 326 read with Section 149 of the Indian Penal Code may be recorded against the members of an unlawful assembly, even if it be established that an offence of murder was committed by a member of that assembly. The offence under Section 326 of the Indian Penal Code is in its relation to the offence of murder a minor offence and the language used in Section 149 of the Indian Penal Code does not prevent the court from convicting for that minor offence merely because an aggravated offence is committed. Counsel for the accused however sought to place reliance upon certain authorities in support of his contention. We may briefly deal with those authorities.

71. In view of above, we are of the considered view that the prosecution has been able to prove its case beyond any reasonable doubt. The act of accused

appellants collectively amounts to culpable homicide amounting to murder and punishable under Section 302 IPC bringing all of them under joint liability of the offence. The conviction and sentence of appellants under Section 302/149 is confirmed. The conviction and sentence of appellants under Section 147 is also confirmed. The conviction and sentence of appellants, Avadhesh Kumar, Patrakhan, Sheo Poojan under Section 148 is also confirmed. The conviction and sentence of appellants, Avadhesh Kumar and Sheo Poojan under Section 201 IPC is also confirmed. .

72. We do not find any error in the impugned judgment. It is evincible from the evidence on record that all the accused were in prior consultation and pre-planned to kill Roop Narain and to further this common object they came to the place of occurrence and committed the crime.

73. Thus, we do not find any merit in the criminal appeal, therefore, the same is liable to be dismissed it is accordingly dismissed.

Order

(i) The criminal appeal no. 14 of 1985 preferred by accused-appellants, Avadhesh Kumar, Patrakhan, Sheo Poojan, Uma Shanker alias Dalla and Kalloo arising out of judgment and order of sentence passed in Sessions Trial No. 117 of 1982, Crime No. 152 of 1981, Police Station Laharpur, District Sitapur under Sections 147, 148, 149, 302, 201 IPC is dismissed. The judgment and order of sentence of life imprisonment is confirmed.

(ii) Copy of the judgment be sent to Sessions Judge, Sitapur to ensure compliance under intimation to this Court.

(iii) The Office is directed to provide the copy of the judgment separately to all the five appellants promptly.

(iv) The office is further directed to enter the judgment in compliance register maintained for the purpose on the Court.

(2020)03-05ILR A57
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.05.2020

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE ALI ZAMIN, J.

Criminal Appeal No. 60 of 2001

Mahadev Prasad & Anr.
...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri B.D. Maurya, Sri Shashi Dhar Pandey

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

Criminal law-Indian Penal Code (45 of 1860)-Section 302, Section 34 - Common intention - Proof - To invoke Section 34 IPC it must be established : (i) common intention and (ii) participation of the accused in the commission of an offence - an act, whether overt or covert, is indispensable to be done by a co-accused - overt or covert act, totality of circumstances, conduct of the accused must be taken into consideration in arriving at the conclusion whether the accused had the such intention to commit an offence of which he could be convicted (19, 24)

Evidence law - Evidence Act (1 of 1872) , Section 3 - Murder - Exhortation to assault - Evidence of exhortation is by nature a weak piece of evidence – however if the

evidence is clear, cogent and reliable conviction can be recorded against the person alleged to have exhorted the actual assailant (Para 23)

In pradhan election Deceased Manish worked for winning candidate - accused Mahadev contested but lost election on account of which he was bearing enmity with the deceased - appellants came armed with country-made pistol - appellant Indra Pal and Gulab Singh exhorted accused Mahadev to kill - on which Mahadev fired a shot on the chest of the deceased - receiving the shot he died then and there- after firing shot all accused fled together - *Held* - circumstances clearly demonstrate that all the accused had common intention to kill the deceased Manish - act of exhortation of the appellant leading to the killing of deceased Manish in furtherance of common intention - clear, cogent and reliable evidence against the appellant Indra Pal in perpetration of the crime - conviction and sentence proper. (Para 35)

Appeal dismissed (E-5)

List of cases cited :

1. Jainul Haque Vs St. Of Bihar AIR 1974 SC1651

2. Ramesh Singh @ Photti Vs St. Of A. P. AIR2004 (SC) 4545

3. Suresh & anr. Vs St. Of U.P. 2001 3 SCC 673

4. Surendra Chauhan Vs St. Of MP.,2000 4 SCC 110

5. Pandurang Vs St. Of Hyderabad 1955 1 SCR 1083

6. Gangabhavani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

(Delivered by Hon'ble Ali Zamin, J.)

1. Heard Sri Shashi Dhar Pandey, learned counsel for the appellant, learned A.G.A for the State and perused record carefully.

2. This is an appeal challenging the judgment and order dated 20.12.2000 passed in S.T. No.131 of 1996 (State vs. Mahadev and others) by which the learned IIIrd Additional Sessions Judge, Firozabad has convicted the appellants under Section 302/34 I.P.C. and sentenced each of the appellants to undergo imprisonment for life and fine Rs.5,000/-.to appellant Mahadev Prasad @ Shiv Ram Goojar, Rs 1000/ to appellant Indra Pal @ Guddu and in default of payment of fine they have been directed to undergo additional rigorous imprisonment for a period of three months and one month respectively.

3. At the outset it is noted that during pendency of the trial Gulab Singh @ Golia died, his case was abated vide order dated 06.7.2000 and during pendency of the appeal, appellant no.1 Mahadev Prasad @ Shivram Goojar also died and appeal against him has been dismissed as abated vide order dated 07.01.2019. Hence this appeal is confined to appellant no.2 Indra Pal Singh @ Guddu only.

4. Briefly stated, the facts of the case, as culled out from the case of prosecution, are that the candidate of informant Dinesh Upadhyay had won the election of Gram Pradhan. Accused Mahadev Prasad @ Shivram Goojar s/o Maharaj Singh Goojar also contested the election and he was defeated. Manish, the deceased had worked for winning candidate of Pradhan. On account of which Mahadev Prasad @ Shivram Goojar, Indra Pal @ Guddu, son of Maharaj Singh and Gulab Singh @ Golia son of Rajbir Jatav of his village were bearing enmity with him. On account of this enmity, to avenge from him Mahadev Prasad @ Shivram Goojar kept his wife and children along with all belongings at his house to somewhere else.

Mahadev and his brother Indra Pal used to visit the house. On 13.08.1995 at about 6:00 p.m. Manish Upadhyay was sitting on a cot in front of his house. Informant Dinesh Upadhyay, Chandrabhan son of Srichandra, Raghvendra son of Om Prakash and Virendra Dubey son of Sri Ram Gopal Dubey resident of Rashidpur Kanetha, P.S. Matsaina were also sitting at a some distance, when the accused Mahadev Prasad @ Shivram Goojar, Indra Pal @ Guddu and Gulab Singh @ Golia came having country-made pistol in their hand. Indra Pal @ Guddu and Gulab Singh @ Golia exhorted Mahadev to kill stating that because of him they have been defeated, upon this Mahadev Prasad @ Shivram Goojar fired a shot on the chest of Manish from a country-made pistol. On which he fell down and died. After firing the shot all the three accused fled, they were chased but pointing country-made pistol and threatening of dire consequences, accused fled away towards north side.

5. On the basis of written report Ext.Ka-1 of informant Dinesh Upadhyay, Case Crime No.72/1995, under Sections 302/34 against accused was registered under chik F.I.R. Ext. Ka-8 on 13.08.1995 at 19:15 p.m. and investigation of the case was handed over to S.H.O. Virendra Singh. Virendra Singh, Investigating Officer reached the place of incident and prepared inquest memo Ext.Ka-3. He also prepared relevant papers i.e. letter to R.I. (Ext.Ka-4), challan lash (Ext.Ka-5) photo lash (Ext.Ka-6), letter to C.M.O. (Ext.Ka-7) and dispatched the dead body for postmortem along with constable Jagvir Singh.

6. P.W.6 Dr. S.L. Saraswat conducted postmortem of the dead body on 14.08.1995 at 01:00 p.m. and prepared its report (Ext.Ka-10), according to which following injuries were found on the dead body:

(i). Gun shot wound of 1.2 c.m. x 1 c.m. on the right side of the middle part of chest. Margin inverted, blackening and tattooing were present. Track is directing medial downward, on cutting underneath tissue is tattooed.

(ii). Multiple pin point sized abrasions all over in front both sides of chest were present and right side lung was lacerated.

In opinion of the doctor injuries were possible by fire arm and due to the injuries death was possible. The injuries were possible to have occurred on 13.08.1995 at 6:00 p.m.

7. On 15.08.1995, investigation of the case was handed over to S.I. D.N. Pandey. On 16.08.1995, Investigating Officer took into his possession, the cot on which deceased Manish was sitting at the time of incident and prepared its memo Ext.Ka-2. He also prepared spot map Ext. Ka-11. After completing the investigation he submitted charge sheet (Ext.Ka-10) against accused Mahadev Pradad @ Shivram Goojar, Indra Pal @ Guddu and Gulab Singh @ Golia under Section 302/34 I.P.C..

8. Since the offence under Section 302/34 I.P.C. is exclusively triable by Court of Sessions, therefore, C.J.M., Firozabad committed the accused to the court of Sessions for trial where Case Crime No.72 of 1995, under Section 302/34 I.P.C. was registered as S.T. No.131 of 1996, where from the trial was made over to the court of IInd Additional Sessions Judge, who framed charge under Section 302/34 I.P.C. against the accused persons. In due course of trial, the case was again transferred from the court of IInd additional sessions judge

Firozabad to the court of IIIrd Additional Sessions Judge Firozabad.

9. To prove the charge against the accused, prosecution produced seven witnesses. P.W.1 Dinesh Upadhyay informant, P.W.2 Raghvendra and P.W.3 Chhotey Lal are the witnesses of fact. P.W.4 S.I. Virendra Singh, first Investigating Officer. P.W.5 Suresh Babu Sharma scribe of chik FIR and G.D. and also deposed as a witness for secondary evidence on account of death of IInd I.O. D.N. Pandey. P.W.6 Dr. S.L. Saraswat conducted postmortem and P.W.7 Jagvir Singh carrier of the dead body for postmortem, are the formal witnesses.

10. After examination of prosecution witnesses statement of accused persons were recorded under Section 313 Cr.P.C., in which they pleaded, case falsely proceeded against them. In defence, no witness has been produced by them.

11. After hearing to the parties and perusal of the record, learned IIIrd Additional Sessions Judge Firozabad passed the impugned judgment and order as disclosed in para 2 of the judgment. Hence this appeal.

12. Sri Shashi Dhar Pandey, learned counsel for the appellant submits that role of exhortation has been assigned to the appellant. Evidence of exhortation is a very weak type of evidence. Apart from the role of exhortation, there is no evidence against the appellant. He also submits that as per FIR as well as ocular evidence single fire was made but in postmortem report two injuries have been found. PW-2 Raghvendra is relative and resident of other village, no independent or neighborhood witness has been produced. Learned trial court without proper evaluation of the evidence has convicted and sentenced the appellant which is not sustainable in the eye of the law and it is liable to set aside.

13. Per contra learned AGA submits that there was pradhan election enmity. Accused Mahadev had contested the Gram pradhan election. In the election he was defeated and one Chunni Lal had won the election. Deceased Manish had worked for Chunni Lal, the winning candidate of Pradhan. On account of which accused Mahadev was bearing enmity against the Manish that because of him he has lost the election. Accused Indra Pal is brother of accused Mahadev and accused Gulab Singh @ Golia is his friend. On account of the election enmity all accused armed with country-made pistol came to the place of incident and on exhortation of accused Indra Pal and Gulab Singh accused Mahadev fired at the deceased from his country-made pistol which hit his chest and due to the injury caused by him he died on the spot. Incident had occurred at 6.00 p.m. on 13.8.95 and its prompt FIR on the same day at 19.15 p.m. has been lodged giving details. It is a day light incident. From the prosecution evidence charge is fully proved against the accused appellant. Learned trial court evaluating properly the evidence on record has rightly convicted and sentenced them and no interference is required by this court.

14. The incident had occurred at 6.00 p.m. on 13.08.95 and its information to the police station as per FIR Ext Ka-8 was given at 19.15 p.m. PW-1 Dinesh Upadhyay has stated that he had written the report at his house. He has also stated that in scribing the report and seeing the son, it took half an hour. As per chik FIR distance of police station from the place of incident

is 3 km and according to informant he went to the police station by cycle, in such circumstance it appears that FIR has been lodged promptly without deliberation and consultation.

15. It is not disputed that it is a case of day light occurrence. It is also not disputed that deceased Manish died of homicidal violence. It is evident from the medical evidence adduced in the case. PW-6 Dr S.L. Saraswat has conducted postmortem and prepared report Ext Ka-10, according to which there was a gun shot wound of 1.2 c.m. x 1 c.m. on the right side of the middle part of chest. Margin inverted, blackening and tattooing were present. Track is directing medial downward on cutting underneath tissue is tattooed and multiple pin point sized abrasions all over in front on both sides of chest were present and right side lung was lacerated. In opinion of the doctor injuries were possible by fire arm and due to the injuries death was possible on 13.08.1995 at 06:00 p.m.. From the above, it is clear that Manish died due to the injuries sustained by him.

16. As per Ext. Ka-8 chik FIR deceased Manish Upadhyay on 13.8.95 at 6.00 p.m. was sitting on a cot in front of his house at that time Mahadev prasad, Indra Pal and Gulab Singh came having country-made pistol in their hand, Indra Pal and Gulab Singh Exhorted to kill saying that because of him we have lost the election, upon which Mahadev fired a shot from country-made pistol on the chest of Manish, upon which he fell down there and died. After firing the shot all the accused fled away towards north. PW-1 Dinesh Upadhyay and PW-2 Raghvendra have supported the FIR version through their testimony and from their cross examination nothing has been extracted by defence so that their testimony with regard to coming of accused persons having country-made pistol in their hand and exhortation to the accused Mahadev by Indra Pal and Gulab Singh to kill, can be doubted. From the prosecution evidence it is explicit that role of the appellant is one of exhortation.

17. Now the question before us is that whether the act of exhortation of the appellant Indra Pal is leading to the doing of a criminal act in furtherance of common intention. To appreciate the issue, it will be apt to refer the law laid down by Hon'ble Supreme Court in this regard.

18. In case of **Jainul Haque vs State Of Bihar, AIR 1974 SC1651**, Hon'ble Supreme Court in para 8 of its judgment has held as under:

"The evidence of exhortation is, in the very nature of things, a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant."

19. In general, principle of criminal law is that the person who commits the offence can be held guilty. Section 34 of Indian Penal Code lays down principle of joint liability in doing criminal act. The essence of liability is to be found in existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. If criminal act is done in furtherance of common intention then

every person who did the criminal act with the common intention will be liable for the act. Common intention essentially being a state of mind, therefore, it is very difficult to procure direct evidence to prove such intention. Hence, in majority of cases it has to be inferred from the overt or covert act, other relevant circumstances of the case and conduct of accused in totality of circumstances of the case. In this regard gainfully, para 12 of the judgment of apex court in the case of **Ramesh Singh @ Photti VS State Of A. P. AIR2004 (SC) 4545**, is quoted as under:

"12. To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted."

20. In **Suresh and another vs State Of U.P. 2001 3 SCC 673**, Hon'ble Supreme Court in para 24 of its judgment has held as under:

"24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34, IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32, IPC. So the act mentioned in Section 34, IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e. g. a co-accused, standing near the victim face to face saw an armed assailant nearing the

victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34, IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34, IPC. "

21. In **Surendra Chauhan VS State Of M. P. , 2000 4 SCC 110**, Hon'ble Supreme Court in para 11 of its judgment has held as under:

"11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. Ramaswami Ayhangar & Ors. v. State of Tamil Nadu2. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. Rajesh Govind Jagesha v. State of Maharashtra3. To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

22. In **Pandurang VS State Of Hyderabad, 1955 1 SCR 1083**, Hon'ble Supreme Court in para 34 and 35 of its judgment has held as under:

"34. In the present case, there is no evidence of any prior meeting. We know nothing of what they said or did before the attack-not even immediately before. Pandurang is not even of the same caste as the others. Bhilia. Tukia and Nilia are Lambadas, Pandurang is a Hatkar and Tukaram a Maratha. It is true prior concert and arrangement can, and indeed often must be determined from subsequent conduct as; for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together

in a body or a meeting together subsequently. But, to quote the Privy Council again,

"the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case".

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (Sarkar s Evidence, 8th edition, page 30).

35. The learned counsel for the state relied on - Mamand v. Emperor , AIR 1946 PC 45 (C), because in that case the accused all ran away and their Lordships took that into consideration to establish a common intention. But there was much more than that. There was evidence of enmity on the part of the accused who only joined in the attack but had no hand in the killing; and none on the part of the two who did the actual murder. There was evidence that all three lived together and that one was a younger brother and the other a tenant of the appellant in question. There was evidence that they all ran away together: not simply that they ran away at the same moment of time when discovered, but that they ran away together .

As we have said, each case must rest on its own facts and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another. In the present case, we are of opinion that the facts disclosed do not warrant an inference of common intention in Pandurang s case. Therefore, even if that had been charged, no conviction could have followed on that basis. Pandurang is accordingly only liable for what he actually did."

23. From the law laid down in the above referred cases it can be deduced that evidence of exhortation is a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by ascribing to that person role of an exhortation to the assailant to assault the victim. Unless the evidence in this respect is clear, cogent and reliable, no conviction can be recorded against the person alleged to have exhorted the actual assailant.

24. The essence of joint liability in doing a criminal act is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. If the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove it. Hence, in most cases it has to be inferred from the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by

one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. Even an illegal omission on the part of such accused can indicate the sharing of common intention. The act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. Presence of the accused, who in one way or other facilitate the execution of common design is tantamount to actual participation in the criminal act. The act need not necessarily be overt, even a covert act is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. To invoke Section 34 IPC two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. To fasten the liability u/s 34 IPC an act, whether overt or covert, is indispensable to be done by a co-accused. If no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34, IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34, IPC. To ascertain common intention, totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the such intention to commit an offence of which he could be convicted.

25. Now, keeping in view the above proposition, we proceed to analyze the evidence in the instant case. As per chik FIR Ext Ka-8 in Gram Panchayat Pradhan election informant candidate had won the election and Mahadev had lost the election of Pradhan. On account of loosing the election Mahadev, Indra Pal and Gulab Singh were bearing enmity with the informant. PW-1 Dinesh Upadhyay has deposed that before the incident, BDC and Gram Panchayat Pradhan election was held. In view of the party organization his son Manish had worked for the winning party. Mahadev had also contested election of Pradhan,who lost the election. On account of this Mahadev was bearing enmity. Defence has not put any question to this witness with regard to Manish had worked for winning party and accused were bearing enmity on account of election of Pradhan, thus, the evidence of the witness with regard to bearing enmity by accused Mahadev on account of defeat in Pradhan election is not controverted. Hence we have no reason to doubt it. Thus, evidence of PW-1 Dinesh Upadhyay with regard to bearing enmity on account of Pradhan election is corroborated with the FIR. In view of the above, enmity of accused Mahadev on account Pradhan election is established.

26. As per FIR Ext. Ka-8, accused Mahadev with intention to avenge due to enmity, had shifted his wife along with his children and household to somewhere else. PW-1 Dinesh Upadhyay has supported the FIR version as he has stated that before the incident Mahadev under a planning had shifted all the goods of his house along with family to somewhere else, only Mahadev and Indra Pal used to visit. On asking in cross examination again he has stated that one-two week before the incident accused Mahadev and Indra Pal had shifted the family and goods from the village and accused used to visit. He has also stated that the incidence of shifting the family and goods was within his knowledge. Although he has stated that he

did not tell to the investigating officer in his statement about shifting of family and children one-two week before the incident, but it will not have any adverse effect on the prosecution case because it is already disclosed in the FIR and supported by his dock evidence. Thus evidence of PW-1 Dinesh, regarding shifting of family and goods to somewhere else before the incident is also corroborated with the FIR. As such from the evidence it is also established that before the incident accused Mahadev had shifted his family and goods to somewhere else and accused Mahadev and Indra Pal used to visit the house.

27. According to the FIR after firing the shot all the three accused fled towards north, when they were chased, then pointing country-made pistol they fled away. PW-1 Dinesh Upadhyay has supported this fact also by stating that the accused fled towards north, Chandra Bhan, Virendra and Raghvendra chased them,while fleeing Mahadev fell down stumbling with brick and accused threatened that, if proceeded ahead will be killed. In cross examination he has stated that he did not disclose this fact in the report Ext Ka-1. He has stated that he does not remember as to whether he had told this fact to the investigating officer or not. If statement of Dinesh is ignored whether accused fell down or not while fleeing, from his testimony it is clear that when after the incident accused fled they were chased by Chandra Bhan, Virendra and Raghvendra. Prosecution has produced PW-2 Raghvendra, who has stated that he and Virendra chased the accused, Chandra Bhan was also with them, accused Mahadev, Indra Pal and Gulab Singh pointing country-made pistol had threatened that return back otherwise you will be killed, then they returned. On asking in cross examination he has stated that he, his friend Virendra had tried to catch the accused but accused had pointed country-made pistol and all the three accused pointing country-made pistol threatened that you will be also killed. He has further stated that he had chased the accused 10-12 steps, he does not remember as to whether he had told to the investigating officer about chasing the accused and threatening by accused pointing country-made pistol to return back otherwise will be killed. Since in the FIR it is mentioned that pointing country-made pistol accused fled away, so his above statement will not have any adverse bearing on the prosecution case. He has also stated that he knows the accused before the incident. Thus, with regard to accused fled after the incident and they were chased then by pointing country made pistol towards PW-2 Raghvendra and others and threatening of dire consequences, they fled away, evidence of PW-1 and PW-2 is consistent and corroborated with the FIR. Accordingly from the evidence it is also established that all the accused fled together after the incident and they were chased by PW-2 Raghvendra and others, then by pointing country-made pistol and threatening of dire consequences, all the accused fled away.

28. As per postmortem report proved by PW-6 Dr S.L. Sarswat two injuries:

1. Gun shot wound of 1.2 c.m. x 1 c.m. on the right side of the middle part of chest. Margin inverted, blackening and tattooing were present. Track is directing medial downward on cutting under neath tissue is tattooed.

2. Multiple pin point sized abrasions all over in front of chest both

sides at front were present and right side lung was lacerated, have been recorded.

Dr S.L. Sarswat in his cross examination has stated that both injuries are possible by single fire. Thus, recording two injuries by the Doctor, does not demonstrate that two shots were fired. In view of the statement of the doctor as well as prosecution case of single shot was fired, submission of learned counsel for the appellant is devoid of substance that as per FIR as well as ocular evidence single fire was made but in postmortem report two injuries have been found.

29. As per FIR Ext. Ka-8, apart from informant Dinesh Upadhayay, incident was witnessed by Sri Chandrabhan, Raghvendra and Virendra Dubey. According to P.W.1 Dinesh Upadhayay, Chandrabhan belong to his pedigree and witness Raghvendra is his brother-in-law (Sala) and witness Virendra is friend of Raghvendra. Raghvendra and Virendra both are resident of village Rashidpur, Kanetha. Since as per prosecution case no independent or other neighborhood, witness except Chandrabhan belonging to his pedigree, thereby related to the informant, has witnessed the incident, therefore, submission of the learned counsel for the appellant is without substance that no independent witness or neighborhood witness has been produced.

30. Regarding related witness in case of **Gangabhavani vs. Rayapati Venkat Reddy and others, (2013) 15 SCC 298**, Hon'ble Supreme Court in para 15 of its judgment has held as under:

"15. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinized and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, relied upon. (Vide Bhagaloo Lodh v. State of U.P., (2011) 12 SCC 206 and Dahari v. State of U.P. (2012) 10 SCC 256)"

31. Thus, keeping in view the law laid down by the Hon'ble Supreme Court in the above referred case, testimony of the witness P.W.2 Raghvendra is to be scrutinized.

32. P.W.2 Raghvendra has stated that his sister Lata is married with Dinesh Uadhayay. On the occasion of Rakshabandhan he had come to his sister on 10.08.1995 for tying Rakhi, his friend Virendra son of Ram Gopal was also with him. On the request of his sister and brother-in-law he stayed there and he has narrated the story about the incident in his deposition. In his cross-examination he has stated that one and half to quarter to two hours of the incident S.O. Matsaina came to the place of incident and he remained there about one and half to quarter to two hours. His statement that, on coming to the place of incident S.O. Matsaina stayed one and half to quarter to two hours, finds support from the statement of informant P.W.1 Dinesh Upadhyay as he has stated on page 18 of the paper book that, when, S.O. Matsaina came on the day of incident then he stayed one and half to two hours. He has also stated about conducting the inquest memo. He has stated that his statement was recorded by the police after 22-23 days of the incident which was recorded at the house of the informant Dinesh Upadhayay. A police constable had gone to his village

to call him. In the period of 22-23 days of the incident no police personnel had gone to him to call for recording his statement. He has also stated that he himself did not tell about the incident to the S.O. Matsaina, which he had witnessed because he did not ask him. P.W.4 Virendra Singh is the first investigating officer, who has stated that he had prepared the inquest memo and other relevant papers like letter to R.I., challan lash, letter to C.M.O. In cross-examination he has clearly stated that after registration of FIR he did not record the statement of scribe of FIR and informant. He did not record statement of Panch. He also did not think it necessary to inquire from informant and other witnesses and preparing the spot map. Since the Ist investigating officer did not even record the statement of the informant and prepared spot map in such a situation recording of statement of this witness after 22-23 days of the incident who is resident of other village, will not adversely affect his veracity. From the cross-examination nothing has been elicited so that his presence on the spot and witnessing the incident can be doubted. Prompt FIR disclosing him as eye-witness of incident has been lodged which also fortify his presence at the time of incident. Considering whole statement of P.W.-2 Raghvendra, it appears that his presence is natural and he is a witness of the incident. He is giving cogent and credible evidence about the incident and his evidence is worthy of trust.

33. In view of the above discussions, we find that evidence of the witness has a ring of truth to it, is cogent, credible and trustworthy.

34. On the basis of the above discussions, it is established that the deceased Manish had worked in election for the winning candidate of Pradhan and accused Mahadev had also contested the election but he lost the election. On account of defeat in the election he was bearing enmity with the deceased. Appellant Indra Pal is brother of the accused Mahadev (died during pendency of appeal). Before the incident Mahadev had shifted his family and goods to somewhere else but Mahadev and appellant Indra Pal used to visit his house. At the time of incident appellant Indra Pal, Gulab Singh and Mahadev came having country-made pistol in their hand. On exhortation of appellant Indra Pal and Gulab Singh accused Mahadev fired a shot on the chest of the deceased Manish and receiving the firearm injury Manish died then and there. After firing the shot all the three accused fled towards north, Raghvendra, Virendra and Chandra Bhan chased them, then pointing country-made pistol accused threatened for dire consequences and fled away.

35. In view of the facts, attending circumstances of the case and evidence on record as discussed above keeping in view the law laid down by the Hon'ble Supreme Court, on considering cumulatively, i.e. deceased Manish had worked for winning candidate of Pradhan election, accused Mahadev had also contested but lost the election on account of which he was bearing enmity with the deceased, shifting of family and goods by Mahadev to somewhere else before the incident and Mahadev and appellant Indra Pal used to visit their house even after shifting the family and goods, appellant came armed with country-made pistol along with the co-accused Mahadev and Gulab Singh also armed with country made pistol, on arriving to the deceased appellant Indra Pal and Gulab Singh exhorted accused Mahadev to kill, on which Mahadev fired a

shot on the chest of the deceased and receiving the shot he died then and there, after firing shot all accused fled together, and on being chased they threatened of dire consequences for the purpose to guard themselves and fled away, all these circumstances clearly demonstrate that all the accused had common intention to kill the deceased Manish and act of exhortation of the appellant is leading to the killing of deceased Manish in furtherance of common intention. There is clear, cogent and reliable evidence against the appellant Indra Pal in perpetration of the crime. Learned trial court properly evaluating the evidence has recorded the finding of conviction and sentence. We find that learned trial court has not committed any illegality or infirmity in passing the impugned judgment and order.

36. Appeal lacks merit. Accordingly it is dismissed.

37. Appellant No.2 Indra Pal Singh @ Guddu is on bail, his bail is canceled. He shall be taken into custody forthwith to serve out the sentence as awarded by the trial court and affirmed by us.

Office is directed to communicate the order to the court concerned forthwith and remit original record to the court concerned.

(2020)03-05ILR A69
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.01.2020

BEFORE
THE HON'BLE ANIL KUMAR, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 80 of 1982

State of U.P. ...Appellant
Versus
Uma Shanker & Ors. ...Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:
P.L. Mishra, Anup Kumar Upadyaya, Subodh Kumar Shukla

Criminal law- Indian Penal Code - Section 302 read with 34 - Appeal against conviction.

Held :-

Testimony related witness -

The prosecution case cannot be rejected only on the ground that witnesses are relatives of deceased. (E-2)

Dying Declaration- An accused may be convicted only on the basis of dying declaration if it is true and is reliable. (para 20) No illegality or infirmity found in the impugned judgment passed by Trial Court. (para 26)

The appeal rejected. (E-2)

List of Cases Cited:-

1. Atbir Vs. Govt. (N.C.T. Of Delhi) (2010) 9 SCC 1,

2. Harbans Sing & anr. Vs. St. of Punj., AIR 1962 SC 439,

3. Khushal Rao Vs. St. of Bombay, AIR 1958 SC 22,

4. Surajpal Singh & ors. Vs. St., AIR 1952 SC 52,

5. St. of M.P. Vs. Mukesh & ors., (2007) 2 SCC 680.

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

1. The instant criminal appeal has been filed against the judgment and order dated 23.10.1981, passed by Ist Additional Sessions Judge, Hardoi in Sessions Trial No.136 of 1981 (State vs. Umashankar and others) arising out of Case Crime No.188 of 1980, P.S.-Qasimpur, District-Hardoi, whereby the respondents-accused (hereinafter referred to as respondents) Uma Shankar, Pyare Lal (since deceased) and Ashok have been acquitted by the trial Court from the charges of offence under Section 302 read with 34 I.P.C.

2. During pendency of appeal, the respondent no.2-Pyare Lal had died and the present appeal filed against him has been abated by this Court vide order dated 11.09.2017.

3. The prosecution case, in brief, is that the deceased Chhotey Lal (hereinafter referred to as deceased), father of P.W.2-Laxmi Kant, the respondents-Pyare Lal (since deceased), Uma Shankar and Ashok were resident of village Rasoolpur Brehman, P.S.-Qasimpur, District-Hardoi. The respondent-Pyare Lal (since deceased) was father of respondent-Ashok whereas respondent-Uma Shankar is friend of respondent-Pyare Lal (since deceased). Shiv Kant, another son of deceased, used to sit with the respondents which was not liked by the deceased as the respondents did not had good character. On 04.11.1980 at 4:00 a.m., the deceased along with his son Laxmi Kant (P.W.-2) was going to plough his field and as they reached near the grove of Chhannu (not examined), the respondents appeared there. Respondent-Ashok was armed with country made pistol whereas respondents-Pyare Lal (since deceased) and Uma Shankar were armed with lathis. The respondent-Pyare Lal (since deceased) instigated the respondents-Uma Shankar and Ashok to kill the deceased whereupon Laxmi Kant (P.W.-2) tried to save his father but he was caught by the respondent-Uma Shankar. On hue and cry made by Laxmi Kant (P.W.-2), Ratan Shankar (not examined) and Chhannu Lal (not examined) appeared at the place of occurrence carrying torches. Meanwhile, the respondent-Ashok fired at the deceased with pistol carried by him, which hit the chest of the deceased, whereupon he fell down. Laxmi Kant (P.W.-2) and other villagers took the deceased by bullock cart at Police Station-Qasimpur, District-Hardoi, where at 7:20 a.m., a written report, (Ext. Ka-1), prepared on dictation of deceased by one Raj Narain (P.W.-1), was filed and first information report (F.I.R.) was registered against the respondents-Pyare Lal (since deceased), Uma Shankar and Ashok and the same was registered as Case Crime No.188 of 1980, under Sections-307/34 I.P.C.. The deceased was sent to Primary Health Center, Behandar, District-Hardoi for recording his dying declaration and his dying declaration was recorded at 8:00 a.m. on 04.11.1980 by Dr. R. K. Singh Chauhan (P.W.-8). The deceased was referred to District Hospital, Hardoi, as his condition was critical, for treatment. Dr. S. N. Singh (P.W.-5), examined the injuries of the deceased at 12:45 p.m. on 04.11.1980 and noted the following injuries on his body :

"Gunshot wound of entry on the right side of chest, just adjacent to the sternal border, 3cmx3cm,chest cavity deep. Margins inverted, bleeds on touch. Air is gashping out of the wound with respiration. Air cavity is present on whole of chest, back with arm and neck. Swelling on the face was present.

4. According to Doctor (P.W.-5), the injuries of the deceased were very dangerous in nature as it was caused by

some fire arm and its duration was about 1/4 day. The patient (deceased) was in a very critical condition and was having a difficulty in talking at that time. He prepared the injury report as Ext. Ka-13.

5. During treatment, the deceased died in District Hospital, Hardoi at 4:25 p.m. on 04.11.1980. The inquest report was prepared by S.I., Vidur JI Tripathi (P.W.-3), who sealed the dead body of the deceased and sent the same for post-mortem examination along with relevant papers to District Hospital, Hardoi. Dr. U. D. Kapoor (P.W.-6), Medical Officer In-charge, Sadar Hospital, District-Hardoi conducted the post mortem examination of the dead body of the deceased at 11:00 a.m. on 06.11.1980 and found the following ante mortem injuries :

(i) One gunshot wound of entry 3 cms x 2 cms x chest cavity deep on right side of the chest. Blackening was present around the wound.

(ii) The third and fourth ribs were fractured. The pleura on the right side was badly lacerated and about 8 ounce of blood was present.

(iii) The right lung was badly lacerated.

According to him, during examination, three wadding pieces and 22 small pellets were found from the body of the deceased. In the opinion of Doctor (P.W.-6), death of deceased was caused due to shock and haemorrhage, resulted by ante mortem injury.

6. Investigation of the case was entrusted to S.I., Sri Ram Patil (P.W.-4), posted at Qasimpur, who recorded the statements of Laxmi Kant (P.W.-2), Ratan Shankar (not examined) and Chhannu Lal (not examined). He inspected the place of occurrence and prepared the site plan (Ext.Ka-6), examined the torches and took it in his custody from Ratan Shankar (not examined) and Chhannu Lal (not examined) and after examination, handed over to them. He prepared the memo of handing over of torches (Ext.Ka-5).

7. During investigation, after the death of deceased, the case was converted into under Section 302 I.P.C. and thereafter, the investigation was entrusted to S.O. Raj Bahadur Singh (not examined), Station Officer, P.S.-Qasimpur, who, after due investigation, filed charge sheet (Ext. Ka-9) against the respondents under Section 302 I.P.C. before Chief Judicial Magistrate, Hardoi, who took the cognizance of an offence and since the case was exclusively triable by the Sessions Court, after providing the copies of relevant police papers, committed the case to Court of Sessions, Hardoi for trial.

8. The charge for the offence under Section 302 I.P.C. was framed against the respondent-Ashok whereas the charge for the offence under Section 302 read with 34 I.P.C. was framed against the respondents-Uma Shankar and Pyare Lal (since deceased). All the respondents denied the charges levelled against them and claimed for trial.

9. During trial, the prosecution, in order to prove its case, examined Raj Narain (P.W.-1), Laxmi Kant (P.W.-2), S.I., Vidur JI Tripathi (P.W.-3), S.I., Sri Ram Patil (P.W.-4), Dr. S. N. Singh (P.W.-5), Dr. U. D. Kapoor (P.W.-6), Constable Sarju Prasad (P.W.-7) and Dr. R. K. Singh Chauhan (P.W.-8). Laxmi Kant (P.W.-2) (eye witness of the occurrence) and Dr. R. K. Singh Chauhan (P.W.-8), who recorded the dying declaration of the deceased are

witnesses of facts whereas rest are formal witnesses.

10. After conclusion of the prosecution evidence, the statement of respondents were recorded under Section 364 Cr.P.C., 1898 (Section 313 Cr.P.C., 1973). They denied the prosecution evidence and stated that they were falsely implicated due to previous enmity. They did not produce any evidence in their defence. The learned trial Court, after considering the entire evidence available on record, found that the prosecution had failed to prove the guilt of the respondents beyond reasonable doubt and accordingly acquitted all the respondents vide impugned judgment and order.

11. Aggrieved by the said judgment and order passed by learned Trial Court, this appeal has been preferred by the State.

12. Heard learned A.G.A., Sri Subodh Kumar Shukla, learned Senior Advocate assisted by Sri Ashok Kumar Verma, learned counsel for the respondents-accused and perused the record.

13. Learned A.G.A. has submitted the impugned judgment and order passed by Trial Court is against the settled provision of criminal jurisprudence. He further submitted that Laxmi Kant (P.W.-2), son of deceased, was present at the time of occurrence and had seen the whole incident ; his evidence can not be discarded but the trial Court had disbelieved his evidence only on the technical ground. Learned A.G.A. further submitted that disbelieving the second dying declaration of the deceased, recorded by Dr. R. K. Singh Chauhan (P.W.-8) as it was not recorded in question and answer form, is against the settled principle of criminal jurisprudence. Learned A.G.A. further submitted that there is no defect in the dying declaration of the deceased and ocular evidence is wholly corroborated by the medical evidence led by the prosecution. Learned A.G.A, further submitted that the impugned judgment and order is liable to be set aside and the appeal be allowed.

14. Per contra, learned counsel appearing for the respondents submitted that the prosecution has miserably failed its case beyond reasonable doubt. Learned counsel further submitted that the alleged offence was committed in the dark night and outskirts of the village where the presence of Laxmi Kant (P.W.-2) was not natural. Learned counsel further submitted that the statement of Laxmi Kant (P.W.-2) is not supported by the medical evidence led by Dr. S. N. Singh (P.W.-5). Learned counsel further submitted that in the F.I.R., source of light was not mentioned, during investigation prosecution story was manufactured that Ratan Shankar (not examined) and Chhannu Lal (not examined) appeared at the place of occurrence carrying torches but these witnesses were not produced by the prosecution to prove the source of light. Learned counsel further submitted that dying declaration is forged and false because deceased was not in position to speak. Learned counsel further submitted that the respondents are innocent ; the deceased was murdered by unknown persons in the night but due to enmity, they were falsely implicated in this case.

15. We have considered the arguments led by learned counsels for both the parties and perused the record.

16. From perusal of the record, it transpires that the whole prosecution story

is based on the statement of Laxmi Kant (P.W.-2) and dying declaration of the deceased. Learned trial Court disbelieved the testimony of Laxmi Kant (P.W.-2) on the ground that the alleged incident was taken place at 4:00 a.m. on 04.11.1980 and at that time there was no source of light at the place of occurrence. Learned trial Court found that on 04.11.1980 sun would have risen at 6:30 a.m. It cannot be believed that even the slightest day light would have been available at 4: 00 a.m. on that day. In addition to it, learned trial Court also disbelieved the statement of Laxmi Kant (P.W.-2) because the deceased had not mentioned the presence of any light at the place of occurrence in his dying declaration (Ext. Ka-16). In the said facts and circumstances, learned trial Court was of the view that Laxmi Kant (P.W.-2) could not have been in a position to identify the assailants properly. In addition to the above, learned trial Court also disbelieved the testimony of Laxami Kant (P.W.-2) on the ground that he had stated that the respondent-Ashok had fired a shot from a distance of 5 steps at his father whereas according to medical evidence, the shot was fired from a very close range as blackening was found present around the wound and the pellets and wadding pieces had entered into the body of the deceased. Learned trial Court also disbelieved the prosecution story on the ground that second dying declaration (Ext.-Ka-16) of the deceased was not in question and answer form.

17. It is settled principle of law that the prosecution case cannot discarded only on the ground that it is based on sole eye witness who is relative of deceased if his testimony is fully trustworthy and reliable. Thus, in this case, it has also to be seen whether the testimony of Laxmi Kant (P.W.2) is reliable or not ? Coming to the facts of this case, admittedly, the alleged occurrence was happened on 04.11.1980 at about 4:00 a.m. in the outskirts of village-Rasoolpur. From the perusal of site plan (Ext. Ka-6), it appears that the said occurrence was caused nearby the grove of one Chhannu Lal (not examined) and nearby the place of occurrence and no residential area has been shown. Laxmi Kant (P.W.-2), star witness of prosecution, has stated that at the time of occurrence, it was 5:00 a.m., he and his father were going to plough his field ; he was carrying plough *(Patela)* and as they reached near the western side to grove of Chhannu Lal (not examined), he saw that respondents-Pyare Lal (since deceased), Uma Shankar and Ashok were present there ; respondent-Ashok was armed with *tamancha* (countrymade pistol) whereas respondent-Uma Shankar and Pyare Lal (since deceased) were armed with lathis. He further stated that respondent-Pyare Lal (since deceased) exhortated to kill his father as he ran to save his father, he was caught by respondent-Uma Shankar then respondent-Ashok fired at his father by pistol which hit right side of his father's chest. He further stated that respondent-Ashok had fired from distance of 4-5 steps. According to him, on his alarm, Ratan Shankar (not examined) and Chhannu Lal (not examined) appeared at the place of occurrence and thereafter the aforesaid respondents fled away. He further stated that it was 4:30 a.m. when his father was shot and there was some light in which he identified the respondents. He further stated that he with the help of witnesses brought his father at his house, thereafter he had gone to place of occurrence to bring the plough and when he returned at his house, he learnt that Raj Narain (P.W.-1) had prepared F.I.R. *(Tahrir)* (Ext.K-1). In cross

examination, he admitted that he had not told to Investigating Officer concerned that at the time of occurrence, he was carrying plough *(Patela)*. He further admitted that it was dark night at the time of occurrence and Ratan Shankar (not examined) and Chhannu Lal (not examined) were carrying torches and it was 4:00 a.m. when fire was shot at his father. Further according to this witness, fire was shot from the distance of five steps whereas the according to Dr. U. D. Kapoor, (P.W.-6), the blackening was present around the wound and three wadding pieces and twenty two small pellets were found from the body of the deceased during post-mortem examination. Thus, in absence of source of light and as the medical evidence is not in support of the testimony of this sole eyewitness, the evidence of Laxmi Kant (P.W.-2) becomes doubtful.

18. In addition to the above, although no effective effort was made by Laxmi Kant (P.W.-2) to save his father and only on this ground, his statement cannot be held unreliable but his statement that he, leaving his seriously injured father, had gone to take back plough *(Patela)* from the place of occurrence in stead to make any effort to carry his father to any hospital forthwith for treatment and meanwhile F.I.R. *(Tahrir)* (Ext.K-1) was prepared by Raj Narayan (P.W.-1) further makes his conduct and evidence very doubtful.

19. In first information report, the presence of Ratan Shankar (not examined) and Chhannu Lal (not examined) has also been shown, who appeared at the place of occurrence on the alarm raised by Laxmi Kant (P.W.-2). They were independent witnesses. As per prosecution story, they were carrying torches but reasons based known to the prosecution, neither Ratan Shankar (not examined) and Chhannu Lal (not examined) were produced nor said torches were produced before the Trial Court. The prosecution has not put any plausible explanation of non production of those witnesses and vital piece of evidence, which also made the prosecution case doubtful.

20. The prosecution case is also based on the dying declaration made by the deceased which was recorded by Dr. R. K. Singh Chuahan (P.W.-8). It is settled principle of law that an accused may be convicted only on the basis of dying declaration if it is true and is reliable because the admissibility of dying declaration is based on the Latin Maxim "Nemo Moriturus Praesumitur mentire" which means that a person will not meet his maker with a lie in his mouth. It is also settled principle that dying declaration cannot be treated as gospel truth; it must inspire the confidence of the Court and before relying on such dying declaration the Court has to satisfy itself regarding truthfulness and veracity of the statement of the person who had recorded and proved such dying declaration because the person who had made the dying declaration never comes before the Court for examination and the defence has no opportunity to cross examine him. In true sense, the evidence of dying declaration is nothing but heresay evidence which is inadmissible in evidence. Thus it is duty of the Court to ensure the fact that whether such dying declaration was made by the deceased or not, and if it is made by him, whether the deceased was in free and sound state of mind and was not tutored, influenced or pressurized by any person. If it is proved that the maker of the statement was tutored, influenced, pressurized or was not in a position to make such dying declaration or any

reasonable suspicion appears in the manner of recording thereof, such dying declaration cannot be made as sole basis for the conviction of accused.

21. Hon'ble Supreme Court in ***Atbir Vs. Government (N.C.T. Of Delhi) (2010) 9 SCC 1,*** while discussing the factors governing the reliability of the dying declaration on the basis of law laid down by the Hon'ble Supreme Court has summarized the principles in this regard as follows:-

"The following principles can be culled out from earlier decisions of the Supreme Court:-

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) ***The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.***

(iii) ***Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.***

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) ***Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.***

(vi) ***A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.***

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

(Emphasis supplied)

22. Further, it is also well settled principle of law that the dying declaration, if it is true and free from any reasonable doubt as well as inspire the confidence of Trial Court, may be sole ground for the conviction. Before relying on such dying declaration, it has to be seen whether there was sufficient light on the place of occurrence and the deceased was in a position to identify the assailant and such dying declaration was recorded in proper manner i.e. in question and answer form or not. The Constitutional Bench of Hon'ble the Apex Court in ***Harbans Sing and another vs. State of Punjab, AIR 1962 SC 439*** while relying the settled principle of law on dying declaration as held by Hon'ble the Apex Court in ***Khushal Rao vs. State of Bombay, AIR 1958 SC 22,*** has held as under :-

"The Court then proceeded to review the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court and stated the law in these words:

"That it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying

declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) ***that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties".***

"Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. *Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from other infirmities as may be disclosed in evidence in that case."*

(Emphasis supplied)

23. Dying declaration (Ext. Ka-16) of the deceased was recorded on 04.11.1980 at about 8:00 a.m. by Dr. R. K. Singh Chauhan (P.W.-8). This dying declaration does not show whether any question was put to deceased regarding occurrence or not ? In this dying declaration neither any source of light nor presence of Laxmi Kant (P.W.-2) nor presence of Ratan Shankar (not examined) and Chhannu Lal (not examined) has been stated by deceased. As per this dying declaration, only deceased was going at about 4:00 a.m. to plough his field and when he reached near the grove of Chhannu Lal, the respondents-Pyare Lal, Uma Shankar and Ashok appeared at the place of occurrence, they stopped the deceased and on the exhortation of the respondent-Pyare Lal (since deceased), the respondent-Ashok fired on the person of

deceased by pistol. According to Dr. S. N. Singh (P.W.-5), injuries of the deceased was so dangerous that it bleeds on touch and air was gashping out of the wound with the respiration ; the patient was in very critical condition. In his opinion, the injury of the patient was dangerous in nature. Thus, in view of absence of source of light at the place of occurrence, critical condition of deceased and also it is not in question and answer form, the dying declaration (Ext. Ka-16) is doubtful and not reliable.

24. It is settled principle of law that the accused will be presumed as innocent unless and until the prosecution has succeeded to prove its case beyond reasonable doubt and the presumption of innocence of accused is further strengthened if he is acquitted by the Trial Court after considering the material evidence available on record. ***Hon'ble the Apex Court in Surajpal Singh and others Vs. State, AIR 1952 SC 52*** held as under :-

"It is well-established that in an appeal under section 417 of the Criminal Procedure Code, the High Court has full power to review the evidence upon which the order of acquittal was founded, ***but it is equally well-settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."*** *(Emphasis supplied).*

25. It is also well settled principle of law that in an appeal against acquittal, if two views are possible, one is in favour of accused-person and judgment of Trial Court is not illegal or manifestly perverse, the appellate Court should not disturb the order of acquittal. Hon'ble the Apex Court in ***State of Madhya Pradesh vs. Mukesh and others, (2007) 2 SCC 680*** held as under :-

"Moreover, it must be borne in mind that we are dealing with a judgment of acquittal passed by the High Court. If two views are possible, ordinarily this Court would not interfere therewith. The State has not been able to show any illegality in the judgment of the High Court. We, therefore, do not intend to interfere therewith. The appeal is dismissed."

26. In the light of above discussions, we are of the view that the impugned judgment and order passed by Trial Court is well reasoned, well discussed and requires no interference. The prosecution has miserably failed to prove its case beyond reasonable doubt and there is no illegality or infirmity in the impugned judgment and order dated 23.10.1981 passed by Trial Court in Sessions Trial No.136 of 1981, whereby the respondents-accused were acquitted. The appeal is liable to be dismissed.

27. The judgment and order dated 23.10.1981 passed by Trial Court in Sessions Trial No.136 of 1981 is affirmed. The appeal lacks merit and is dismissed.

(2020)03-05ILR A77
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2019

BEFORE
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 119 of 2019

Vinod ...Appellant(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Anurag Mishra, Sri Om Prakash

Counsel for the Respondent:
A.G.A., Sri Zuber Ahmad Siddiqui, Sri Ankur Tandon

A. Criminal Law-Indian Penal Code (45 of 1860)-Section 304B, S.498A - Evidence Act (1 of 1872) , Section 3 - Relative as witnesses - No independent eye witness - Reliability - Offences relating to dowry death are mostly committed inside the house of the accused - in such cases there is at least possibility of independent witness - in normal circumstances, neighbours, servants do not come forward to disclose anything regarding the occurrence - close relative do not prefer to implicate a false person, leaving aside the real culprit - it has to be established by the defence, as to why the nearest relative of deceased are falsely implicating him by leaving aside the real culprit - merely on the ground of non production of independent witness, prosecution case can not be thrown out (Para 21, 23)

B. Criminal Law-Indian Penal Code (45 of 1860), Section 304B - Evidence Act (1 of 1872) , Section 113B - Dowry death – Expression - "Soon before her death" - Proximity test - soon before her death does not mean just soon before her death - It means that *there should be a proximity* between the cruelty or harassment related to the demand of dowry and unnatural death of deceased (Para 24)

C.Criminal Law-Criminal Procedure Code (2 of 1974)-Section 313 - Examination of accused - Object - to give accused an opportunity of explaining the circumstances that appear against him - S. 304 B IPC - Dowry Death -husband with deceased at the time of death - it was husband duty to explain the circumstances that how the death of deceased was caused - what effort was made by him to prevent her from committing suicide - Failure, to explain circumstances or produce any reliable evidence in defence against the evidence produced by the prosecution regarding unnatural death of deceased - strengthen the culpability of husband. (Para 36)

Deceased Pooja married with appellant Vinod - she died within 7 years of her marriage - in unnatural circumstances, inside the house of the appellant - she was subjected to cruelty and harassment just soon before her death by the appellant - due to demand of dowry - FIR lodged without delay - As per medical report died due to strangulation - at the time of death of deceased the appellant was with her but he did not explain any circumstances regarding manner or cause of her death - Husband also not explained as to how the dead body of deceased was laid, out side his house - Conviction justified.

Appeal Dismissed (E-5)

List of cases cited :

1.Vajresh Venkatray Anvekar Vs St. of Maha (2013) 3 SCC 462

2.Maya Devi Vs St. of Har. AIR 2016 SC 125

3.Trimukh Maroti Kirkan Vs St. of Mah. 2006 (10) SCC 681

4.Ramesh Vithal Patil Vs St. of Karn. (2014) 11 SCC 516

(Delivered by Hon'ble Virendra Kumar Srivastava, J.

1. This appeal has been filed against the judgment and order dated 24.11.2018, passed by Additional Session Judge, Bansi, District Siddharth Nagar, in Sessions Trial No. 30 of 2018 *(State vs. Vinod and another)*, arising out of Case Crime No. 09 of 2018, Police Station (P.S.) Bansi, District Siddharth Nagar, whereby the accused-appellant (hereinafter referred as "appellant') has been convicted and sentenced under Section 498-A I.P.C. for two years rigorous imprisonment and fine of Rs. 5,000/- in default whereof, two months additional imprisonment, under

Section 304-B I.P.C. for seven years rigorous imprisonment and under Section 4 of Dowry Prohibition Act, 1961 (in short "D.P. Act') for two years imprisonment and fine of Rs. 5,000/- and in default whereof, for two months further imprisonment. All the sentences have been directed to run concurrently.

2. The prosecution story, in brief, is that the Pooja (deceased), daughter of PW-2 Subhawati, informant, was married to appellant-Vinod, four years prior to the occurrence. On 11.1.2018, at about 10:30 a.m., PW-2 Subhawati, lodged first information report (hereinafter referred as "F.I.R.') at P.S. Bansi, District Siddharth Nagar that her daughter Pooja (deceased), aged about 27 years, was married to the appellant in 2013; after marriage, the appellant and his mother Ishrawati (since acquitted) used to taunt and harass deceased for want of dowry. It was further stated in F.I.R. that deceased Pooja used to tell PW-2, Subhawati regarding the demand of dowry and torture caused by the appellant and Ishrawati (since acquitted) to her, but she, being widow and unable to fulfil the demand of dowry due to poverty, could not do anything in this regard. In the intervening night of 10/11.1.2018, appellant Vinod along with her mother Ishrawati (since acquitted) committed murder of deceased Pooja by strangulation and her dead body is lying at place of occurrence.

3. The said information was entered in G.D. Report (Ex.Ka.1) and was lodged as Crime No. 0009 of 2018, U/s 498-A, 304-B I.P.C. and 3/ 4 of D.P. Act at P.S. Bansi, District Siddharth Nagar by PW-1 Const. Ankit Singh and investigation was entrusted to PW-8 Dy.S.P. Mahendra Singh.

4. Information was given to PW-4, Kesari Nandan Tripathi (Executive Magistrate), Nayab Tehsildar, Bansi for inspecting and conducting inquest of the dead body of deceased, who proceeded to the place of occurrence, inspected the dead body on 11.1.2018 with the help of S.I. Ravi Kant Mani, and prepared the inquest report (Ex.Ka.1), as well as the relevant papers Ex.Ka.5 to Ex.Ka.8 i.e. challan lash, photo lash, letter to C.M.O., letter to R.I., sealed the dead body of deceased and sent it for post-mortem examination.

5. PW-3, Dr. Sanjay Chaudhary, conducted the post-mortem examination on 11.1.2018 and found the following the ante-mortem injuries on the body of deceased;

(i) Ligature mark around neck 25 c.m. in length and 1 to ½ c.m. in breadth. 5 c.m. below right ear lobe, 8 c.m. below left ear lobe and 6 c.m. below the chin.

(ii) Saliva was dribbling out from the mouth.

6. According to him, upon opening the ligature mark, white subcutaneous tissues were found and the bone of neck was normal. According to him, the death of deceased was caused due to asphyxia caused by ante mortem injury.

7. PW-8, Dy.S.P. Mahendra Dev Singh, inspected the place of occurrence, prepared the site plan Ex.Ka.10, recorded the statement of PW-1 Const. Ankit Singh and PW-2 Smt. Shubhavati, arrested the appellant Vinod and another accused Smt. Ishrawati (since acquitted) and recorded their statement. Meanwhile, upon his transfer, the investigation was entrusted to PW-6, Dy.S.P. Uma Shankar Singh who recorded the statement of other witnesses

and upon conclusion of investigation, filed charge-sheet Ex.Ka.9 against the appellant and Smt. Israwati (since acquitted) before competent Magistrate.

8. The Chief Judicial Magistrate took the cognizance and, since the offence was exclusively triable by the Session Court, committed it for trial, after providing the relevant copies of police papers.

9. The learned Trial Judge framed charges against the appellant-Vinod and Smt. Ishrawati (since acquitted) under section 498-A, 304-B I.P.C. and ¾ D.P. Act alternatively under Section 302 I.P.C. who denied the charges and claimed to be tried.

10. Prosecution in order to prove its case, examined PW-1 Const. Ankit Singh, PW-2 Smt. Subhavati, PW-3 Dr. Sanjay Chaudhary, PW-4 Kesari Nandan Tiwari, PW-5 Sangeeta, PW-6 Umashankar Singh, PW-7 Gyandas and PW-8 Mahendra Dev Singh. PW-2 Subhawati, PW-5 Sangeeta and PW-7 Gyan Das are the witnesses of fact and rest witnesses are formal witness.

11. After prosecution evidence, statement of appellant-Vinod and Smt. Ishrawati (since acquitted) U/s 313 Cr.P.C. were recorded, wherein, they denied the prosecution evidence and claimed that they have been falsely implicated in this case. An opportunity was given to them to lead the defence evidence in order to explain the prosecution evidence, DW-1 Ram Sundar was examined by them in defence.

12. Learned Trial Court, by the aforesaid impugned order, while acquitting Smt. Ishrawati, mother-in-law of the deceased, convicted the appellant-Vinod as above, aggrieved whereof, he has preferred this appeal.

13. Heard learned counsel for the appellant, learned A.G.A. for the State and perused the record.

14. Learned counsel for the appellant has submitted that the appellant is innocent and has been falsely implicated in this case. The marriage of deceased was solemnized more than 10 years prior to the occurrence; appellant had neither demanded any dowry nor committed any cruelty or harassment to deceased soon before her death; and medical evidence is not corroborated by the ocular evidence as the deceased had committed suicide due to frustration. Learned counsel further submitted that the prosecution has failed to produce either any independent witness or any eye witness. The whole prosecution story is based on the statement of PW-2, Subhawati, mother of deceased who is an interested witness and hence not reliable. Prosecution has miserably failed to prove its case beyond reasonable doubt. The impugned judgment and order is illegal, unjustified and liable to be set aside.

15. Per-contra, learned A.G.A. and learned counsel for the informant have submitted that the deceased has been found dead inside the house of appellant, husband of deceased. Learned counsels further submitted that due to demand of dowry, appellant used to torture and harass the deceased and caused her death by strangulation. F.I.R. was lodged without any delay and as per medical examination report, deceased had died due to strangulation. Learned counsel further submitted that at the time of death of deceased appellant was with her but he did not explain any circumstances regarding

manner or cause of her death. Learned counsel further submitted that the prosecution has succeeded to prove its case beyond reasonable doubt against the appellant. Appeal is liable to be dismissed.

16. I have considered the rival submission of learned counsel for both the parties and perused the record.

17. The offence in question in this case is related to demand of dowry, dowry death, harassment of victim for demand of dowry, cruelty and harassment to the deceased by her husband.

18. Before considering the evidence available on record, led by both parties, in the light of argument advanced by the learned counsel for the parties, it is necessary to refer the relevant provision of law relating to the offence in question i.e. Section 304-B and Section 498-A I.P.C., Section 113-B of Indian Evidence Act and Section 2 Dowry Prohibition Act, 1961 which are as under:-

Section 304-B ***(1)*** *Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.*

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Section 498-A *Husband or relative of husband of a woman subjecting her to cruelty.--Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.--For the purpose of this section, "cruelty" means*

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Section 113-B of Indian Evidence Act-*Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code.*

Section 2 of Dowry Prohibition Act-*Definition of "dowry'. In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly*

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person.

19. The above provision, related with dowry death, clearly shows that if a death of any women is caused within 7 years of her marriage by burn *"or otherwise than under normal circumstances"* and it is shown that if soon before the death of such women, she was subjected to *cruelty or harassment* by her husband or any relative of her husband, in connection with demand for dowry and if the prosecution succeeds to prove the above ingredient, such death shall be called as dowry death. In addition to above Section 113-B of Indian Evidence Act, further provides that in such cases, if it is shown that a women was subjected, soon before her death by the accused, to cruelty or harassment for in or connection with any demand of dowry, the Court shall presume that such accused had caused the dowry death.

20. According to PW-1 Ankit singh, F.I.R. (Ex.Ka.1) was lodged by him on the information given by PW-2 Shubhawati on 11.1.2018 at about 10:30 a.m. under Section 498-A, 304-B I.P.C. and ¾ D.P. Act. As per the prosecution case, the occurrence was happened in the intervening night of 10/11.1.2018 and PW-2 Shubhawati lodged the F.I.R. when she was informed by PW-5 Sangeeta on 11.1.2018 at about 5:00 a.m. and upon that information PW-2 Shubhawati came to the place of occurrence, saw the dead body of her daughter and lodged the F.I.R. Thus, there is no delay in lodging the F.I.R.

21. So far as the submission of learned counsel for the appellant that no independent witness has been produced and the witnesses produced by the prosecution are relative of deceased, hence the prosecution is doubtful, is concerned, it is settled principle of criminal law that merely on the ground of non production of independent witness, prosecution case can not be thrown out. Offences relating to dowry death are mostly committed inside the house of the accused and in such cases there is at least possibility of independent witness because most of the evidence, facts and circumstances are within the knowledge of the accused person who usually do not state anything regarding the occurrence. In such cases, in normal circumstances, neighbours, servants and family member of the accused also do not come forward to disclose anything regarding the occurrence, in order to save the accused.

22. Hon'ble Supreme Court in **Vajresh Venkatray Anvekar vs. State of Maharashtra (2013) 3 SCC 462**, while discussing the nature of evidence required for offences relating to dowry death has held as under:-

17. The learned Sessions Judge has refused to rely upon the evidence of the parents, brother and brothers-in-law of Girija primarily on the ground that they are interested witnesses. ***We find this approach to be very unfortunate. When a woman is subjected to ill-treatment within the four walls of her matrimonial house, ill-treatment is witnessed only by the perpetrators of the crime. They would certainly not depose about it. It is common knowledge that independent witnesses like servants or neighbours do not want to get involved.*** *In fact, in this case, a maid employed in the house of the appellant who was examined by the prosecution turned hostile.*

18. It is true that chances of exaggeration by the interested witnesses cannot be ruled out. Witnesses are prone to

exaggeration. It is for the trained judicial mind to find out the truth. If the exaggeration is of such nature as to make the witness wholly unreliable, the court would obviously not rely on him. If attendant circumstances and evidence on record clearly support and corroborate the witness, then merely because he is interested witness he cannot be disbelieved because of some exaggeration, if his evidence is otherwise reliable. In this case, we do not find any such exaggeration qua the appellant. The witnesses have stood the test of cross- examination very well. There are telltale circumstances which speak volumes. Injuries suffered by Girija prior to the suicide cannot be ignored. The pathetic story of Girija's woes disclosed by her parents, her brother and her brothers-in-law deserves to be accepted and has rightly been accepted by the High Court. A1 and A3 have been acquitted by the Sessions Court. That acquittal has been confirmed by the High Court. The State has not appealed against that order. We do not want to therefore go into that aspect. But, we must record that we are not happy with the manner in which learned Sessions Judge has ignored vital evidence.

(Emphasis Supplied)

23. In addition to above, it is also settled principle of law that the evidence, produced by the relative of the deceased, cannot be ignored only on the ground that they are relative because the close relative do not prefer to implicate a false person, leaving aside the real culprit. If it is alleged by the defence, it has to be established by the defence, as to why the nearest relative of deceased are falsely implicating him by leaving aside the real culprit. In this case, the evidence led by the PW-2 Subhawati, PW-5 Sangeeta and PW-5 Gyan Das who are nearest relative of deceased are reliable and their evidence cannot be discarded only on the ground that they are relative of the deceased. Thus, the submission raised by the learned counsel for the appellant, in this regard, has no force.

24. It is pertinent to note at this juncture that for the offence of dowry death, homicidal death of the women is not necessary. It includes unnatural as well as accidental death also. It is also necessary to note that section 304-B I.P.C. as well as 113-B of Indian Evidence Act, both the provision state that prosecution is not required to prove the factum of cruelty or harassment by the accused with the deceased soon before death of deceased, beyond reasonable doubt because in these provisions, burden has been laid on prosecution only to show that soon before the death of deceased, she was subjected to cruelty or harassment in connection with demand of dowry by her husband or relatives of her husband. In addition to above, the word soon before her death does not mean just soon before her death. It means that there should be a proximity between the cruelty or harassment related to the demand of dowry and unnatural death of deceased. Hon'ble Supreme Court while discussing Section 304 B I.P.C., Section 113-B Indian Evidence Act and definition of dowry as provided in Section 2 of the D.P. Act, in **Maya Devi vs. State of Haryana AIR 2016 SC 125** has held as follows:-

*"16. To attract the provisions of Section 304B, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty or harassment "for, or in connection with the demand for dowry". **The expression "soon before her death" used in Section 304B IPC and***

Section 113B of the Evidence Act is present with the idea of proximity test. *In fact, learned senior counsel appearing for the appellants submitted that there is no proximity for the alleged demand of dowry and harassment. With regard to the said claim, we shall advert to while considering the evidence led in by the prosecution. Though the language used is "soon before her death", no definite period has been enacted and the expression "soon before her death" has not been defined in both the enactments.* ***Accordingly, the determination of the period which can come within the term "soon before her death" is to be determined by the courts, depending upon the facts and circumstances of each case. However, the said expression would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. In other words, there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence."***

(Emphasis Supplied)

25. Hon'ble Court further in **Maya Devi (supra)**, discussing the law laid down by the Apex Court in **Bansi Lal vs. State of Harayana AIR 2011 SC 691; Mustafa Shahadal Shaikh vs. State of Maharashtra AIR 2013 SC 851** and **Ramesh Vithal Patil vs. State of Karnataka (2014) 11 SCC 516**; regarding the nature of proof required for dowry death, has held as under:-

" 21. Section 304B IPC does not categorise death as homicidal or suicidal or accidental. This is because death caused by burns can, in a given case, be homicidal or suicidal or accidental. Similarly, death caused by bodily injury can, in a given case, be homicidal or suicidal or accidental. ***Finally, any death occurring "otherwise than under normal circumstances" can, in a given case, be homicidal or suicidal or accidental. Therefore, if all the other ingredients of Section 304B IPC are fulfilled, any death (homicidal or suicidal or accidental) whether caused by burns or by bodily injury or occurring otherwise than under normal circumstances shall, as per the legislative mandate, be called a "dowry death" and the woman's husband or his relative "shall be deemed to have caused her death".*** *The section clearly specifies what constitutes the offence of dowry death and also identifies the single offender or multiple offenders who has or have caused the dowry death.*

22. The key words under Section 113B of the Evidence Act, 1872 are ***"shall presume" leaving no option with a court but to presume an accused brought before it of causing a dowry death guilty of the offence.*** *However, the redeeming factor of this provision is that the presumption is rebuttable. Section 113B of the Act enables an accused to prove his innocence and places a reverse onus of proof on him or her. In the case on hand, accused persons failed to prove beyond reasonable doubt that the deceased died a natural death. When Kavita allegedly committed suicide, her husband- appellant No.2, though he was not present in the house, was present in his office at M.D. University, Rohtak at the relevant time but he did not make any sincere effort to take her to the hospital which was very near to the place of the incident. Similarly, appellant No. 2 got the deceased examined by DW-2 in order to*

create an impression that she was struggling with chronic depression but the truth floated upon the surface when the deceased reveals that the accused persons were maltreating her and she had started picking up the ideas of suicide. Lastly, appellant No. 2 falsely informed the court that having learnt about the death of his wife Kavita, he left for Delhi to inform her family members. In fact, the accused never went to Delhi and the complainant received a telephonic message from an unknown person regarding the death of his daughter. So far as Maya Devi- appellant No. 1 herein is concerned, there is no denying the fact that she was working as a teacher in a government school and she was not present at the relevant time at the place of incident but it is very much clear from the evidence on record that both the accused persons had a dominating role in the entire episode and she had always accompanied her son-appellant No. 2 herein to the house of the complainant (PW-3) for the dowry demands. ***The presumption under Section 113B of the Act is mandatory may be contrasted with Section 113A of the Act which was introduced contemporaneously. Section 113A of the Act, dealing with abetment of suicide, uses the expression "may presume". This being the position, a two-stage process is required to be followed in respect of an offence punishable under Section 304-B IPC: it is necessary to first ascertain whether the ingredients of the Section have been made out against the accused; if the ingredients are made out, then the accused is deemed to have caused the death of the woman but is entitled to rebut the statutory presumption of having caused a dowry death.*** *From the evidence on record, we are of the opinion that in the present case Kavita died an unnatural death by committing suicide as she was subjected to cruelty/harassment by her husband and in-laws in connection with the demand for dowry which started from the time of her marriage and continued till she committed suicide. Thus, the provisions of Sections 304B and 498A of the IPC will be fully attracted." (Emphasis supplied)*

26. Now the question arises, whether, the deceased died within 7 years of her marriage with the appellant; her death was unnatural; and she was subjected to cruelty or harassment, soon before her death, by the appellant, in connection with demand of dowry or not.

27. PW-2 Smt. Subhawati, mother of the deceased, has specifically stated that the marriage of deceased was solemnized with appellant, four years before her death. According to her, she had given dowry as per her capacity; just after the marriage the appellant, his parents and sisters used to demand a motorcycle in dowry and also to harass and torture her. She further stated that 8-10 days prior to of the occurrence, the appellant Vinod took away deceased from her house and at that time also, he asked for a motorcycle as a dowry. She has further stated that her daughter Sangeeta (PW-5) informed her on phone that deceased Pooja was killed by her in-laws and on that information, she came to Bansi (appellant's house) and saw that the dead body of Pooja was lying in the outer side of the house of appellant. She further stated that she had lodged the F.I.R. (Ex.Ka.3); police reached the place of occurrence and recovered an iron rod in length about 2.5 ft, a scarf and a mobile charger. She further stated that on perusal of dead body, it appeared that the death was caused by strangulation. According to her, dead body of the deceased was sealed before her and inquest report (Ex.Ka.4) was also prepared

before her, whereupon she had also put her thumb impression.

28. PW-5, Smt. Sangeeta, sister of deceased, also stated that deceased, her youngest sister, was married with appellant Vinod, just 4 years before the occurrence. Stating that at the time of marriage, dowry was given to appellant according to her capacity; appellant was not satisfied with dowry; he was demanding a motorcycle in dowry and was harassing and torturing the deceased for want of dowry, she further stated that deceased Pooja used to tell her the act of harassment and demand of dowry made to her by the appellant and his relatives, whereupon she used to pacify her. She further stated that on 10th January, 2018, she was in Mumbai; appellant Vinod, at about 4:00 O' clock in the morning, informed her that deceased was not feeling well and was in critical condition. Thereafter, he switched off his phone but as she rang after an hour, he informed that the deceased had died. She further stated that thereafter, she informed her mother (PW-2) that deceased had been murdered by her in-laws.

29. PW-7, Gyan Das, maternal uncle of the deceased, has also stated that deceased was married with the appellant just 4 years before her death and when he used to visit the deceased's matrimonial house, she used to tell him that appellant and his family members used to demand a motorcycle and also used to harass and torture her.

30. PW-3 Dr. Sanjay Chaudhary stating the ante mortem injuries caused to deceased (noted in para no. 5) has specifically stated that the deceased had died due to asphyxia caused by ante-mortem injury. According to him, 500 gm. semi digested food was also found in stomach of deceased.

31. PW-8, Dy. SP Mahendra Singh, Investigating Officer, who inspected the place of occurrence and prepared site plan (Ex.Ka.10) has stated that death of deceased was caused in her bed room.

32. PW-6 Dy. SP Umashanker Singh, who took over the investigation after PW-8 Mahendra Singh, has stated that after recording statement of witnesses and inspecting the panchnama, post-mortem report and other documents, he concluded the investigation and filed charge-sheet (Ex.Ka.9)

33. In addition to above, in F.I.R. (Ex.Ka.3) it has been specifically mentioned that marriage of deceased with appellant was solemnized in 2013 and the incident happened in the intervening night of 10/11.1.2018. PW-2 Smt. Subhavati, PW-5 Sangeeta and PW-7 Gyandas have specifically stated that the deceased was married with applicant four years prior to the occurrence. In cross-examination PW-2 Shubhawati, although has stated that, at the time of marriage, deceased was aged about 15-16 years but again she stated that deceased was graduate. She was not further cross examined on the point of duration of marriage of deceased. In cross-examination, PW-5 Sangeeta further said that the deceased was married with appellant in 2013. Thus the prosecution have successfully proved that unnatural death of deceased was caused within 7 years of her marriage and the submission made by the learned counsel for the appellant has no force.

34. In this case, the nature of cause of death is not disputed because it is admitted

fact that the death of deceased was not natural. According to PW-2 Subhawati, PW-5 Sangeeta and PW-7 Gyan Das, the death of deceased was caused by the appellant-Vinod along with his family member for demand of dowry and deceased was subjected to cruelty and harassment by them just before her death in connection with dowry. It is very pertinent to note at this juncture that for the first time PW-2 Subhavati when she reached the place of occurrence, she found that the dead body of deceased was lying in the outer side of the house of appellant. According to PW-3, Dr. Sanjay Chaudhary, ligature mark was present around the neck of deceased. This witness has not found any gap in ligature mark which is generally found in suicidal case by hanging. In addition to above, no rope was found on the place of occurrence by Investigating Officer PW-8 Dy.S.P. Mahendra Singh whereas from perusal of site plan (Ex.Ka.10) it transpires that only two rooms are inside the house of appellant and deceased had died in one room where bed was also lying.

35. According to PW-5, Sangeeta, the appellant Vinod rang her at 4:00 O' clock in the morning of 10th January, 2018 and informed that deceased Pooja was in critical condition. Thereafter, he switched off his phone and after one hour when she (PW-5) again rang him, he informed that the deceased had died. This clearly shows that at the time of death of deceased, the appellant was with the deceased.

36. Appellant Vinod has not stated in his statement under section 313 Cr.P.C., as to how, deceased had died, whereas her death was caused inside his house. He has also not explained as to how the dead body of deceased was laid, out side his house. He has also not specifically denied his presence, at the time of occurrence, inside his house. He has also not explained or disclosed anything regarding the circumstances related to the cause of death, cruelty or harassment just before the death of deceased, demand of motorcycle as dowry and duration of his marriage with deceased. DW-1 Ram Sundar has stated that he got the marriage of appellant Vinod with Pooja solemnized 10 years ago; there was no demand of dowry by the appellant; and there was no harassment or torture with deceased by the appellant. In cross examination, he has specifically admitted that he has also solemnized two other marriages. He further admitted that appellant Vinod is his relative (brother-in-law). This witness neither normally resides at the house of appellant nor was present at the time of occurrence at the house of appellant. Appellant being husband of deceased has to disclose the exact duration or year of his marriage, facts and circumstances as well as cause of death of deceased, in his statement under Section 313 Cr.P.C., but he did not disclosed it and only answered that prosecution version is false. Similarly, if the appellant was with the deceased at the time of occurrence, it was also his duty to explain the circumstances that how the death of deceased was caused and if she committed suicide, what effort was made by him to prevent her to take such step. Failure, to explain circumstances or produce any reliable evidence in defence against the evidence produced by the prosecution regarding unnatural death of deceased, demand of dowry, cruelty and harassment to deceased, duration of marriage and, to discharge the burden as required U/s 113 B Evidence Act and mere denial to the prosecution evidence put to him U/s 313 Cr.P.C., strengthen the culpability of appellant in committing the offence and the

statement of DW-1 Ram Sundar is not sufficient to controvert the prosecution version.

37. Hon'ble Supreme Court **Trimukh Maroti Kirkan Vs. State of Maharashtra 2006 (10) SCC 681** where accused was charged for committing murder of his wife and it was established by the prosecution that shortly before the offence, he was seen with his wife inside his house where he and his wife were normally used to reside. Hon'ble Supreme Court has held as under:

"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes placed in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. *In Nika Ram v. State of Himachal Pradesh AIR 1972 SC 2077 it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra (1992) 3 SCC 106 the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation were held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State of U.P. v. Dr. Ravindra Prakash Mittal AIR 1992 SC 2045 the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In State of Tamil Nadu v. Rajendran (1999) 8 SCC 679 the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation*

and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime."

(Emphasis supplied)

38. Hon'ble Supreme Court in Ramesh Vithal Patil vs. State of Karnataka (2014) 11 SCC 516, while discussing the provision of Section 304B I.P.C. and relevance of Section 113-B of Evidence Act, 1872, held as under:-

"There is also another angle to this case. The prosecution has succeeded in proving facts from which a reasonable inference can be drawn that the deceased committed suicide by jumping in the river along with her daughter. The deceased was in the custody of the appellant. She left the appellant's house with the small child. Admittedly, neither the appellant nor any member of his family lodged any missing complaint. The appellant straightway went to the house of the deceased to enquire about her. This conduct is strange. When his wife and small child had left the house and were not traceable the appellant was expected to move heaven and earth to trace them. As to when and why the deceased left the house and how she died in suspicious circumstances was within the special knowledge of the appellant. ***When the prosecution established facts from which reasonable inference can be drawn that the deceased committed suicide, the appellant should have, by virtue of his special knowledge regarding those facts, offered an explanation which might drive the court to draw a different inference. The burden of proving those facts was on the appellant as per Section 106 of the Evidence Act but the appellant has not discharged the same leading to an adverse inference being drawn against him."***

(Emphasis supplied)

39. Lastly, it is also pertinent to note that all the witnesses, produced by the prosecution were put to lengthy cross-examination, but nothing could be elicited by way of cross-examination so as to create doubt about their testimonies. Their testimonies have been well supported by the medical evidence which shows that the deceased had been caused to death within 7 years of her marriage, in unnatural circumstances by the appellant due to demand of dowry and prior to her death, she was also subjected to cruelty for the dowry. Death of deceased was caused inside the house of appellant where his presence has been found natural at the time of occurrence. Appellant has failed to produce any reliable evidence regarding his innocence or to create any doubt in the prosecution evidence. Prosecution witness of fact i.e. PW-2 Subhavati, PW-5 Smt. Sangeeta and PW-7 Gyandas are illiterate, and rustic witnesses. The minor discrepancies in the evidence produced by the prosecution will not overshadow the prosecution version in peculiar facts and circumstances of this case. There is complete consistency and coherence in the examination-in-chief and in the cross examination of the prosecution witnesses. There is nothing on record to show that the prosecution witnesses had any animus against the appellant so as to implicate him falsely absolving the actual accused.

40. Thus the prosecution has succeeded to prove that deceased Pooja was married with appellant Vinod; she died within 7 years of her marriage, in unnatural circumstances, inside the house of the appellant and she was subjected to cruelty and harassment just soon before her death by the appellant, due to demand of dowry. Appellant has failed to produce any reliable evidence in his defence to rebut or explain the prosecution evidence in view of the statutory presumption as provided under Section 113 B Evidence Act. The learned

Trial Court has elaborately discussed the evidence led by the prosecution in the light of argument advanced by the prosecution as well as the defence. The impugned judgment and order requires no interference and liable to be affirmed.

41. Now coming to the question of sentence whether sentence passed by the Trial Court, is just and proper or not.

42. Appellant has been convicted for the offence under Section 304-B and 498-A I.P.C. and under Section 4 of Dowry Prohibition Act. He has been sentenced only for 7 years rigorous imprisonment for the offence under Section 304-B I.P.C., for 2 years and fine of Rs. 5,000/- for the offence under Section 498-A I.P.C. and Section 4 of Dowry Prohibition Act, for each offence. It has been further directed that all the sentences were run concurrently. Thus the maximum sentence, awarded against the appellant, is 7 years.

43. Looking into the nature and gravity of the offence, I am of the view that the punishment awarded by the Trial Court is just and appropriate and requires no interference. Appeal is liable to be dismissed and impugned judgment and order passed by the learned Trial Court is liable to be affirmed.

44. In the light of above discussion, the appeal lacks merit and is hereby **dismissed**. The impugned judgment and order dated 24.11.2018 passed by Additional Session Judge, Bansi, District Siddharth Nagar in Sessions Trial No. 30 of 2018 *(State vs. Vinod and another)*, is maintained and affirmed.

45. The appellant is in jail.

46. Let a copy of this judgment along with lower court record be sent to the Additional Sessions Judge, Bansi, District Siddharth Nagar for necessary information and compliance.

(2020)03-05ILR A90
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 153 of 1991

Hargovind & Anr. ...Appellants(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri G.P. Dixit, Sri Ashok Kumar Singh

Counsel for the Respondent:
A.G.A.

A. Criminal law-Criminal Procedure Code (2 of 1974) - Section 154 - FIR - Delay - No plausible explanation for delay of 16 hours in registering FIR by complainant - *Held* - adverse inference that FIR lodged with due deliberation and consultation - delay fatal to the prosecution case (Para 19)

B. Evidence Law-Evidence Act (1 of 1872) - Section 3 - Contradiction - Material contradictions in testimonies of prosecution witness - as per FIR main door opened by Ram Ratan however P.W. 3 stated that both miscreants opened the door - Another contradiction that there are 3 miscreants however P.W. 2 clearly stated only two miscreants in the incident - contradiction corrodes the credibility of witness - no reliance can be placed (Para 22)

C. Criminal Law-Indian Penal Code (45 of 1860) - Section 393 - Attempt to commit robbery - Allegations that accused persons intended/tried to snatch anklets from the feet of victim however on hearing noise one miscreant fired two rounds - Held - In

the present case, alleged gun shot fired by the appellants do not intend to carry away any property as no property was taken away by the appellants - not a case u/s 393 IPC (Para 30)

Appeal allowed (E-5)

List of cases cited :

1.Lal Man Vs St. of U.P. 1990 0 Supreme Court (All) 1871

2.Jaggi & ors Vs St. of U.P. 2014 (2) Law Suit (All) 4219

3.Thulia Kali Vs St. of TN AIR 1973 SC 501

4.Dalip Singh & ors. Vs St. of Pun AIR 1953 SC 364

5.Masalti & ors. Vs St. of U.P. AIR 1965 SC 202

6.Guli Chand & ors. Vs St. of Raj. 1974 (3) SCC 698

7.Vadivelu Thevar Vs St. of Mad AIR 1975SC 614

8.Israr Vs St. of U.P. 2005(51) ACC 113

9.Galivenkataiah Vs St. of A.P. 2008 (60) ACC 370

10.St. of AP Vs S. Rayappa & ors. 2006 (1) AAR 259 (SC)

11.Ranganayaki Vs St. (2004) 12 SCC 521

12.Mangaru & ors. Vs St. of U.P. 2008 (62) ACC 40

(Delivered by Hon'ble Suresh Kumar Gupta, J.

1. Heard learned counsel for the appellant and learned A.G.A and perused the record.

2. This criminal appeal has been preferred by appellants-Hargovind and Sri Kishan against the judgment and order dated 30.01.1991, passed by Special Judge (DAA)/ 6th Additional District Judge, Etawah, in S.T. No. 45-46 of 1990 (State Vs. Hargovind and another), whereby convicting the appellant under Section 393 IPC, sentence them to 4 years rigorous imprisonment each and fine of Rs. 500/- each and in default of payment of fine period of 3 months further rigorous imprisonment.

3. Brief facts of this case are as follows:-

4. An FIR Ext. Ka-1 was lodged by Megh Singh and scribed by constable Rajendra Singh S/o Megh Singh (complainant) that in the intervening night on 3/4 .08.1988 at about 11.30 p.m. first informant Megh Singh was sleeping inside the house below the thatch and his son Ram Ratan Singh was sleeping in the gallery of the house and wife of Ram Ratan, Smt. Mahadevi was sleeping in the courtyard and the lantern was lightning in the house and a lamp was lightning near the door and that time Ram Ratan kept torch. On fateful night, three miscreants entered into the house and reached the courtyard and that time accused tried to snatch anklets (Toria), then his brother's wife shouted loudly then one miscreant fired two rounds. Meanwhile, Ram Ratan opened the main door and flashed the torch on miscreants and exhorted them and after hearing the noise and sound of fire complainant also woke up then miscreants fled away from the place of occurrence, immediately and that time villagers namely; Badshah, Suraj Pal and Bhoop Singh etc. armed with *lathi* and torch reached on the spot and identified the miscreants Hargovind and Shri Kishan, who armed with country made pistol and one miscreants could not be identified. On

this allegation, the FIR was lodged by first informant Megh Singh at P.S. Chauvia, District Etawah, under sections 393/397 IPC.

5. After lodging the FIR investigation of the case was entrusted to inspector K.L. Chaudhary, who conducted investigation of this case, during investigation, Investigating Officer on pointing out of complainant prepared site plan Ext. Ka-7. Investigating Officer also recorded the statement of witnesses after completing the formalities of investigation Investigating Officer submitted charge-sheet Ext. Ka 5 against the appellants Hargovind and Sri Kishan under section 393/397 IPC.

6. After filing of the charge-sheet, the charge against appellants Harigovind and Sri Kishan was framed under sections 393/397 IPC by Shri Raj Singh, Spl. Judge (D.A.A.)/ Additional Sessions Judge, Etawah on 02.03.1989.

7. After framing of charge, charge was read over to accused. Accused denied the charge and claimed to be tried.

8. In order to substantiate the charge levelled against the appellants, prosecution examined P.W. 1 complainant Megh Singh, P.W. 2 Badshah, eyewitness, P.W. 3 Smt. Maha Devi eyewitness and victim, P.W. 4 Jai Prakash, who proved FIR Exh. Ka-1, the GD *rapat* No. 15 Ext. Ka 2, recovery mimo of empty cartridges Ext. Ka-3, and also proved the G.D. No. 25 05/05/88 time 20.5 arrest of the accused Hargovind and empty cartridges as material Ext. 2 and 3. P.W. 5 Sub-Inspector K.L. Chaudhary, investigating officer, who has submitted charge-sheet dated 31.08.1988 and 07.12.1988, who proved the same as Ext. Ka 5 and 6, Site plan as Ext. Ka-7, recovery and *Supardigi* Memo of torch and Latern as Ext. Ka-8.

9. After conclusion of evidence of prosecution witnesses, trial court has recorded the statements of appellants under section 313 IPC, in which the appellants-accused denied the charge levelled against them and stated that they have been falsely implicated in this case due to enmity. The witness further stated in his testimony that the marriage of his elder brother was solemnized by Jai Devi, elder sister of witness Maha Devi. He further stated that when the marriage proposal of Maha Devi was given to the first informant Megh Singh, then elder brother of accused objected this marriage and due to this reason false case was lodged by the first informant.

10. Learned trial court after hearing the parties convicted the appellants under section 393 IPC as aforesaid.

11. Learned counsel for the appellants has submitted that they have been falsely implicated in this case on the basis of surmise and conjuncture. The evidence adduced by prosecution is deficient. Learned trial court has wrongly convicted the appellants . He further submitted the following points:-

(1) Learned counsel for the appellants submitted that the appellants Hargovind and Sri Kishan are real brother. He further submitted that Jai Veer and appellants Hargovind and Shri Kishan are real brother and Jai Devi is the wife of Jai Veer Singh. P.W. 3 Mahadevi is the sister of Jai Devi, wife of Jai Veer Singh. Jai Veer Singh is the elder brother of appellants. He further submitted that when the marriage proposal of Maha Devi was

given to the first informant Megh Singh, then elder brother of appellants objected this marriage and due to this enmity false case was lodged by the first informant against the appellants Hargovind and Sri Kishan due to enmity.

(2) Time of incident is 03.08.1988 at 11.30 mid night and the FIR was lodged against the appellants on 04.08.1988 at 3.30 p.m. FIR was lodged after 16 hours of the incident, while the distance from the police station to the place of occurrence is about 8 kms. Due to delay of lodging the FIR, FIR looses spontaneity. FIR was lodged with due deliberation and consultation hence, no reliance can be placed in the FIR.

3. Learned counsel for the appellants has also submitted that only 3 witnesses of the fact were examined by the prosecution. All the 3 witnesses are relative and interested witnesses and no independent witnesses of the locality on the spot was produced by the prosecution, so the non production of the independent witnesses are totally belie the prosecution case. So no reliance placed on the testimony of the witnesses of fact.

(4) Prosecution is failed to assigned any motive against the appellants.

(5) Both the appellants and the first informant of the same village and this also not believable, but in spite of that the accused persons had not tried to conceal their identity which is very unnatural and if, at all they have planted to robbery at least they would have hided their face, so nobody was recognized the same. Learned counsel for the appellant has also submitted that no offence under section 393 IPC is made out.

(6) There are several material contradictions in the statement of examined witness. This aspect is also corrodes the credibility of witness. So no reliance placed on the testimony of the witnesses of fact. In support of this contention, learned counsel for the appellants has relied upon the following judgment:-

1. Lal Man vs. State of U.P. 1990 0 Supreme Court (All) 1871 and

2. Jaggi and others vs. State of U.P. 2014 (2) Law Suit (All) 4219.

12. Learned AGA has vehemently opposed the prayer and submitted that the learned trial court after appreciating the evidence rightly convicted the appellants. Next submission is that the accused were known person and they are clearly identified by the witnesses who present on the spot and although the incident took place in the night but the appellants are the resident of same village. There was sufficient light to identify the known persons of the villagers. It is also submitted that two empty cartridge were recovered from the place of occurrence, which is delivered by the first informant to the police station regarding which the recovery memo was prepared by the police at the time of lodging of the FIR and recovery memo Ext. Ka-2 is duly proved by prosecution.

13. Section 393 IPC reads as under:-

*"**Section 393** in The Indian Penal Code. **393**. Attempt to commit robbery. -- Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine."*

In this Session trial appellants were convicted under section 393 IPC for attempt to commit robbery.

14. **Section 390 Indian Panel Code reads as under:-**

"390. Robbery.--In all robbery there is either theft or extortion. When theft is robbery.--Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. When extortion is robbery.--Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted. Explanation.--The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint."

15. Whether the offence under section 393 is made out against the appellants or not will be discussed after considering the other argument raised by the appellants.

16. So far as regard one of the argument of the appellants is that the FIR is 16 hours delayed, but there is no plausible explanation regarding delay of the FIR on behalf of prosecution.

17. In criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the Court at the earliest instance. That is why if there is delay in either coming before the police or before the Court, the Courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case.

18. In **Thulia Kali v. The State of Tamil Nadu (AIR 1973 SC 501)**, it was held that the delay in lodging the first information report quite often results in embellishment as a result of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation.

19. In this case although the prosecution tried to explain the delay that P.W. 1 is rustic and his son Rajendra Kumar who was posted at the time of incident as police constable in the police line, Etah. P.W. 1 lodged the FIR with the consultation of his son Rajendra Kumar. Although the prosecution has tried to explain the delay but on perusal of entire circumstances the delay is not satisfactorily explained so adverse inference is to be drawn in this case. This possibility cannot be ruled out that FIR was lodged by the complainant with due deliberation and consultation.

20. Another argument of learned counsel for the appellants is that three relatives and interested witnesses were examined by the prosecution and no independent witness of the locality was produced by the prosecution and due to

this, whole prosecution of the case create suspicion. So far as regards the evidentiary value of related and interested witnesses are concerned, in the case of **Dalip Singh and others vs. State of Punjab, (AIR 1953 SC 364)**, it has been laid down as under by the Hon'ble Apex Court:-

No doubt, the evidence of related and interested witnesses has to be scrutinized with caution.

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts."

Observations of the Hon'ble Apex Court **Masalti and others vs. State of U.P., A.I.R. 1965 SC 202**, are worth mentioning:-

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how such evidence should be appreciated. Judicial approach has to be cautions in dealing with such evidence, but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

The above decision has been followed in **Guli Chand and others vs. State of Rajasthan, 1974 (3) SCC 698**, in which **Vadivelu Thevar vs. State of Madras, AIR 1975 SC 614** was also relied upon. The following observations were made by the Hon'ble Apex Court in **Israr vs. State of U.P., [2005(51) ACC 113]** in para-12 of the judgement are also important:-

".... Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible."

21. The position has been highlighted by Apex Court in the case of **Galivenkataiah vs. State of A.P., 2008 (60) ACC 370**, in which reference has been made to some other cases also. The Hon'ble Supreme Court in the case of **State of Andhra Pradesh vs. S. Rayappa and others, 2006 (1) AAR 259 (SC)** dealing the evidence of related/interested witnesses has observed as under:-

"..... By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must

have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons.:

In para-8 their Lordships have further observed:

"The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased, they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously..."

22. The relative witness is not necessarily an interested witness. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously. So on the basis of the interested witnesses of prosecution case is not thrown out that no independent witness examined by the court.

23. One of the argument of learned counsel for the appellants is that prosecution failed to assign any motive of alleged incident. So, the conviction could not upheld due to observe of motive.

24. The Hon'ble Apex Court in the case of **Ranganayaki vs. State, (2004) 12 SCC 521** has held as under:

"The motive for committing a criminal act is generally a difficult area for the prosecution. One cannot normally see into the mind of anther. Motive is in the mind which impels a man to do a particular act. Such impulsion need not necessarily be proportionally grave to do grave crimes. Many murders have been committed without any known or prominent motive. It is quite possible that the aforesaid imputing factor would remain undiscovered."

2. The Hon'ble Apex Court in **Mangaru and others vs. State of U.P., 2008 (62) ACC 40** has laid down that motive may be of importance in the cases of circumstantial evidence and it is well settled principle of law that in the case of direct evidence, motive looses its value.

3. In the present case in hand prosecution could not establish some motive of this incident hence this case is fully based on direct evidence so motive looses its value, hence the motive in this case is not much consequence.

25. One of the argument of learned counsel for the appellants is that there are several material contradictions in the statement of the witnesses examined by the prosecution. Due to material contradiction prosecution is utterly failed to prove the case.

26. Learned counsel for the appellant pointed out several contradictions. One of the contradiction is pointed out by the appellants is that as per first information report the main door was opened by Ram Ratan. P.W. 3 Mahadevi stated in her statement that both the miscreants opened the door and fled away from the spot. Another contradiction is also pointed out that there are 3 miscreants, one miscreant was unknown and P.W. 2 has clearly stated that only two miscreants in this incident.

27. It is also pointed out by learned counsel for the appellants is that P.W. 2 in his statement has stated that he create the

pressure then the miscreants made fire while they were running. P.W. 1 and P.W. 3 clearly stated that named appellants fired inside the house. It is also submitted that no fire mark was present in the wall, then the story is concocted and fabricated.

28. There are material contradictions which is pointed out by appellants. These material contradictions are also corrodes in the statements of witnesses examined by the prosecution.

29. Learned counsel for the appellants is also submitted that this point is also ruled out with the false implication of the accused persons. It is argued by learned counsel for the appellants that the appellants were known to the complainant and other witnesses, but in spite of that two accused persons had not tried to conceal their identity, which is very unnatural and if at all they had a plan to commit robbery at least they would have masked their face so that nobody could recognize them in the present case. All the examined witnesses of the fact had deposed that all the miscreants were having open face and did not try to conceal their identity, so this creates doubt upon prosecution story.

30. Now the question raised whether the offence under section 393 IPC is made out against the appellants or not. As mentioned in the FIR that the accused persons had intended to take away anklet (toria) from the feet of Smt. Mahadevi. On perusal of the statement of Smt. Mahadevi, P.W.3, its reveals in her statement that the accused persons have touched anklet (toria), but in their statements it is clearly stated that they have touched her feet. In the present case, if any alleged gun shot fired by the appellants do not intend to carry away any property as no property was taken away by the appellants so prima facie it transpires that this is not a case under the preview of Section 393 IPC. It is surprising that due to such fire no injury cause to any person. It is also surprising that several persons gathered on the spot, but nobody tried to apprehend the appellants on the spot, surprisingly both the appellants escape away from spot safely, so the possibility of false implication is not ruled out in this case.

31. Therefore, looking into the entire facts and circumstances of the case, this Court is of the view that the prosecution has failed to prove its case beyond shadow of doubt. The present appeal is liable to be allowed and the judgment and order of the learned trial court for convicting and sentencing the appellants is liable to be set aside.

32. Accordingly, the appeal is allowed. The judgment and order dated 30.01.1991 passed by Special Judge (DAA)/ 6th Additional District Judge, Etawah, for convicting and sentencing the appellants is set aside. The appellants are **acquitted** under section 393 IPC.

33. Appeal against the appellants is hereby **allowed.**

34. The appellants are on bail. There is no need for their surrender. Their bail bonds are canceled and sureties are hereby discharged.

35. Office is directed to transmit the certified copy of this order to the court below along with the lower court record, for necessary compliance.

(2020)03-05ILR A98
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2020

BEFORE
THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 175 of 1992

Prem Pal ...Appellant (In Jail)
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri S.S. Sharma, Sri Sanjay Kumar Chaurasia, Sri Shah Om Prakash Agarwal

Counsel for the Respondents:
A.G.A.

Criminal law- Drugs and Cosmetics Act (23 of 1940)- Section18, S.19(3)(b) - Sale of adulterous drug - Benefit of defence - Once a retailer / seller - establish that he bought the drug / cosmetic from a licensed manufacturer or distributor & stored them properly - then the retailer / seller has only to exercise reasonable diligence as expected from an ordinary person indulging in that particular trade – However where the drug appears to be misbranded / sub-standard to even a naked eye then it may afford no protection to the retailer / seller that he purchased the drug / cosmetic from a licensed manufacturer and had stored it properly (Para 13)

Accused - Appellant, a retailer established that he acquired the drug from a duly licensed manufacturer - and he could not with reasonable diligence, have ascertained that the drug in question, contravened S. 18 - he is entitled to the defence u/s 19(3) of the Act - no evidence that the accused appellant had any knowledge that the drug in question was adulterated - appellant discontinued the sale of the drug the moment he came to know of the drug being spurious after receipt of the test report - conviction u/s Section 275 IPC illegal – Conviction set aside

Appeal allowed (E-5)

(Delivered by Hon'ble Pankaj Naqvi, J.)

This criminal appeal is preferred against the judgment and order dated 21.1.1992 passed by VIth Additional Sessions Judge, Aligarh in S.T. No. 78 of 1991 (State Vs. Prem Pal Varshney) convicting/ sentencing the appellant under Section 275 IPC/Section 27 of Drugs and Cosmetics Act, 1940 to life with fine of Rs.1 lac and a default sentence of 5 years R.I.

(a) PW-1, a Drug Inspector on 12.5.1982 inspected the shop of the appellant, namely M/s National Medical Store, wherein he purchased 5 tables of DEXAMETHASONE (Batch No.38 D/M May 81) vide Cash Memo (Ex.Ka 1), for the purpose of sample/ test survey. PW-1 sent the said sample to Central Drug Laboratory, Calcutta (hereinafter referred to C.D.L.), where it was received on 14.05.1982. The C.D.L. submitted the test report dated 04.06.82 (Ex.Ka 4) disclosing the sample as spurious and that it did not contain DEXAMETHASONE.

(b) PW-1 on 26.6.1982, again inspected the shop of the appellant and purchased vide a cash memo (Exbt Ka-5) 47 tablets of DEXAMETHASONE (Batch No. 38D/M May 81). Out of 47 tablets, PW-1 prepared 4 samples, i.e, 20+9+9+9 and got them sealed in the presence of appellant, duly signed by both of them, appellant was intimated of the same on Form 17 of the same date. PW-1 sent the sample containing 20 tablets to the C.D.L, vide a memo dated 28.06.82 to obtain a test

report, which was received by the laboratory on 20.7.1982.

(c) The Government Analyst, C.D.L, Calcutta submitted a report dated 19.8.1982 (Exbt. Ka-10) disclosing that the sample does not contain DEXAMETHASONE and as also the sample is misbranded as per Section 17(f) and adulterated as per Section 17B(eii) of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as the Act). The report dated 19.8.1982 was sent by Registered AD/ Post to the accused / appellant on 28.8.1982 (Ex.Ka-16). The accused / appellant vide his registered / AD Post reply dated 25.9.1982 (Exbt. Ka-18), inter alia controverted the report alleging that the said medicines were purchased from M/s Bharat Pharma and Chemicals, A-5 of Industrial Estate, Hathras under their bill no. 35 dated 22.4.1982. He also requested for a fresh analysis of a sample from a sealed bottle in his possession.

2. PW-1 on above allegations filed a statutory complaint under Section 27 (a), 27(6) read with section 18a(i), 18a(ii), 18a(iia) and 18a(vi) of the Act, on 21.9.1983 before the Special Court. The trial court taking cognizance of an offence under Section 275 of the IPC read with U.P. Act 47 of 1975, as also under Section 18(a)(i), (ii), (iii) and 18(c) of the Act proceeded against the appellant as well as the manufacturer. It appears that the manufacturer approached this Court in A-482 no. 10644 of 1991 and obtained an interim order on 11.10.1991, whereby proceedings of the trial court were stayed against him. The trial of the manufacturer stood segregated.

3. The prosecution examined PW-1, in order to establish its case. The appellant denied the allegations and contended that the alleged sample was purchased from M/s Bharat Pharma and Chemicals, Hathras, a Licensed firm. He examined himself as DW-1.

4. The trial court after considering the evidence was of the view that as the appellant failed to discharge the burden under Section 19(3)(b) of the Act, he is not entitled to the defence available therein, proceeded to convict and sentence him as above.

5. Heard Sri S.S. Sharma, learned counsel for the appellant and Sri A.N. Mulla, the learned A.G.A, assisted by Dr. S.B. Maurya, the learned A.G.A-I.

6. It is submitted by learned counsel for the appellant that as per the case of the prosecution appellant was a retailer, sample in question was sold to PW-1 in the same condition as it was received from the manufacturer against an invoice (CST no. HT717 and UPST no. HT2934) (Ext. Ka-7). He submits that as the appellant did not and could not ascertain that the drug contravened the provisions of Section 18, even after exercising reasonable diligence, he cannot be convicted under Section 27 of the Act. He finally submitted that the conviction under Section 275 IPC is also not sustainable as the appellant discontinued the sale of the drug the moment he came to know of the drug being spurious.

7. The learned A.G.A, controverted the submissions by submitting that the appellant cannot be absolved from his responsibility, merely on the premise that he held a valid license or that he purchased the said medicine from a licensed manufacturer as he had failed to exercise

reasonable/ diligence to ascertain that the drug was spurious / misbranded. He further submitted that it was a life saving drug, offence is sufficiently established both under the Drugs Act as also under IPC and no leniency can be shown.

8. The appellant, a retailer, is charged for an offence under Section 18 of the Act on the basis of a test report dated 19.8.1982, duly confronted to him. Section 18 of the Act, insofar relevant is quoted hereinbelow:

"Prohibition of manufacture and sale of certain drugs and cosmetics. --From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf--

(a) manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale,] or distribute--

(i) any drug which is not of a standard quality, or is misbranded, adulterated or spurious;

(ii) any cosmetic which is not of a standard quality, or is misbranded, adulterated or spurious;

(iii) any patent or proprietary medicine, unless there is displayed in the prescribed manner on the label or container thereof the true formula or list of active ingredients contained in it together with the quantities, thereof;

(iv) any drug which by means of any statement design or device accompanying it or by any other means, purports or claims to prevent, cure or mitigate any such disease or ailment, or to have any such other effect as may be prescribed;

(v) any cosmetic containing any ingredient which may render it unsafe or harmful for use under the directions indicated or recommended;

(vi) any drug or cosmetic in contravention of any of the provisions of this Chapter or any rule made thereunder"

9. The plea of defence available to an accused, not being manufacturer or his agent for the distribution thereof, in a prosecution under Section 18 of the Act, is provided under Section 19 of the Act, which is quoted hereunder:

"Section 19. Pleas. - (1) Save as hereinafter provided in this section, it shall be no defence in a prosecution under this Chapter to prove merely that the accused was ignorant of the nature, substance or quality of the drug or cosmetic, in respect of which, the offence has been committed or of the circumstances of its manufacture or import, or that a purchaser, having bought only for the purpose of test or analysis, has not been prejudiced by the sale.

(2) For the purposes of section 18 a drug shall not be deemed to be misbranded or adulterated or spurious or to be below standard quality nor shall a cosmetic be deemed to be misbranded or to be below standard quality only by reason of the fact that -

(a) There has been added thereto some innocuous substance or ingredient because the same is required for the manufacture or preparation of the drug or

cosmetic as an article of commerce in a state fit for carriage or consumption, and not to increase the bulk, weight or measure of the drug or cosmetic or to conceal its inferior quality or other defects ; or

(b) In the process of manufacture, preparation or conveyance some extraneous substance has unavoidably become intermixed with it; provided that this clause shall not apply in relation to any sale or distribution of the drug or cosmetic occurring after the vendor or distributor became aware of such intermixture.

(3) A person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall not be liable for a contravention of section 18 if he proves -

(a) That he acquired the drug or cosmetic from a duly licensed manufacturer, distributor or dealer thereof ;

(b) That he did not know and could not, with reasonable diligence, have ascertained that the drug or cosmetic in any way contravened the provisions of that section; and

(c) that the drug or cosmetic, while in his possession, was properly stored and remained in the same state as when he acquired it."

10. Sub-section (1) of Section 19 provides that the accused cannot, as a defence, plead ignorance to the nature, substance or quality of the drug involved in the commission of the offence, neither can he plead that he was unaware, or how was it manufactured / imported, nor can he plead that the purchaser suffered no prejudice / loss. Sub-section (3) of Section 19 is in the nature of an exception to Sub-section (1) of Section 19. It applies only when the accused is neither a manufacturer nor his agent for distribution. The said exception provides that such a person, shall not be held liable for the contravention of Section 18, but only when he proves that he acquired the drug or cosmetic from a duly licensed manufacturer, distributor or dealer thereof and even after exercising reasonable diligence, he did not know and could not, have ascertained that the said drug or cosmetic in any way contravened the provisions of Section 18 and that the said drug or cosmetic was properly stored and remained in the same state as he acquired them.

11. Thus, the only moot point in this appeal is as to whether the appellant who is neither a manufacturer nor his agent, succeeded to set up and establish his defence under Section 19(3) of the Act or not.

12. It is admitted case of the prosecution that DEXAMETHASONE was purchased from the appellant, a valid license holder, vide cash memo (Ext. Ka-5) dated 26.6.1982.

13. The term "reasonable diligence" provided under Section 19(3)(b) of the Act will have to be interpreted in the light of the context as also the person, who is expected to exercise reasonable diligence. We are dealing with a statute, where adulteration / misbranding have to be seriously dealt with but while doing so it be also ensured that the burden which is placed on a retailer / seller is not such onerous or cumbersome that it becomes impossible for retailer/ seller to transact normal business. The law does not expect

that the retailer / seller would microscopically examine each and every drug / cosmetic or to conduct any other test to authenticate the genuineness of the drug / cosmetic. Once a retailer / seller has established that he bought the drug / cosmetic from a licensed manufacturer or distributor thereof, and stored them properly then the retailer / seller has only to exercise reasonable diligence as expected from an ordinary person indulging in that particular trade. For example, where the drug / cosmetic appears to be misbranded / sub-standard to even a naked eye then it may afford no protection to the retailer / seller that he purchased the drug / cosmetic from a licensed manufacturer and had stored it properly.

14. The trial court refused to give benefit of defence under Section 19(3)(b) on the following grounds:

I) The accused went on selling the drug in question after 5 tablets of DEXAMETHASONE were purchased from the appellant on 12.5.1982 with batch no. 38 D/M May 81 and the report of the CDL, Calcutta dated 4.6.1982 indicated the drug to be spurious.

(II) No complaint to higher authorities against the manufacturer after the receipt of first report dated 4.6.1982.

(III) Warranty was executed by the son of manufaturer in the absence of any role in the proprietorship firm.

15. PW-1 nowhere alleged that the report of the first sample, purchased on 12.5.1982 was ever confronted to the appellant. The appellant under Section 313 CrPC vide Question no.9 specifically denied the receipt of any report dated 4.6.1982 (Ext. Ka-4). The burden was upon the prosecution to establish the service of the report dated 4.6.1982, which it failed to discharge. Thus the finding of the trial court that despite service of the test report dated 4.6.1982, the appellant continued to sell the drug in question, would demonstrate lack of reasonable care and due diligence disentitling him of the defence under Section 19(3)(b) being perverse stands vitiated.

16. The second ground also cannot be sustained, as even after disclosure by the appellant to PW-1 at the first available opportunity that he purchased the drug in question from a licensed manufacturer, i.e, M/s Bharat Pharma and Chemicals, yet no effort was made by PW-1 in seizing the drugs or even inspecting the premises of the manufacturer, rather after an unexplained delay of nearly a month, the concerned officials on 22.7.1982 inspected the premises of the manufacturer. The trial court's view that the lapse on the part of the investigating authorities would not enure to the benefit of accused so as to claim available defence, cannot be sustained as once an accused discloses the name of the manufacturer to the Drug Inspector, then merely because the accused did not complain to higher authorities would not disentitle him of the defence available under Section 19(3) of the Act.

17. The third ground also fails for the reason that the manufacturer was running a proprietorship concern and the deed of warranty was not executed by an outsider but by the son of the manufacturer. Further even assuming that the deed of warranty was not signed by the competent person, yet the same would not deprive the appellant of the defence under Section 19(3)(b), as merely because of this reason,

it cannot be said that the appellant knew or could have ascertained that the drug was in contravention of the provisions of Section 18 of the Act. Thus, failure to obtain a warranty from the manufacturer would not ipso facto mean that the accused failed to exercise reasonable diligence.

18. We on above evidence, are of the considered view that once the appellant established that he acquired the drug from a duly licensed manufacturer, whose identity was disclosed to PW-1, at the first available opportunity, he did not know and could not with reasonable diligence, have ascertained that the drug in question, in any way contravened the provisions of Section 18, coupled with the fact that it was not the case of the prosecution that the drug was not properly stored, thus he is entitled to the defence available under Section 19(3) of the Act, and the view taken by the trial court to the contrary cannot be sustained. Insofar, the conviction/ sentence under Section 275 IPC is concerned, there is no evidence that the accused appellant had any knowledge that the drug in question was adulterated. It has come in evidence that after receipt of the test report dated 26.6.1982, which was the basis of the prosecution, the appellant stopped the sale of the drug in question.

Thus, in view of above, the appeal is **allowed**. Conviction / sentence of the appellant is set aside. The appellant is on bail. His bail bond stands cancelled, sureties discharged.

Let a copy of this judgment along with record be sent to the learned Sessions Judge, concerned for ensuring compliance within 2 months under the intimation to this Court.

(2020)03-05ILR A103
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Capital Case No. 198 of 2018
With
Reference No. 03 of 2018

Najeem Miyan ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Ajay Kumar Srivastava, Sri Pawan Singh Pundir (A.C.), Sri Gopal Swaroop Chaturvedi(A.C.), Sri S.M. Ayyaz Ali, Sri Suresh Singh

Counsel for the Opposite Party:
Sri J.K. Upadhyay, A.G.A., Sri Ajay Kumar Srivastava

(A) Criminal Law-Indian Penal Code (45 of 1860)-Section 302-Section 377-Section 511 - Protection of Children From Sexual Offences Act (32 of 2012) , S.3, S.4 - Murder - accused kidnap a six year boy - made an attempt to have unnatural sex with him - when deceased refused he was brutally killed by cutting into pieces - Conviction proper (Para 21)

Criminal law- Indian Penal Code (45 of 1860)- Section 52, 302 - Murder - Imposition of sentence - Court are required to scrutinize the case minutely to find out whether the case falls under the category of "rarest of the rare case" - whether imposition of death penalty, which is an exception, would be the only appropriate & meaningful sentence and whether imprisonment for life which is the rule would not be adequate and would not meet the ends of justice – a just balance has to be struck between the aggravating and the mitigating circumstances (Para 34)

Allegations of murder against accused - no evidence on record to establish that the accused appellant committed pre-planned and pre-meditated murder of a minor child - accused-appellant suffering from mental ailment 'Unspecified Non-Organic Psychosis'- *Held* - the manner in which crime is committed by knife blows is brutal, cruel but there is no evidence to suggest as to what could be the reason for the appellant to commit the said offence - This could be on account of frustration, mental stress or because of emotional disorder which would be the mitigating circumstances - Hence death sentence modified to life imprisonment till end of life without remission (Para 38, 40)

Appeal Dismissed (E-5)

List of cases cited :

1. Bachan Singh Vs St. of Punj. AIR 1980 SC 898

2. Machhi Singh Vs St. of Punj. (1983) 3 SCC 470

3. Ramnaresh & ors. Vs St. of Chhattisgarh (2012) 4 SCC 257

4. Sk Abdul Hamid Vs St. of MP (1998) 3 SCC 188

5. Dharam Deo Yadav Vs St. of UP (2014) 5 SCC 509

6. Kalu Khan Vs St. of Raj. (2015) 16 SCC 492

7. Allauddin Mian Vs St. of Bihar (1989) 3 SCC 5

8. A. Devendran Vs St. of T.N. (1997) 11 SCC 720

9. Om Prakash Vs St. of Har. (1999) 3 SCC 19

10. Accused 'X' Vs St. of Mah., reported in (2019) 7 SCC 1

(Delivered by Hon'ble Pritinker Diwaker, J.).

1. This death reference was made to this Court under Section 366 of the Criminal Procedure Code, 1973 (in short 'Cr PC') for confirmation of sentence awarded to the appellant. The capital case and the death reference are heard together and this judgment will govern both the capital case as well as the reference.

2. A large number of cases in recent times coming before the Courts of law involving rape and murder of young boys/girls, is a matter of concern. In the instant case, boy was about six years of age, who was the victim of sexual assault and animal lust of the accused appellant, he was not only sexually assaulted but was murdered by the accused appellant.

3. This death reference and the capital case arise out of the judgment and order dated 10.4.2018 passed by the Court of Additional Sessions Judge/Court No.1, Pilibhit in Special Sessions Trial No.51/2017 in which, accused/appellant herein was tried, found guilty, convicted and sentenced to undergo death sentence and to pay a fine of Rs.25,000/- for the offence punishable under Section 302 of IPC, to undergo rigorous imprisonment of ten years and to pay a fine of Rs.10,000/- for the offence punishable under Section 377/511 of IPC and to undergo life imprisonment and a fine of Rs.10,000/- for the offence punishable under Section 3/4 of POCSO Act. In default of payment of fine, he shall undergo two years' rigorous imprisonment; one year's rigorous imprisonment and one year's rigorous imprisonment under Sections 302, 377/511 of IPC and Section 3/4 of POCSO Act respectively.

4. In the present case, deceased was a young boy aged about six years, who went missing on 21.2.2017 from his house. He was searched immediately and at about 12:30 in the afternoon, (PW-3) Laik

Ahmad, informed the informant (PW-1) Moin (uncle of the deceased) that he saw accused-appellant Nazeem Mian, carrying Monish (deceased) to the house of Mobin in his arms. Informant immediately rushed to the house in question, and saw the accused-appellant cutting the body of Monish in pieces. Hue and cry was raised by him and hearing the same, number of his neighbours including (PW-2) Uvash reached to the place of occurrence; information was also given to the police who also immediately reached to the place of occurrence; entered the house of Mobin and the accused-appellant was caught red handed. At 12:45 in the afternoon, beheaded dead body of the deceased was found and the body was cut in several pieces, even internal organs of the body were taken out from the body of the deceased which were clustered near the dead body. The crowd gathered there, made an attempt to catch the accused-appellant, but upon information, police made an attempt to make the situation normal. During this, villagers had closed their shops and there was total chaos in the village. Police brought the accused-appellant along with them to the police station and on the basis of written report Ex.Ka.1 lodged by (PW-1) Moin, at 1:30 pm FIR Ex.Ka.16 was registered against the accused-appellant under Sections 377 and 302 of IPC read with Section 3/4 of POCSO Act.

Inquest on the dead body of the deceased was conducted, vide Ex.Ka.6 on 21.2.2017; photograph of the dead body was marked as Material Ex.1. and the body was sent for postmortem which was conducted on the same day, vide Ex.Ka.4 by (PW-4) Dr S K Chawla.

As per Autopsy Surgeon, following injuries were noticed on the body of the deceased:

Injuries - all Ante-mortem:

External Injuries:

1. Deep Hair singed out with blood, Head chopped out from body at level of C-1 vertebra, Large vessels, Trachea, Hyoid bone not traceable.

2. A vertical midline. Incised wound 38 cm x 5 cm in the midline from the level of neck to the genetalia and the intervening gluteal region.

3. On the ventral side skin peeled out to depth vertebra and ribeage below upto the gluteal region.

Internal Injuries:

4. All internal organs viz-a-viz Heart, spleen, liver, small and large intestines separated out and kept in cluster. Both kidneys, attached in place.

5. Internal organs absolutely pale with occasional clots on the body.

6. Missed organs - Intercostal muscles, fatty tissues. Alimentary canal with Rectum & Anal canal, Larynx, Hyoid bone, Trachea- Oesophagus also not traceable.

Cause of Death

Death as a result of Shock and Haemorrhage due to syncope, due to ante-mortem injuries.

5. While framing charge, trial Judge has framed charge against the accused-appellant under Sections 377 and 302 of IPC and Section 3/4 of POCSO Act.

6. So as to hold accused appellant guilty, prosecution has examined seven witnesses. Statement of the accused-appellant was recorded under Section 313 of Cr PC in which, he pleaded his innocence and false implication.

7. By the impugned judgment and order, the trial Judge has convicted the appellant and sentenced, as mentioned in

paragraph-3 of this judgment. Hence this appeal.

8. Counsel for the appellant submits:-

(i) that the evidence of last seen by (PW-3) Laik Ahmad is not reliable and it appears that he has falsely implicated the accused appellant.

(ii) that a very improbable story has been put forth by the prosecution where it is alleged that when (PW-1) Moin and (PW-2) Uvash and other villagers, including the police reached to the house of Mobin, accused-appellant was still cutting the body of the deceased in pieces. It has been argued that no normal man would commit such heinous offence and it appears that the deceased was murdered by some third person. Counsel for the accused appellant submits that unfortunately, accused-appellant, who is an innocent and simple villager, was not mentally sound and he has been falsely implicated in the case.

(iii) that there is no conclusive and clinching evidence showing the involvement of the accused-appellant in the commission of crime under Section 377 of IPC; even postmortem report does not suggest the same.

(iv) that the accused-appellant is suffering from mental ailment, namely, 'Unspecified Non-Organic Psychosis' (F-29/0).

9. On the other hand, learned State Counsel submits:

(i) that the trial Court is fully justified in awarding death sentence to the accused-appellant.

(ii) that a young boy, aged about six year, has been done to death by the accused-appellant for no fault of him.

(iii) that upon receiving information of last seen by (PW-3) Laik Ahmad, complainant (PW-1) Moin and (PW-2) Uvash reached to the house of Mobin and there, they were perplexed to see the accused-appellant sitting with the pieces of dead body of the deceased.

(iv) that while referring to the photograph of the dead body, Material Ex.1, it has been argued that the offence has been committed in such a brutal manner where the accused- appellant had taken out the internal organs of the dead body, including heart, spleen, small and large intestines, liver etc. Even Head of the deceased was chopped by the accused-appellant and kept near the dead body.

(v) that after receiving information, police party reached to the place of occurrence and they also saw the brutality done by the accused-appellant in killing the deceased.

(vi) that in 313 Cr PC statement, instead of offering any defence, most of the questions have been admitted by the accused-appellant and thereafter, nothing remains in favour of the accused-appellant and only conclusion is the award of death sentence.

(vii) that from the spot, one knife and one blade was seized and as per FSL, blood was found on both these articles, whereas human blood was found on the knife.

(viii) that taking into consideration the brutality of the offence; age of the victim and acts of perversion on the person of the victim, cumulatively, the sentence awarded by the trial Court is just and proper and does not call for any interference by this Court in its appellate jurisdiction.

(ix) that the accused appellant was found sitting near the dead body of the deceased and blood was also found on his mouth and hands and thus, possibility that the accused appellant might have eaten certain parts of the body, which have been found missing, cannot be ruled out.

(x) that when the accused appellant could not succeed in committing unnatural sex with the deceased, he killed him and this fact, has been admitted by the accused appellant in his 313 Cr PC statement while answering question no.8.

10. Learned State Counsel has also produced a recent medical report of the accused-appellant dated 24.11.2019, mentioning therein that the accused-appellant is not suffering from any mental ailment and is completely fit. Medical report dated 24.11.22019 is given to learned counsel for the defence and is taken on record.

11. (PW-1) Moin, is an uncle of deceased Monish. He states that he knew the accused appellant. On 21.2.2017, his nephew Monish went missing; he was searched by him and other persons and at about 12:30 in the afternoon, he was informed by (PW-3) Laik Ahmad that accused-appellant had taken the deceased in the house of Mobin on his lap. He (this witness) entered the house of Mobin and there in a room, he saw the accused-appellant cutting the dead body of the deceased into pieces by a knife and the body was in naked condition. He immediately raised his cries and upon hearing the same, Anish Ahmad, Iqbal Ahmad, Uvash and Fahmeez reached there and upon receiving information, the police party also reached there and saw the occurrence. Chopped head was kept separately by the appellant and he was cutting the body in pieces. The accused appellant was arrested at the place of occurrence itself and at that time, he was having a knife with him. He states that after seeing the incident, he gathered an impression that the accused appellant did the offence with an intention to commit unnatural sex with the deceased, which might have been protested by him, resulting the commission of offence. He further states that crowed gathered at the place of occurrence wanted to beat the accused appellant, but he was saved by the police. He further states that because of the terror of the incident, villagers had closed their shops and that at his instance, FIR was registered against the accused appellant. He further states that a knife kept by the accused appellant in his hand and was stained with blood. He further states that the clothes of the accused appellant were also stained with blood and he also noticed blood on his mouth and hands. He further states that from the place of occurrence, one bloodstained blade was also seized. Photographer was called, who took a photo of mutilated dead body of the deceased, vide Material Ex.1. Seized articles were produced in the Court and this witness identified all those articles, including knife, blade and other articles. He further states that the body was beheaded; intestines, lungs, liver and heart were separated from the body.

12. (PW-2) Uvash, is other eyewitness to the incident. He states that on the date of occurrence at about 12:30 in the afternoon, he was in his house and upon hearing the commotion, when he reached to the house of Mobin, he saw the accused-appellant having a knife in his hand and then, he noticed the mutilated dead body of the deceased and that the accused appellant was cutting the body in pieces. He also states that he noticed blood on the mouth and hands of the accused appellant. He further states that (PW-1) Moin and Anish were also present at the spot itself.

13. (PW-3) Laik Ahmad, is a witness of last seen, has stated that on the date of

occurrence at about 11:45 pm, he saw accused appellant taking the deceased towards the house of Mobin on his lap. He states that as a lot of villagers used to go to the house of Mobin for consuming plums, as a plum tree was in his house, he did not pay much attention as to why the accused appellant is going to said house. However, when he saw Moin, Anish and Nazeem searching the deceased, he informed them that he saw the accused appellant taking the deceased in his lap in the house of Mobin. He further states that after informing this fact to Moin, he left for another village Karjaina to attend one wedding and there, he received telephonic information from his son and daughter that Monish have been killed by the accused appellant.

14. (PW-4) Dr S K Chawala, conducted postmortem on the body of the deceased, vide Ex.Ka.4. He states that the deceased was a young boy of six years; his dead body was in mutilated condition and the separated head was also sent for postmortem. Following injuries have been noted on the body of the deceased:

"External Injuries:

1. Deep Hair singed out with blood, Head chopped out from body at level of C-1 vertebra, Large vessels, Trachea, Hyoid bone not traceable.

2. A vertical midline. Incised wound 38 cm x 5 cm in the midline from the level of neck to the genitalia and the intervening gluteal region.

3. On the ventral side skin peeled out to depth vertebra and ribeage below upto the gluteal region.

Internal Injuries:

4. All internal organs viz-a-viz Heart, spleen, liver, small and large intestines separated out and kept in cluster. Both kidneys, attached in place.

5. Internal organs absolutely pale with occasional clots on the body.

6. Missed organs - Intercostal muscles, fatty tissues. Alimentary canal with Rectum & Anal canal, Larynx, Hyoid bone, Trachea- Oesophagus also not traceable.

Cause of Death

Death as a result of Shock and Haemorrhage due to syncope, due to ante-mortem injuries."

15. (PW-5) Sacchidanand Ray, is the first Investigating Officer. He states that he reached to the place of occurrence and started investigation. In his presence, photographer took the photograph of mutilated dead body, vide Material Ex.1 and inquest was conducted. He further states that during investigation, he was informed by Sameem Begam, Sajida, Noori, Haseena Bano, Shabina, Lal Mohammad and Mobin that, quite often, the accused-appellant used to tease young kids and everybody was troubled with his conduct, but to avoid dispute/litigation and police action, no complaint was made to the police, resultantly, occurrence of the present incident. He further states that 100 number vehicle reached to the police station at about 12:45 in the afternoon and they disclosed the incident.

16. (PW-6) Jitendra Pal Singh, recorded FIR, vide Ex.Ka.16. He also states that when he saw the accused appellant, his clothes were bloodstained and that he also noticed blood on his face. Accused-appellant was fully conscious and normal.

A question was put to this witness by the Court as to when the accused appellant was in the police station, he was

sent for mental check up. Answer was given by the witness that the accused was normal and healthy and, therefore, he was not sent for medical check up. He has further clarified that as the activities of the accused appellant were not abnormal, he did not make any entry regarding his mental condition.

17. (PW-7) Jitendra Singh Yadav, is the second Investigating Officer, has duly supported the prosecution case. He also filed charge-sheet against the accused appellant. He has further clarified that no document regarding medical treatment of the accused appellant has been filed, as he was found medically fit.

18. In 313 Cr PC statement, various questions were put to the accused appellant. While answering question no.1, which relates to the commission of unnatural sex with the deceased and killing him, he replied that this is not correct. He also denied the fact that he took the deceased in his lap to the house of Mobin. He, however, has admitted the fact that the house of Mobin was vacant and that Moin has made a statement that when he reached to the house of Mobin, he saw him (accused appellant) cutting the body of the deceased in pieces. Answering this question, the accused appellant has admitted the fact that he did the said act. He has also admitted the fact that as the deceased had refused to allow him to have physical relation with him, he first killed him and then cut his body in pieces. He has further admitted the fact that certain persons, within the vicinity, have informed that he (accused appellant) used to tease the small children. While answering this question, the appellant says 'yes'. He has also admitted the fact that, at the time of incident, he was fully conscious and his mental condition was normal. He, however, has denied the fact of posting of certain officers in police station by saying he is not aware of the same. The questions and answers put to the accused appellant in 313 Cr PC statement reflect that his mental condition was normal and he was not having any mental problem at the time of recording his 313 Cr PC statement. True it is that merely on the basis of 313 Cr PC statement, accused cannot be convicted, but it can be relied upon and referred to by the Court while considering the other facts and circumstances of the case.

19. Close scrutiny of the evidence makes it clear that on 21.2.2017, the accused-appellant took deceased Monish in the house of Mobin and killed him in a brutal manner. While searching deceased-Monish, when Moin and Ovash reached to the house of Mobin, they found accused appellant sitting and cutting the dead body of the deceased in various pieces; he was having a knife with him and his hands and mouth were stained with blood. From the spot, bloodstained knife and blade were seized. The brutality of the offence can be seen by the act of the accused appellant where the beheaded body was found in several pieces. A reference of the same may be made as under:

"All internal organs viz-a-viz Heart, spleen, liver, small and large intestines separated out and kept in cluster. Both kidneys, attached in place.

Internal organs absolutely pale with occasional clots on the body.

Missed organs - Intercostal muscles, fatty tissues. Alimentary canal with Rectum & Anal canal, Larynx, Hyoid bone, Trachea- Oesophagus also not traceable."

Even when the police reached to the place of occurrence, they found the

accused appellant sitting with the pieces of body. (PW-3) Laik Ahmad, a witness of last seen, has also supported the prosecution case and has stated that when Moin was searching the deceased, he informed him that he saw the accused-appellant, carrying the deceased in his arms to the house of Mobin.

20. Considering the statements of (PW-1) Moin, (PW-2) Uvash and (PW-3) Laik Ahmad and the police officials, there is no hesitation for this Court to hold that it is the accused appellant who committed the murder of the deceased in a brutal manner. Even in his 313 Cr PC statement, the accused appellant has admitted his guilt and has stated that it is he who killed the deceased. True it is that merely on the basis of admission made by an accused in his 313 Cr PC statement, he cannot be convicted, but the law in this respect is well settled that if other piece of evidence reflects the involvement of the accused in commission of the offence, his 313 Cr PC statement can be treated as an additional evidence against him. The evidence also reflects that the accused appellant was habitual of teasing/harassing young children.

21. Considering all these aspects of the case, it appears that the accused appellant lifted deceased Monish in his arms to the house of Mobin and made an attempt to have unnatural sex with him. When the deceased refused to succumb to the pressure of the accused appellant, he was brutally killed by him. Taking all these aspects of the matter, in our considered opinion, the trial Court was fully justified in convicting the accused appellant under Sections 302, 377/511 of IPC and Section 3/4 of POCSO Act.

22. Upholding the conviction of the accused appellant, we proceed to consider the question of 'death sentence' awarded to him by the Court below under Section 302 of IPC.

23. Capital punishment has been the subject-matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one indisputable statement of law follows that it is neither possible nor prudent to state any universal form which would be applicable to all the cases of criminology where capital punishment has been prescribed. Thus, it is imperative for the court to examine each case on its own facts, in the light of enunciated principles and before opting for the death penalty, the circumstances of the offender are also required to be taken into consideration along with the circumstances of crime for the reason that life imprisonment is the rule and death sentence is an exception.

24. Before going into the legality and propriety of question of sentence imposed upon the appellant, it is profitable to have a look at the various decisions of the Apex Court in the matter. The decision in **Bachan Singh v. State of Punjab reported** in **AIR 1980 SC 898** pronounced by the Constitutional Bench of the Hon'ble Apex Court stands first among the class making a detailed discussion after the amendment of Cr.P.C. in 1974. In this case, the Apex Court has held that provision of death penalty was an alternative punishment for murder and is not violative of Article 19 of the Constitution of India. Relevant paragraphs of the said judgment are relevant and the same are reproduced herein below:-

"132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302 of the Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware -- as we shall presently show they were -- of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235 (2) and 354 (3) in that Code providing for presentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302 of the Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19.

200. Drawing upon the penal statutes of the States in U.S.A. framed after Furman v, Georgia, in general, and Clauses 2(a), (b), (c), and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":

Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by suc

member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

201. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

204. Dr. Chitaley has suggested these mitigating factors:

"**Mitigating circumstances**":- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. It the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society. (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.

209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354 (3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane

concern, directed along the high-road of legislative policy outlined in Section 354 (3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

25. In **Machhi Singh v. State of Punjab reported in (1983) 3 SCC 470**, a three- Judges Bench of the Supreme Court has made an attempt to cull out certain aggravating and mitigating circumstances and it has been held that it was only in rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. In this judgment the Supreme Court has summarized the instances on which death sentence may be imposed, which reads thus:-

"38. xxxxxxxxxxx

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life Imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed herein above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

(Emphasis supplied)

26. The issue again came up before Hon'ble Apex Court in **Ramnaresh & others v. State of Chhattisgarh** reported in **(2012) 4 SCC 257**, wherein the Supreme Court reiterated 13 aggravating and 7 mitigating circumstances as laid down in the case of Bachan Singh (supra) required to be taken into consideration while applying the doctrine of "rarest of rare" case. Relevant Para of the same reads thus:-

"76. The law enunciated by this Court in its recent judgements, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh (supra) and thereafter, in the case of Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the "aggravating circumstances" while the other being the "mitigating circumstances". The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354 (3) of Cr.P.C.

Aggravating Circumstances:

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed fr ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused."

27. In **Sk Abdul Hamid vs. State of MP** reported in **(1998) 3 SCC 188**, while dealing with the question of sentence for the offence of murder, has observed thus;-

9. Now, coming to the death sentence awarded to the appellants which was confirmed by the High Court, it may be noted that under sub-section (3) of Section 354 CrPC when the conviction is for an offence punishable with death or in the alternative, with an imprisonment for life, the Court is required to state reasons for sentence awarded, and in case of sentence of death, the special reasons for such sentence are to be given. Thus, under the provisions of the Code of Criminal Procedure, life imprisonment for the offence of murder is the rule and death sentence is an exception to be resorted to for special reasons to be recorded by the Court. This Court in a number of decisions has laid down guidelines when the extreme penalty of death sentence is to be awarded. (*See: Bachan Singh v. State of Punjab and Machhi Singh v. State of Punjab.*) In these cases, it was pointed out that death penalty could be awarded in the rarest of rare cases and the circumstance, when the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner, so as to arouse intense and extreme indignation of the community would fall within the category of the rarest of rare cases.

10. Special reasons given by the trial court in awarding death sentence to the appellants and confirmed by the High Court, were that it was such a cruel act where the appellants have not even spared the innocent child and the motive being to grab the property. We have given our earnest consideration to the question of sentence and the reasons given by the High Court for awarding death sentence to the appellants. Having regard to the guidelines stated above, it may be noticed that in the present case it was not pointed out by the prosecution that it was a cold-blooded murder. There is nothing on record to show how the murder has taken place. In the absence of such evidence, we do not find that the case before us falls within the category of the rarest of rare cases, deserving extreme penalty of death.

Keeping in view the afore-stated facts, we are of the view that the ends of justice would be met if we substitute the death sentence with that of life imprisonment under Sections 302/34 IPC, while upholding the appellants' conviction, as recorded by the High Court."

28. In the matter of **Dharam Deo Yadav vs. State of UP** reported in **(2014) 5 SCC 509**, the Supreme Court has held thus:-

"36. We may now consider whether the case falls under the category of rarest of the rare case so as to award death sentence for which, as already held, in Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546 this Court laid down three tests, namely, Crime Test, Criminal Test and RR Test. So far as the present case is concerned, both the Crime Test and Criminal Test have been satisfied as against the accused. Learned counsel appearing for the accused, however, submitted that he had no previous criminal records and that apart from the circumstantial evidence, there is no eye-witness in the above case, and hence, the manner in which the crime was committed is not in evidence. Consequently, it was pointed out that it would not be possible for this Court to come to the conclusion that the crime was committed in a barbaric manner and, hence the instant case would not fall under the category of rarest of rare. We find some force in that contention. Taking in consideration all aspects of the matter, we are of the view that, due to lack of any evidence with regard to the manner in which the crime was committed, the case will not fall under the category of rarest of rare case. Consequently, we are inclined to commute the death sentence to life and award 20 years of rigorous imprisonment, over and above the period already undergone by the accused, without any remission, which, in our view, would meet the ends of justice."

29. In **Kalu Khan v. State of Rajasthan** reported in **(2015) 16 SCC 492**, the Hon'ble Supreme Court has held that:-

"30. In *Mahesh Dhanaji Shinde v. State of Maharashtra*, the conviction of the appellant-accused was upheld keeping in view that the circumstantial evidence pointed only in the direction of their guilt given that the modus operandi of the crime, homicidal death, identity of 9 of 10 victims, last seen theory and other incriminating circumstances were proved. However, the Court has thought it fit to commute the sentence of death to imprisonment for life considering the age, socio-economic conditions, custodial behaviour of the appellant-accused persons and that the case was entirely based on circumstantial evidence. This Court has placed reliance on the observations in *Sunil Dutt Sharma v. State (Govt. of NCT of Delhi)* as follows: (Mahesh Dhanaji case, SCC p. 314, para 35)

"35. In a recent pronouncement in *Sunil Dutt Sharma v. State (Govt. of NCT of Delhi)*, it has been observed by this Court that the principles of sentencing in our country are fairly well settled -- the difficulty is not in identifying such principles but lies in the application thereof. Such application, we may respectfully add, is a matter of judicial expertise and experience where judicial wisdom must search for an answer to the vexed question -- Whether the option of life sentence is unquestionably foreclosed? The unbiased and trained judicial mind free from all prejudices and notions is the only

asset which would guide the Judge to reach the "truth'."

31. In the instant case, admittedly the entire web of evidence is circumstantial. The appellant-accused's culpability rests on various independent evidence, such as, him being "last seen" with the deceased before she went missing; the extra-judicial confession of his co-accused before PW 1 and the village members; corroborative testimonies of the said village members to the extra-judicial confession and recovery of the deceased's body; coupled with the medical evidence which when joined together paint him in the blood of the deceased. While the said evidence proves the guilt of the appellant-accused and makes this a fit case for conviction, it does not sufficiently convince the judicial mind to entirely foreclose the option of a sentence lesser than the death penalty. Even though there are no missing links in the chain, the evidence also does not sufficiently provide any direct indicia whereby irrefutable conclusions can be drawn with regard to the nexus between "the crime" and "the criminal". Undoubtedly, the aggravating circumstances reflected through the nature of the crime and young age of the victim make the crime socially abhorrent and demand harsh punishment. However, there exist the circumstances such as there being no criminal antecedents of the appellant-accused and the entire case having been rested on circumstantial evidence including the extra-judicial confession of a co-accused. These factors impregnate the balance of circumstances and introduce uncertainty in the "culpability calculus" and thus, persuade us that death penalty is not an inescapable conclusion in the instant case. We are inclined to conclude that in the present scenario an alternate to the death penalty, that is, imprisonment for life would be appropriate punishment in the present circumstances."

30. In **Allauddin Mian v. State of Bihar** reported in **(1989) 3 SCC 5,** it was laid down that unless the nature of crime and the circumstances of the offender reveal that the criminal was a menace to the society and the sentence of life imprisonment would be altogether inadequate, the court should ordinarily impose a lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only.

31. In **A. Devendran v. State of Tamil Nadu** reported in **(1997) 11 SCC 720**, which is a case of triple murder, the Hon'ble Supreme Court held that the trial court was not justified in awarding death sentence as the accused had no pre-meditated plan to kill any person and as the main object was to commit robbery.

32. In **Om Prakash v. State of Haryana** reported in **(1999) 3 SCC 19**, a dispute over a small house between two neighbours resulted in the murder of seven persons. Death sentence was imposed on the accused by the trial court which was confirmed by the appellate court. The Hon'ble Supreme Court observed that the bitterness increased to a boiling point and the agony suffered by the appellant and his family members at the hands of the other party, and for not getting protection from the police officers concerned or total inaction despite repeated written prayers, goaded or compelled the accused to take law in his own hands which culminated in the gruesome murders. The accused was a BSF Jawan aged 23 at the time of incident. The Hon'ble Supreme Court commuted the death penalty to imprisonment for life.

33. In the case of **Accused 'X' v. State of Maharashtra,** reported in **(2019) 7 SCC 1**, the Supreme Court, while

considering the post-conviction mental illness of accused/death row convict as mitigating factor, has observed as under:

55. Having observed some of the general aspects of sentencing, it is necessary to consider the aspect of post-conviction mental illness as mitigating factor in the analysis of "rarest of the rare' doctrine which has come into force post *Bachan Singh case* (supra).

56. As a starting point, we need to refer to *Piare Dusadh v. King Emperor, AIR 1944 FC 1*, that has already recognized pos-conviction mental illness as a mitigating factor in the following manner: (SCC OnLine FC)

"Case No. 47-The applicant in this case was convicted by a Special Judge of the offence of murder and was sentenced to death on 30.9.1942. His appeal to the Allahabad High Court was dismissed and the sentence of death was confirmed.

The appellant is a young man of 25 who has been twice widowed. His victim was his aunt, 30 years of age, whose husband (Kanchan) had about six years previously murdered his own brother, appellant's father. Kanchan was sentenced to death for the murder, but lost his reason while awaiting the execution of the death sentence, and is now detained as a lunatic.

The evidence in this case leaves no room for doubt that the appellant was rightly convicted of murder. There is some confusion as to the exact motive for the undoubtedly brutal assault of which the appellant made his aunt the victim. The prosecution alleged that the appellant being a widower was chagrined by the refusal of his aunt to become his mistress. In his statement before, the Special Judge he said that another uncle (P.W. 7) who according to the appellant was behind the prosecution was on terms of improper intimacy with the deceased and resented even small acts of kindness on the part of the deceased towards the appellant. In the appeal preferred by him through the jail authorities to the High Court, the appellant stated that his aunt was a woman of loose character and was pursuing him with unwelcome attentions. The previous history of this family indicates that the appellant probably suffers from an unbalanced mind. The nature and ferocity of the assault upon his aunt appear to confirm this. *In committing the offence the appellant must have been actuated by jealousy or by indignation either of which would tend further to disturb the balance of his mind. He has besides been awaiting the execution of his death sentence for over a year. We think that in this case a sentence of transportation for life would be more appropriate than the sentence of death. We accordingly reduce the sentence of death to one of transportation for life and subject to this modification dismiss the appeal."*

(emphasis supplied)

However, this case does not provide any guidelines or the threshold for evaluating what kind of mental illness needs to be taken into consideration by the Courts.

57. We note that, usually, mitigating factors are associated with the criminal and aggravating factors are relatable to commission of the crime. These mitigating factors include considerations such as the accused's age, socio-economic condition etc. We note that the ground claimed by "accused x' is arising after a long time-gap after crime and conviction. Therefore, the justification to include the same as a mitigating factor does not tie in with the equities of the case, rather the normative justification is founded in the Constitution as well as the jurisprudence of

the "rarest of the rare' doctrine. It is now settled that the death penalty can only be imposed in the rarest of the rare case which requires a consideration of the totality of circumstances. In this light, we have to assess the inclusion of post-conviction mental illness as a determining factor to disqualify as a "rarest of the rare' case.

59. All human beings possess the capacities inherent in their nature even though, because of infancy, disability, or senility, they may not yet, not now, or no longer have the ability to exercise them. When such disability occurs, a person may not be in a position to understand the implications of his actions and the consequence it entails. In this situation, the execution of such a person would lower the majesty of law.

71.1 That the post-conviction severe mental illness will be a mitigating factor that the appellate court, in appropriate cases, needs to consider while sentencing an accused to death penalty."

34. In the light of above proposition of law, we are required to scrutinize the case in hand minutely to find out whether the case falls under the category of "rarest of the rare case", whether imposition of death penalty, which is an exception, would be the only appropriate & meaningful sentence and whether imprisonment for life which is the rule would not be adequate and would not meet the ends of justice.

35. While awarding the death sentence to the appellant, the Court below has drawn a conclusion that the act of the appellant was brutal and the same comes in the category of 'rarest of rare case'. The Court below has observed as follows:

"प्रस्तुत प्रकरण में भी जिस तरीके से अमानवीय कृत्य द्वारा अपराध कारित किया गया है एवं पीड़ित के छोटे–छोटे टुकड़े करके उसकी हत्या की गयी है तथा उसकी खाल ब्लेड से छीलकर निकाली गयी है तथा उसके आंतरिक अंगों को भी काटकर बाहर किया गया है तथा उसका सर धड़ से अलग किया गया है। उक्त समस्त तथ्य अभियुक्त द्वारा कारित अपराध की अतुलनीय भयानकता व बर्बरता को दर्शित करता है तथा यह तथ्य भी उल्लेखनीय है कि मृतक/पीड़ित की आयु मात्र 6 वर्ष थी एवं अभियुक्त उसे बहुत आराम से अधिशासित किये जाने की स्थिति में था एवं पीड़ित द्वारा अभियुक्त को किसी प्रकार से कोई प्रकोपन नहीं दिया गया था। उल्लेखनीय है कि माननीय उच्चतम न्यायालय द्वारा उपरोक्त निर्णय के अंत में उपरोक्तानुसार दो प्रश्न विरचित किये गये हैं, जिसके संबंध में यह कहना समुचित होगा कि दोष सिद्व द्वारा कारित अपराध असामान्य था एवं उपरोक्त अपराध के परिप्रेक्ष्य में अभियुक्त को आजीवन कारावास के दण्ड से दण्डित किया जाना अपर्याप्त होगा एवं समुचित नहीं होगा।

उल्लेखनीय है कि अभियुक्त द्वारा 6 वर्षीय अबोध बालक के साथ क्रूरतम तरीका अपनाते हुये उसकी हत्या इस प्रकार कारित की गयी है कि ऐसी हत्या एवं ऐसा तरीका मानवीय इतिहास में कदाचित ही देखने को मिलता है। माननीय उच्चतम न्यायालय द्वारा उपरोक्त निर्णय में विरचित द्वितीय प्रश्न के आलोक में यह स्पष्ट है कि दोष सिद्व द्वारा कारित अपराध अत्यन्त नृशंसतापूर्वक कारित किया गया है, सामान्य जनमानस की अन्तरात्मा विचलित हो गयी है एवं न्यायालय द्वारा उसे मृत्यृ दण्ड ही दिया जाना चाहिए और यदि उसे मृत्यु दण्ड नहीं दिया गया तो यह समुचित एवं न्यायपूर्ण नहीं होगा तथा यह पीड़ित के परिवार एवं सामान्य जनमानस के साथ न्याय करना नहीं होगा। इसके अतिरिक्त अभियुक्त द्वारा जिस प्रकार का अपराध कारित किया गया है उससे निश्चित ही rarest of rare श्रेणी में आता है।

उल्लेखनीय है कि प्रस्तुत प्रकरण माननीय उच्चतम न्यायालय द्वारा पारित उपरोक्त निर्णय में मार्गदर्शित सिद्वांतों एवं अभिनिश्चित सिद्वांतों की श्रेणी में आता है एवं उक्त निर्णय में वर्णित सभी मानकों को पूर्ण करता है। यहां यह तथ्य भी उल्लेखनीय है कि माननीय उच्चतम न्यायालय द्वारा उपरोक्त निर्णय में संदर्भित अन्य निर्णयों में विहित अभिनिश्चत मार्गदर्शित सिद्वांतों को पूर्ण करता है।

AIR 2017 SUPREME COURT 2530 SAMPAT DOPADE VS STATE OF MAHARASHTRA.

माननीय उच्चतम न्यायालय द्वारा उपरोक्त निर्णय में भी मृत्यु दण्ड के संबंध में पूर्व पारित निर्णय **बच्चन सिंह बनाम पंजाब राज्य ए. आई.आर. 1982 (सु0को0)** में मृत्यु दण्ड से संबंधित प्रतिपादित सिद्वांतों को संदर्भित किया है एवं सम्प्रेक्षित किया है कि (a) if the murder has been committed after previous planning and involves extreme brutality; or (b) if the murder involves exceptional depravity.

माननीय उच्चतम न्यायालय द्वारा **माछी सिंह बनाम पंजाब राज्य, ए.आई.आर. 1983 (सु0को0)** को संदर्भित किया है। माननीय उच्चतम न्यायालय द्वारा उक्त निर्णय में इस आशय का सम्प्रेक्षण किया गया है कि But the community will not do so in every case. It may do so 'in the rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining.

उल्लेखनीय है कि **श्रीमद् भगवत गीता के अध्याय 4 श्लोक 8** निम्न प्रकार है –

परित्राणाय साधूनां विनाशय च दुष्कृताम् ।

धर्मसंस्थापनार्थाय सम्भवामि युगे युगे।।

श्रीमद् भगवत गीता के उक्त श्लोक को दृष्टिगत रखते हुए आज के परिप्रेक्ष्य में यह कहना समुचित होगा कि धर्म की स्थापना का अर्थ विधि के शासन की स्थापना है। अतः प्रकरण के उपरोक्त समस्त तथ्यों को दृष्टिगत रखते हुये यह न्यायालय इस निष्कर्ष पर पहुंचती हैं कि दोष सिद्व नजीम मियां को उसके द्वारा कारित अपराध rarest of rare case की श्रेणी में आता है एवं उसके लिए दोष सिद्व को **मृत्यु दण्ड** से ही दण्डित किया जाना सर्वथा उचित होगा। प्रस्तुत प्रकरण के उपरोक्त समस्त तथ्यों एवं परिस्थितियों एवं कारित अपराध की भयानकता, नृशंसता को दृष्टिगत रखते हुये दोष सिद्व नजीम मियां को उसके विरूद्व आरोपित अपराधों के लिए निम्न प्रकार से दण्डित किया जाना समुचित होगा –

1– दोष सिद्व नजीम मियां को **धारा 302 भारतीय दण्ड संहिता** के अंतर्गत दण्डनीय अपराध के लिए **मृत्यु दण्ड एवं 25,000/–रू0 (पच्चीस हजार रूपये) के अर्थदण्ड।**"

36. From a perusal of the above, it is clear that the special reasons assigned by the trial Court for awarding extreme penalty of death are that the murder was horrifying as the accused-appellant was in a dominant position; victim was helpless being a child aged about 6 years and the murder was pre-meditated and pre-planned one and committed in a cruel, grotesque and diabolical manner. The accused is a menace to the Society and, therefore, imposition of lesser sentence than that of death sentence, would not be adequate and appropriate. In these circumstances, the Court below has held that the balance-sheet of the aggravating and mitigating circumstances was heavily weighed against the appellant making it the rarest of rare cases and consequently awarded the death sentence.

37. But, having gone through the facts and circumstances of this case, we find that there was no evidence on record to establish that the accused appellant committed pre-planned and pre-meditated murder of a minor child. At least, no such evidence has been led by the prosecution to establish this fact. True it is that the appellant cut the body of the deceased in pieces and when he was doing so, even the witnesses also reached there, but that itself is not sufficient to hold that it is a pre-meditated or pre-planned murder.

38. True that the manner in which crime is committed by knife blows is brutal, cruel and gruesome, but there is absolutely no evidence to suggest as to what could be the reason for the appellant

to commit the said offence. This could be on account of frustration, mental stress or because of emotional disorder which would be the mitigating circumstances to be taken note of.

39. It is relevant to mention here that in compliance of the orders of this Court dated 6.2.2019 and 27.3.2019, the Director General (Medical & Health) Uttar Pradesh, Lucknow, filed an affidavit of compliance on 4.4.2019 along with a report of Medical Board, comprising five members, dated 5.3.2019, which indicates the mental health of the appellant. Relevant part of said report is as under:

ष.....सिद्वदोष बन्दी नजीम मियॉ का गठित बोर्ड के अध्यक्ष/सदस्यों के द्वारा बन्दी नजीम मियॉ का मानसिक परीक्षण किया गया। परीक्षणोपरान्त बन्दी नजीम मियॉ को Unspecified Non-Organic Psychosis (F 29.0) रोग से ग्रसित पाया गया है।ष

On 5.1.2020, learned State Counsel has submitted another medical report of the appellant, enclosing several letters which also indicate the mental condition of the appellant. Relevant parts of some letters read as under:

(i) Letter dated 5.12.2018:

".....इस चिकित्सालय के विजिटर्स बोर्ड की बैठक जो माननीय जनपद न्यायाधीश, वाराणसी की अध्यक्षता में दिनांक 24.11.2018 को सम्पन्न हुई, बन्दी नजीम मियॉ को मानसिक रूप से **अस्वस्थ्य घोषित कर दिया गया है** और मनोरोग विशेषज्ञ की सलाह के अनुसार उपचार चलाते रहने की सलाह दी गयी है। जिसका उपचार मनोरोग विशेषज्ञ की सलाह के अनुसार चल रहा है। ष

(ii) Letter dated 9.4.2019:

".....इस चिकित्सालय के विजिटर्स बोर्ड की बैठक जो माननीय जनपद न्यायाधीश, वाराणसी की अध्यक्षता में दिनांक 06.04.2019 को सम्पन्न हुई, बन्दी नजीम मियॉ को मानसिक रूप से **अस्वस्थ्य घोषित कर दिया गया है** और मनोरोग विशेषज्ञ की सलाह के अनुसार उपचार चलाते रहने की सलाह दी गयी है। जिसका उपचार मनोरोग विशेषज्ञ की सलाह के अनुसार चल रहा है। ष

(iii) Letter dated 23.4.2019:

".....With Due regards the patient Mr Najeem Miyan S/o Tasabbar Ali was admitted in Mental Hospital, Varanasi Dated-22-10-2018 was diagnosed as a case of "Unspecified Non-Organic Psychosis" (F-29.0) by medical board conclusion dated 05.03.2019 and who was declared unfit by Visitor's Board meeting on dated 06-04-2019, after since the patient was on continuous medication and has shown significant improvement on his mental status examination.

In Context of Point No.3 it could not be commented regarding the aforesaid illness since Adequate history/prescriptions were not available.

On current examination patient is conscious, oriented, responding to external stimulus promptly, mood-euthymic, maintaining personal hygiene and obeying commands.

Judgment intact.

Patient is advised for medication and to be retained in Mental Hospital Varanasi till next Visitor's Board meeting, or till any order from next higher authority."

(iv) Conduct report and behavioral report dated 28.4.2019:

"सिद्वदोष बंदी नजीम मियॉ दिनांक 21.02.2017 को जिला कारागार पीलीभीत दाखिल हुआ। जेल प्रवेश के समय बंदी की मानसिक **अवस्था गुमसुम सी प्रतीत हो रही थी**। वह किसी भी प्रकार की उत्तेजना से प्रभावित नही था। सिद्वदोष बंदी सामान्य बंदियों की तरह ही बैरक मे रह रहा था व अन्य बंदियो के साथ सामान्य व्यवहार था। दिनांक 04.09.17 को बंदी के असामान्य व्यवहार प्रतीत होने की वजह से जिला अस्पताल पीलीभीत भेजा गया, जहॉ से बंदी को फिजीशियन द्वारा **मानसिक रूप से पीड़ित बताया गया** व दवा प्रदान की गयी इसके बाद बंदी को दिनांक–19.09.2017 को मानसिक चिकित्सालय

बरेली रेफर किया गया, जहॉ पर मानसिक रोग विशेषज्ञ द्वारा बंदी का उपचार चल रहा था। बंदी को पूर्ण रूप से स्वास्थ्य मे सुधार न होने के कारण मानसिक रोग विशेषज्ञ बरेली द्वारा दिनांक–29.08.2018 को मानसिक चिकित्सालय वाराणसी रेफर किया गया, जिस कारण बंदी को दिनांक–22.10.2018 से मानसिक चिकित्सालय वाराणसी मे भेजा गया, तद्दिनांक से अब तक उसका ईलाज चल रहा है।"

(v) Letter dated 17.9.2019:

".....इस चिकित्सालय के विजिटर्स बोर्ड की बैठक जो माननीय जनपद न्यायाधीश, वाराणसी की अध्यक्षता में दिनांक 13.09.2019 को सम्पन्न हुई, बन्दी नजीम मियॉ को मानसिक रूप से **स्वस्थ्य घोषित कर दिया गया है** और कारागार वापस स्थानान्तरित करने की संस्तुति की गई है।"

(vi) Letter dated 12.12.2019:

".....उपचार के उपरान्त उक्त विशेषज्ञ द्वारा दिनांक 26.10.19 बंदी को मानसिक रूप से **स्वस्थ घोषित** व आवश्यक दवाईयॉ प्रदत्त करते हुए जिला कारागार पीलीभीत हेतु वापस किया गया। ... ...

वर्तमान मे बंदी नजीम मियॉ पुत्र तसब्बर अली सामान्य बंदियो के साथ बैरक मे रह रहा है तथा बंदी का **स्वास्थ्य सामान्य** है।"

40. After considering the above facts and circumstances of the case and the fact that the appellant is suffering from 'Unspecified Non-Organic Psychosis' (F 29.0) [a mental ailment] and further relying upon the case of **'Accused 'X'** (supra), we are of the view that the instant case does not fall in the category of 'rarest of rare case', warranting capital punishment, particularly looking to the fact that the appellant is suffering from a mental illness. Hence, the death sentence awarded to the appellant under Section 302 of IPC is liable to be converted into life imprisonment till the end of his life without remission.

41. Resultantly, while affirming the conviction of the appellant under Section 302 of IPC, we set aside the 'sentence of death' awarded to the appellant by the Court below and direct that, for the murder committed by the appellant, he shall serve imprisonment till the end of his life without remission. Subject to this alteration in the sentence, capital case is **dismissed.**

(2020)03-05ILR A122
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2020

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

CRIMINAL APPEAL No. 246 of 1991

Ataullah ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Y.K. Shukla, Sri Vimal Kumar (A.C.)

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

Criminal law - Indian Penal Code (45 of 1860)- Section 302-Section34 - Murder - Testimony of eye-witnesses - Accused gave knife blow and fired on the chest of accused on 28.05.1989 at 4 PM – FIR promptly lodged after incident on the same day at 5 PM by wife of deceased - Informant wife & her elder brother eye-witnesses of the incident & both deposed involvement of accused in assault - Ocular version tallied with post mortem report corroborate with description of incident in FIR as well as examination of the two eye-witnesses - Testimony on record sufficient for recording conviction of accused - Prosecution proved its case beyond doubt - Conviction, proper.
(Para 19 21)

Appeal dismissed (E-5)

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

(1) Heard Sri Vimal Kumar, learned amicus curiae for appellant, Sri Krishna Pahal, learned A.A.G. assisted by Sri Om Narin Tripathi, learned A.G.A. Ist, Sri Jitendra Kumar, Sri Sanjay Kumar Rajbhar Sri Nafesh Ahmad, Sri Bhanu Prakash Singh and Sri Ajay Kumar Singh, learned A.G.As/brief holder of the State and perused the record of this appeal.

(2) By way of instant criminal appeal, challenge has been made to the validity and sustainability of the judgment and order of conviction dated 14.02.1991 passed by II Additional Sessions Judge, Shahjahanpur, in Sessions Trial No.413 of 1989 (State Vs. Ata Ullah @ Antu Shah and another), arising out of case crime no.183/1989, under Sections 302 read with Section 34 IPC, Police Station- Tilhar, District- Shahjahanpur, whereby appellant has been sentenced to imprisonment for life.

(3) Brief story as reflected from the FIR appears to be that an FIR was lodged by the informant- Munisha Begum- P.W.1- on 28.05.1989 at 5.00 P.M. in Police Station- Tilhar, District- Shahjahanpur at Case Crime No.183, under Sections 302 IPC against three persons including the present appellant- Ataullah @ Antu Shah- to the effect that one and half months ago some incident of dacoity took place in the house of the appellant, wherein, son of the appellant- Shafi Ullah @ Lalua was murdered. In that incident, Ataullah @ Antu Shah had named husband of the informant- Shahbuddin- and the cousin brother of the informant- Chaman Shah on account of enmity. Chaman Shah had surrendered and obtained bail from the court concerned, and the police and the family members of appellant were searching Shahbuddin (husband of the informant), as the appellant along with his father-in-law Nanhey Shah were intending to kill the husband of the informant prior to the completion of 'chaliswa' ceremony after the death of the son of the appellant. The F.I.R. adds that on the fateful day of occurrence i.e. on 28th May, 1989 at about 4 P.M. the informant was going to take medicine for her son along with deceased- Shahabuddin and jeth (brother-in-law)- Babu Shah, while on way they reached near Tonga Stand in Maujampur Market Tilhar, then the elder brother of the informant- Banney Mian also met them but the informant- Munisha Begum- P.W.1 began to converse with her brother. In the meanwhile, Ataullah @ Antu Shah and the two others- Nanhey Shah and his elder brother Sabir Shah- appeared on the scene and caught hold of informant's husband and at the exhortation of the appellant, Nanhey Shah and Sabir Shah took out their knives and began to assault Shahabuddin (informant's husband) with the same. The informant husband somehow retrieved himself and tried to scamper away, but he was caught again by the appellants and was given knife blows and in the process Ataullah @ Antu Shah whipped out his countrymade gun and pointed it on the chest of the deceased and fired due to which informant's husband fell down and died. On the alarm of the informant the accused ran away towards Chakki. It was requested that report be lodged against the accused and action be taken. This report is Exhibit Ka-1.

(4) Relevant entries were made in the concerned check F.I.R. at Case Crime

No.183/1989, under Section 302 I.P.C. at Police Station- Tilhar, District- Shahjahanpur, which is on record as Ex. Ka.3.

(5) Pursuant to the entries so made in the check F.I.R., a case was registered against the accused at Rapat No.35 dated 28.05.1989 at 17.00 hours in the concerned General Diary at aforesaid case crime number under aforesaid section of Indian Penal Code, copy whereof is on record as Ex.Ka.12.

(6) The investigation was entrusted to P.W.3 S.I. Sri R.S. Bora. He has proceeded to the spot and prepared the inquest report of deceased. It commenced 6.00 P.M. and concluded at 7.30 P.M. on 28.05.1989, which is on record as Exhibit Ka-4. The relevant papers were also prepared at the same time- say- photo of dead body (photo nash)- Exhibit Ka-5, Challan dead body- Exhibit Ka-6, letter to C.M.O.- Exhibit Ka-7, Specimen seal- Exhibit Ka-8. He has also collected the blood stained soil and simple soil and kept it in different containers and prepared a Fard, copy whereof is on record as Exhibit Ka-10. He has inspected the place of occurrence and prepared the site plan, which is Exhibit Ka-9.

(7) After completing the necessary formalities, the cadaver of deceased was sent for postmortem examination. Postmortem examination on the cadaver of deceased was conducted on 29.05.1989 at 04.40 P.M. by Dr. O.P. Khatri P.W.6, wherein the following ante-mortem injury was noted at the time of examination:

Ante mortem injuries

1. One gunshot wound of entry rounded in shape on the right side of chest in 6 O'clock position. The edges were wragged and there was blackening and scorching around the injury.

2. Incised wound 3 cm x 1 cm x 1 cm on the left side of chest.

3. Incised wound 2.5 cm x 1.5 cm x muscle deep on the right side of stomach, 8 cm away from the injury no.1.

4. Multiple incised wound (6) on the back at left side. Among these wounds many wounds were big upto muscle and some of them were deep upto back boon. The bigger wound is 2.5 cm x 1 cm and smallest wound is 1 cm x 1.5 cm. But all the multiple incised wounds are in the area of 28 cm x 14 cm.

5. Multiple incised wounds (4) on the left forearm each wound is 2.5cm x 1cm x muscle deep and all the incised wounds are in the area of 26 cm x 4 cm.

6. Abrasion 3cm x .1 cm in the root of index finger of right hand.

In the opinion of doctor, cause of death was stated to be shock and the ante-mortem injuries. The postmortem report is Exhibit Ka-13.

(8) Statement of the prosecution witnesses was recorded and after completing the formalities charge- sheet- Exhibit Ka-11- was filed against the accused. Consequently, the trial commenced and trial Judge charged the accused under Section 302/34 IPC for committing murder of deceased on 28.05.1989 around 4.00 P.M. within police station- Tilhar, District- Shahjananpur. The Charge was read over and explained to the accused, who denied the charge and opted for trial.

(9) In turn, prosecution was asked to adduce its testimony in order to prove the guilt. The prosecution produced in all six witnesses out of whom, two are the witness of fact and the rest four are formal witnesses. Brief reference of the prosecution witnesses is ut-infra:-

Munisha Begum P.W.1 is the first informant and he has proved written report Ext. Ka.-1.

Banney Mian is the P.W.2 and he is also a witness of fact and elder brother of the Munisha Begum P.W.1.

Ranjeet Singh Vora P.W.3 is the Investigating Officer of this case.

Bhim Sen Sharma is the P.W.4. Samar Pal Singh is P.W.5. He has proved the FIR which is Exhibit Ka-3 and the copy of the GD as Exhibit Ka-12.

Dr. O.P. Khatri P.W. 6 has conducted post-mortem and has proved post-mortem examination report as Exhibit Ka-13.

(10) Except as above, no other evidence was produced and the statement of the accused was recorded u/s 313 Cr.P.C., wherein, he claimed to have been falsely implicated on account of enmity and witnesses were not present on the spot.

(11) However, no evidence was led by the defence.

(12) Consequently, the case was posted for hearing of arguments. After considering the case on its merits and appraisal of facts and circumstances and evaluation of evidence on record, the learned trial judge returned aforesaid finding of conviction against the accused and sentenced him to imprisonment for life, which paved way to this appeal.

(13) It has been succinctly claimed on behalf of the appellant by Amicus Curiae Sri Vimal Kumar that ocular testimony of the occurrence cannot be accepted to be truthful version on account of certain facts so strewn on point of availability of the informant P.W.1 Munisha Begum on the spot at the time of the occurrence at 4.00 P.M. for the specific reason that it is virtually established that the informant was having strange relationship with her husband- the deceased- at the time of the occurrence and was residing separately at her parental home, therefore, there was no point in accompanying the deceased upto the spot where the incident occurred. It is specific defence of the accused that the informant after the occurrence took place was called on the spot and after that only the report was managed and lodged. There are material contradictions regarding the very origin of the incident to the magnitude that the deceased was accompanying the informant from his house and on reaching upto the spot (place of occurrence) the brother of the informant- Banney Mian P.W.2- also met her and while conversing at Mozampur Bazar in front of some hotel, the incident was caused. Infact nothing of the sort ever occurred and no one saw the occurrence. The deceased was having criminal antecedent and a number of criminal cases were lodged against him and there is every possibility of he being killed by others, who are not in the light for the time being and the accused, who had enmity with the informant under impression of strong suspicion and high motive to falsely implicate the accused, the informant has cooked up a false story in collusion with the police after the incident

had occurred. The FIR is ante- timed. The presence of the another eye witness P.W.2- Banney Mian is also not believable and acceptable situation under facts and circumstances of the case for the reason that he (P.W.2) resides at far off place from the place of occurrence and as per his own statement, he used to work at the tailoring shop right from 7.30 A.M. upto 5 P.M. There is no explanation as to how and under what circumstances he reached at the spot and witnessed the incident. In the absence of any such conspicuous testimony as adduced by P.W.2, his presence on the spot cannot be believed to be natural one and fact of his presence on the spot must be discarded as such. It is a case of blind murder. Prosecution story is full of a number of infirmities even the Investigating Officer has not investigated properly. The inquest report does not bear the signature of the informant or his brother P.W.1 Munisha Begum and P.W.2 Banney Mian, respectively, whereas the prosecution case is that they were present on the spot at time of preparation of the inquest report, which is Exhibit Ka.4.

(14) A cumulative reading of the entire merit, vis a vis, the evidence on record would not inspire confidence and the prosecution has not proved to the hilt the case of the accused within the four corners of Section 300/302 IPC and the trial court was ignorant of the vitality of the law to be applied in the case has recorded erroneous finding of conviction.

(15) Leaned A.A.G. has supported the presence of the prosecution witnesses particularly P.W.1 Munisha Begum and P.W.2 Banney Mian on the spot at the time of occurrence and has stated that their testimony does not vacillate on the point of main occurrence as to how it started, how it culminated into death of the deceased- the husband of the informant- Shahabuddin. In so far as the contradictions are concerned, the same appear to be minor and there is nothing material reflected throwing any doubt on the point of occurrence. Occurrence itself is established and it went unchallenged. There is no point in sparing the real culprits and involving false person.

(16) In the wake of rival claim, the moot point that arises for adjudication of this appeal relates to the fact as to whether the prosecution has been able to prove its case beyond all reasonable doubt against the appellant?

(17) While scrutinizing the record and particularly evaluating the testimony of the prosecution witnesses of fact, we are required to evaluate the same vis a vis prevailing facts and the circumstances of this case and need to be addressed at this juncture. In so far as the contention regarding the FIR being ante- timed is concerned, then we have before us the F.I.R., Exhibit Ka-1, and the Check F.I.R.. Exhibit Ka-3 as well, which when read conjointly with the testimony of the concerned Head Moharir P.W.5 Samar Pal Singh indicates that the F.I.R. was lodged at Police Station- Tilhar at 5 P.M.- soon after the occurrence which took place at 4.00 P.M. at locality- Mauzampur Bazar. The distance of the police station from the place of occurrence is stated to be 1 Km. The argument of the appellant is that the informant- Munisha Begum was called from her parental home, thereafter the report was lodged after deliberation with the police.

(18) This argument is bald without any supportive materiel and does not stand test of scattered facts and the prevailing

circumstances of this case so as to give credence to the claim so raised by the appellant's counsel that it so occurred and no one saw the occurrence and the informant- Munisha Begum was not present on the spot. There is nothing on record, which may show that the informant was called from her parental home and only then the proceeding of the case took place. On that particular aspect certain variations or vacillations are there creeping in the description of the post- incidental follow up, but that would not throw any doubt on the occurrence as the lodging of the FIR is prompt after the incident at 5 P.M. at Police Station- Tilhar, therefore, mere argument would not work in the absence of any cogent supporting material and circumstance of the case therefore, the argument regarding the FIR being ante-timed false flat.

(19) Now, we come over to the contention regarding presence of the prosecution witnesses on the spot at the time of occurrence. The two ocular versions have comeforth in the shape of the description of the occurrence and both the eye witnesses- P.W.1 and P.W.2, respectively, have supported the prosecution version in the manner and the style, as has been described in the FIR itself that it was around 4 P.M. when Babu Shah, Shahbuddin- informant and Bannay Mian were conversing with each other in the locality Umerpur when the accused in company with other assailants appeared on the spot threatened, exhorted, overpowered the victim and the two other assailants dealt knife blows on him. In the meanwhile, when the deceased retrieved himself from the clutches of the two assailants and tried to escape away from the scene, he was again overpowered and he was fatally dealt with by the assailants jointly and the role of the appellant is stated to be at that point of time he whipped out his gun and caused the fatal shot on the chest of the deceased. This ocular version when tallied with the postmortem examination report, Exhibit Ka-13, gives corroboration to the description of the incident described in the first information report as well as in the examination of the two eye-witnesses. There is no whisper of any attendant circumstance, which may lead us to infer that it never happened in that manner, therefore, the point of non- presence of both the eye-witnesses on the spot, cannot be accepted and in regard thereto the argument on this point of the appellant is of no avail.

(20) In so far as the role of the Investigating Officer P.W.3 Sri R.S. Vora is concerned, then Investigating Officer has also proved facts that he recorded statement of the witnesses and collected the simple and the blood stained clay from the spot and he has proved the same as Exhibit Ka-10. The check FIR has also been proved by P.W.3 and similarly the concerned GD entry of the day when the FIR was lodged and apart from that the relevant documents at the time of the preparation of the inquest have also been duly proved in the shape of photo nash- Exhibit Ka-5, Challan dead body- Exhibit Ka-6, letter to C.M.O.- Exhibit Ka-7, Specimen seal- Exhibit Ka-8, respectively. The site plan was prepared by this witness which he has proved as Exhibit Ka-9. There is nothing of the sort, which may throw any doubt regarding the occurrence and the post- incidental processorial development on the spot. Argument to the ambit that the signature of P.W.1 and P.W.2 in the inquest report are missing, would not itself throw away the prosecution case because the post-incidental development is the mind- set of

the informant and the working nature of the police, who is seized of the matter on the spot and it cannot be held with certainty that this being that happens, therefore, argument advanced to that ambit is also not material on record.

(21) In so far as the other aspects of this case are concerned, then certainly we come across minor contradictions appearing in the testimony of P.W.1 Munisha Begum and P.W.2 Banney Mian but that is not substantive in nature, therefore, we unhesitatingly and unequivocally hold that the testimony on record is sufficient for recording conviction of the accused as has been rightly done by the trial court itself. Consequently, charge under Section 320/34 IPC stands proved against the appellant and the incident is consistently established, then the motive in the presence of direct ocular testimony of the two witnesses (P.W.1 and P.W.2) is relegated to the background. The prosecution has proved its case beyond all reasonable doubt.

(22) Accordingly, judgment and order dated 14.02.1991 passed by II Additional Sessions Judge, Shahjahanpur, in Sessions Trial No.413 of 1989 (State Vs. Ata Ullah @ Antu Shah and another), arising out of case crime no.183/1989, under Sections 302 read with Section 34 IPC, Police Station- Tilhar, District- Shahjahanpur is affirmed.

(23) Consequently, this appeal lacks merits and the same is hereby **dismissed**.

(24) Appellant- Ataullah @ Antu Shah- is on bail. His bails bonds and surety bonds are hereby cancelled. He shall be taken into custody forthwith for serving out the remaining part of his sentence.

(25) Let a copy of this order be certified to the concerned trial court for its intimation and follow up action.

(2020)03-05ILR A128
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE J.J. MUNIR, J.

Criminal Appeal No. 293 of 2004
&
Criminal Appeal No. 6021 Of 2003
&
Criminal Appeal No. 109 of 2004

Dhan Singh & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri B.K. Tripathi, Sri Anil Yadav, Sri Arun Kumar Singh, Sri Ashok Kumar Mishra, Sri Krishna Kumar Shukla, Sri Lav Srivastava, Sri Rajeshwar Prasad Sinha, Sri Sanjay Kumar Mishra, Sri Sanjay Kumar Srivastava, Yakub Ansari

Counsel for the Opposite Party:
A.G.A., Sri Ravindra Rai

A. Evidence Law-Indian Evidence Act, 1872- Section 8- Conduct of Prosecution witnesses- The conduct of men on encountering a particular situation is to be evaluated going by the prevalent circumstances in a society and is not at all blameworthy or one that creates any doubt about the First Information Report, carrying a truthful account. Non- examination of independent witness- Is lapse of investigation on the part of the police, but in no way does it detract from the veracity of the First Information Report.

The conduct of a person encountering a situation differs from person to person and the same cannot be a ground to question the veracity of the narrative in the F.I.R.

B. Evidence law-Indian Evidence Act, 1872- Section 3, Section 27-Allegedly recovered proceeds of the dacoity - Not recovered in the presence of the prosecution witnesses, who have signed the recovery memo - Also not signed by any member of the public who are said to be present in large numbers - Not made after a disclosure statement or at least a prior mention of it, followed by its recovery at the pointing of the appellants. Recovered articles are chance discoveries while the appellants were searched and held in connection with the NDPS Case- This recovery is not relevant under Section 27 of the Evidence Act however, it would have to be proved in accordance with law. Recovery on the pointing of the appellants- It cannot be held proved, though not disapproved either- Falls in the category of a fact 'not proved' within the meaning of Section 3 of the Indian Evidence Act. Part of the recovery, that has been sought to be proved with the aid of Section 27 of the Evidence Act must be seen in togetherness with the findings on the evidence of PW-3.

Section 27 of the Evidence Act mandates that the discovered fact has to be in pursuance of a disclosure in order to make it a relevant fact and thus admissible in evidence. Chance recoveries made in connection with some other case, without disclosure, cannot be termed as relevant within the meaning of Section 27 of the Evidence Act.

C. Evidence law-Indian Evidence Act, 1872- Section 9- Identification of accused - The result of a test identification parade is relevant under Section 9 of the Evidence Act, and although, it is a procedure that rightfully belongs to the stage of investigation to lend the Investigator an assurance about the identity of the offender, it is of great worth in corroborating evidence of the identifying witness in the dock. Fact that the appellants were unlawfully got identified by the police, two days ahead their arrest being shown, at the Police Station by PW-3, privately and unlawfully without holding a test identification parade, is no lapse of investigation but is a relevant fact that hits at the bottom of the prosecution case about the manner in which the appellants came to be identified and arrested, at the instance of the solitary injured witness of the occurrence, PW-3.

The result of Test Identification is a relevant fact for the purpose of corroboration but the same has to be legal and proper so as to withstand the scrutiny of law. (Para9,61,62,66,69,73,82,88,89)

Criminal Appeals allowed. (E-3)

List of caes cited:-

1. Dalip Singh Vs. St. of Punj., AIR 1953 SC 364

2. Abdul Sayeed Vs. St. of M.P., (2010) 10 SCC 259

3. Daya Singh Vs. St. of Har., (2001) 3 SCC 468

4. Malkhan Singh Vs. St. of M.P., (2003) 5 SCC 746

5. Raja Vs. St. By the Insp. Genrl. of Police, 2019 SCC OnLine SC 1591

(Delivered by Hon'ble J.J. Munir, J.)

1. These three criminal appeals arise out of a judgment and order of Sri P.K. Singh, the then Additional Sessions Judge, Fast Track Court no.4, Gorakhpur, dated 29.10.2003 passed in Sessions Trial no.177 of 2002, State of U.P. vs. Shyam @ Sambhal and others (arising out of Case Crime no.883 of 2001), under Sections 396, 412 IPC, Police Station Khorabar, District Gorakhpur.

2. By the aforesaid judgment and order, each of the five appellants, have been convicted by the learned Trial Judge of commission of an offence punishable under Section 396 IPC and sentenced to suffer

Rigorous Imprisonment for Life, besides being ordered to pay a fine of Rs.5000/- each. In default of payment of fine, the concerned appellant has been ordered to suffer one year's R.I. Appellants, Shyam @ Sambhal, Rinku Kumar Chaudhary and Raju Mali have also been convicted of an offence punishable under Section 412 IPC and sentenced to suffer ten years' Rigorous Imprisonment, besides being ordered to pay a fine of Rs.3000/-. In the event of default, the said appellants, have been ordered to suffer seven months' R.I. Both the sentences have been ordered to run concurrently. Aggrieved, Dhan Singh, Rinku Kumar Chaudhary and Jeevan Mali have preferred Criminal Appeal no.293 of 2004, whereas Shyam @ Sambhal has preferred Criminal Appeal no.6021 of 2003. Raju Mali has appealed separately through Criminal Appeal no.109 of 2004. Criminal Appeal no.293 of 2003 has been heard as the leading case.

3. The facts giving rise to the present appeal are that a written report, Ex. Ka-1 scribed by the informant, Ajay Kumar Rai (PW-1) was lodged at the Police Station Khorabar, District Gorakhpur with the allegations that on 22.11.2001 at 8 O'clock in the morning, he was at his shop, situate at Chandi (Colony). At that time, he received a telephonic call from his uncle's son, Anil Kumar Rai that something untoward had happened at the house of Rakesh situate in Shivaji Nagar Colony, and that therefore, they should come over at once. On this information, he along with his family members reached the house of Rakesh situate at Shivaji Nagar Colony, and saw that the main door was bolted from the inside. They made a lot of effort to open the door, but to no avail. Then they gained entry into the house by scaling a wall on one side. Once inside, they saw that all the doors were ajar, and upon reaching the kitchen, they found the dead bodies of Rakesh Chandra Rai, Chandra Shekhar Rai and Anoop Kumar Rai lying there, and in the *Poojaghar* abutting the Kitchen, they found Smt. Leelawati wife of Rakesh Chandra Rai and Renu Rai daughter of Rakesh Chandra Rai lying injured, while in the northern Bedroom, the dead bodies of Bobby, Vikki and Vibhu Rai, all sons of Ranjit Rai, lay. All the attaché-cases and trunks carrying belongings of the inmates had been broken open, and contents were strewn all over the place, giving an impression that the victims had been murdered and their valuables looted. The injured Leelawati Rai and Renu Rai were sent to the Hospital for medical aid. The written report closed with a request to register a case and initiate appropriate action.

4. On the basis of this written report, Ex. Ka-1, the chik FIR Ex. Ka42 giving rise to Case Crime No.883 of 2001, under Sections 302, 307, 394 IPC was registered at P.S. Khorabar, District Gorakhpur, and an entry in this regard has been made in G.D. no.21 at 09.30 hours on 22.11.2001. An extract of this GD Entry is Ex. Ka-43.

5. On 22.11.2001, the injured Renu Rai was admitted to R.D.M.O. District Hospital, Gorakhpur. PW-11, Dr. S.K. Srivastava, Medical Officer, examined her and found the following injuries on her person:

(1) Contused ir. (injury) area 5 x 3cm on whole of Lt. eye;

(2) Contusion area 3.5x3 cm on the nose clotted blood present. Inj. kept U.O. Advised X-ray.

(3) Contusion area 5x0.5 cm on Rt. ear bleeding from Rt. ear kept UO &

Advised X-ray. Advise referred to ENT Surgeon and Surgeon.

Thereafter, she was referred to the K.G.M.I., Lucknow considering the serious condition of the injured, Renu Rai, where she was admitted to the Gandhi Memorial and Associate Hospital of K.G.M.I., Lucknow.

6. On 22.11.2011, the injured Renu Rai was admitted to the Gandhi Memorial and Associate Hospital of K.G.M.I., Lucknow, where Dr. Amit Sharma attended on her. She remained at the said Hospital an indoor patient from 22.11.2001 to 07.12.2001. PW-10, Dr. J.D. Rawat, Assistant Professor, Surgery Department, K.G.M.I., Lucknow further treated her and also proved the case history drawn up by Dr. Amit Sharma and marked, Ex. Ka-55.

7. On 22.11.2001, PW-6, SI Virendra Pratap Singh prepared inquests of the deceased, Rakesh Chandra Rai, Anoop Kumar Rai, Chandra Shekhar Rai, Bobby, Vikki and Vibhu, and after completing necessary formalities, sent their corpses for autopsy to the District Hospital, Gorakhpur.

8. Smt. Leela Rai, died at the District Hospital, Gorakhpur and her inquest was held by PW-8, SI Amrendra Kumar Rai at the Mortuary of the Hospital in the presence of Panch witnesses on 22.11.2001. The said document is Ex. Ka-42, proved by PW-8, SI Amrendra Kumar Rai.

9. On 22.11.2001, PW-4, Dr. R.K.L. Gupta conducted autopsy of all the seven deceased and drew up postmortem reports, the material part of each of which are as under:

Deceased Rakesh Chand Rai
Ante-mortem injuries

(1) Contused swelling 12cm x 8 cm on occipital region, more on Lt. side;

(2) Contused swelling 5cm x 4cm on Lt. orbital region;

(3) Contused swelling 9cm x 6cm on Lt. side frontal region. On cutting surface haemotoma present.

The cause of death is due to coma as a result of AM head injury.

Deceased Chandra Shekhar Rai
Ante-mortem injuries

(1) Contused swelling 5cm x 4 cm over Lt. orbital region;

(2) Contused swelling 12cm x 8cm on Lt. side of face;

(3) Lacerated wound 2cm x 1-1/2 cm x bone deep on inner part of chin, underlying Haematoma & mandible fracture present;

(4) Contused swelling 5cm x 6cm on Lt. temporal region on cutting Haematoma present.

(5) Contused swelling 15-1/2 cm x 10 cm on front of neck & upper part of chest, on cutting profused Haematoma & carotid vessels ruptured & thyroid bone fractured.

The cause of death is due to asphyxia as a result of strangulation.

Deceased Lila Rai
Ante-mortem injuries

(1) Lacerated wound 3cm x 1-1/2 cm x bone deep on front of chin, underlying Haematoma & mandible fractured;

(2) Contused swelling 12cm x 5cm on Lt. side of face, on cutting Haematoma present.

(3) Contused swelling 10-1/2 cm x 6cm over front of neck, on cutting profuse Haematoma found. Both carotid vessels ruptured and Hyoid bone fractured.

The cause of death is due to asphyxia as a result of strangulation.

Deceased Anoop Kumar Rai

Ante-mortem injuries

(1) Lacerated wound 6cm x 1-1/2 cm on Lt. side chin;

(2) Contused swelling 15cm x 8cm on Lt. side face upto forehead;

(3) Contused swelling 6cm x 4 cm on Rt. Side forehead;

(4) Contused swelling 6cm x 5cm on Rt. face;

(5) Contused swelling 12 cm x 8 cm on Lt. side of head, just above ear, on cutting profuse Haematoma present.

The cause of death is due to coma as a result of AM head injury.

Deceased Bobby

Ante-mortem injuries

(1) Contused swelling 7cm x 5 cm on Rt. side of forehead, 3cm above from Rt. eyebrow, on cutting Haematoma & underlying frontal bone fracture present;

(2) Contused swelling 8cm x 4cm on Lt. side of head, just above the Lt. ear, on cutting Haematoma present.

The cause of death is due to coma as a result of AM Head injury.

Deceased Vikki

Ante-mortem injuries

(1) Contused swelling 13cm x 6-1/2 cm over Lt. side head, extending from frontal to occipital region underlying profuse haematoma & frontal & parietal Lt. bone fractured.

The cause of death is due to coma as a result of AM Head injury.

Deceased Vibhu

Ante-mortem injuries

(1) Contused swelling 11-1/2cm x 7-1/2 cm over upper part of the head, on cutting profuse Haematoma & multiple pieces of vault of skull present. Brain matter contused, mannings torn.

The cause of death is due to coma as a result of AM head injury.

10. According to the prosecution, during the course of investigation, the Investigating Officer and other police personnel on 12.12.2001 at 12.30 hours were inquiring from the appellants and one Rajesh Mali, who were arrested in connection with an NDPS Case, about certain items of jewelry recovered from three of them. At that time, Smt. Renu Rai (injured in the present case) along with her relatives, Ajay Kumar Rai and Anil Kumar Rai arrived there, and upon seeing the appellants, she turned hysterical and assaulting the appellants, crying aloud, identified them as the robbers who had entered her father's house on the night of occurrence, committed loot and done the entire family to death. Upon being shown the recovered items of jewelry, she identified two *Mangalsutra*, a silver coin, a pair of silver *Bichhiya* as hers, which the appellants had looted in the night of 21/22.11.2001. On identification of the appellants by the injured Renu and recovery of proceeds of the dacoity, they were taken into custody in connection with the present crime, apprising them of the offence under Section 396 IPC made out against them. Since the recovered jewelry were case property, the same were sealed in separate containers.

11. According to the prosecution, the appellants confessed to their crime and said that they along with their companions, Vishram and Kalu, entered the victims' house via the roof and after battering the inmates, looted the house. They further said that the stick *(Danda)* used in the crime and a looted bag carrying diaries, wallet etc., they had thrown under the foliage for fear of identification. According to the prosecution, the appellants volunteered to get the stick *(Danda)* and the bag thrown away in the bushes nearby, recovered in case the police were willing. The police acting on the aforesaid disclosure, proceeded along with the appellants and the injured victim Renu Rai, together with her relatives, Ajay Kumar Rai and Anil Kumar Rai, to the place where the weapon of

offence and the bag were said to have been thrown away by the appellants. The appellants led the way and getting off the main road, walked into the grove of one Arjun, wherefrom under the foliage of a bush, they produced a rexine bag, brownish in colour with print bearing the label 'VIP', made of metal with two black zippers and a stick from a guava tree. Upon opening the bag, were found inside a black coloured wallet, that carried an identity card with a photograph of Rakesh Chandra Rai issued by the Income Tax Commissioner, Allahabad, two small diaries with the name of Chandra Shekhar Rai, scribed on it. Upon seeing the bag and wallet, Renu Rai said that the identity card in the wallet was her father's whereas the diary was her brother's. The stick *(danda)* bore blood stains and measured the length of about a hand and a three quarters (the manner the dimensions are described in the recovery memo).

12. The police on the basis of this case and material, charge sheeted the appellants vide charge sheet dated 01.03.2002, Ex. Ka-54, submitted by the Investigating Officer Ravi Chandra Mishra, PW-9, praying that the appellants be summoned and punished for the commission of offences punishable under Sections 396 & 412 IPC.

13. The case was committed to the sessions by the learned Additional Chief Judicial Magistrate, Court no.14, Gorakhpur vide order dated 14.05.2002. After committal to the Court of Session, the Additional Sessions Judge/ Fast Track Court no.3, Gorakhpur, before whom the case came up for framing of charges, proceeded to hear the learned counsel for the parties, and framed a charge for an offence punishable under Section 396 IPC against all the appellants, and against the appellants Shyam @ Sambhal, Raju Mali and Rinku Kumar, framed a charge for an offence punishable under Section 412 IPC. The appellants pleaded not guilty and claimed trial.

14. In order to prove their case, the prosecution have examined the following witnesses:

(1) PW-1, Ajay Kumar Rai, informant and scribe of the written report;

(2) PW-2, Anil Kumar Rai, another witness of fact and relative of the victim family;

(3) PW-3, Renu Rai, injured witness;

(4) PW-4, Dr. R.A.L. Gupta, conducted autopsy;

(5) PW-5, Dr. Mahendra Singh, Superintendent, District Hospital, Gorakhpur, who gave primary medical attention to injured Renu Rai, admitted her and referred her to K.G.M.I., Lucknow;

(6) PW-6, SI Virendra Pratap Singh, drew up inquest reports and other documents regarding investigation;

(7) PW-7, HC 138 Awadhesh Kumar Pandey, registered the FIR in Case Crime no.883 of 2001, under Sectins 302, 306, 394 IPC and also made entry in GD about the case;

(8) PW-8, SI Amarendra Kumar Rai, prepared inquest of Smt. Leela Rai and also drew up other documents for her postmortem;

(9) PW-9, IO Ravi Chandra Mishra, investigated the case and submitted charge sheet;

(10) PW-10, Dr. J.D. Rawat, Assistant Professor, Surgery

Department, KGMI, Lucknow, medically managed injured Renu Rai at KGMI, Lucknow, and proved the Medical Case History of injured Renu Rai; and

(11) PW-11, Dr. S.K. Srivastava, examined injuries and drew up the medico-legal report of injured Renu Rai, dated 22.11.2001.

15. The prosecution have relied on the following documents:

Sr. No.	Exhibit No.	Exhibited documents with brief particulars
1	Ex. Ka-1	Written report dated 22.11.2001 lodged with the Police Station Khorabar, District Gorakhpur and proved by PW-1, Ajay Kumar Rai
2	Ex. Ka-2	Recovery memo dated 12.12.2001 with regard to the weapon *(danda)* used in the crime and a rexine bag belong to the victim family, proved by PW-1, Ajay Kumar Rai
3	Ex. Ka-3	Recovery memo dated 12.12.2001 with regard to stolen articles, proved by PW-2, Anil Kumar Rai
4	Ex. Ka-4	Postmortem Report of Rakesh Chand Rai, dated 22.11.2001, proved by PW-4, Dr. R.K.L. Gupta
5	Ex. Ka-5	Postmortem Report of Chandra Shekhar Rai, dated 22.11.2001, proved by PW-4, Dr. R.K.L. Gupta
6	Ex. Ka-6	Postmortem Report of Smt. Lila Rai, dated 22.11.2001, proved by PW-4, Dr. R.K.L. Gupta
7	Ex. ka-7	Postmortem Report of Anoop Rai, dated 22.11.2001, proved by PW-4, Dr. R.K.L. Gupta
8	Ex. Ka-8	Postmortem Report of Bobby Rai, dated 22.11.2001, proved by PW-4, Dr. R.K.L. Gupta
9	Ex. Ka-9	Postmortem Report of Vikki, dated 22.11.2001, proved by PW-4, Dr. R.K.L. Gupta
10	Ex. Ka-10	Postmortem Report of Bibhu, dated 22.11.2001, proved by PW-4, Dr. R.K.L. Gupta
11	Ex. Ka-11	Referral letter of Renu Rai, dated 22.11.2001 to KGMI Lucknow, proved by PW-5, Dr. Mahendra Singh
12	Ex. Ka-12	Inquest Report of deceased Rakesh Chandra Rai, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh
13	Ex. Ka-13	Photo Nash of Rakesh Chandra Rai, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh
14	Ex. Ka-14	Police Form no.33, dated 22.11.2001 for autopsy of deceased Rakesh Chandra, proved by PW-6, SI Virendra Pratap Singh
15	Ex. Ka-15	Form no.13, dated 22.11.2001 of deceased Rakesh Chandra, proved by PW-6, SI Virendra Pratap Singh
16	Ex. Ka-16	Letter written to CMO dated 22.11.2001 for PM examination of Rakesh Chandra, proved by PW-6, SI Virendra Pratap Singh
17	Ex. Ka-17	Inquest Report of deceased Anoop Kumar Rai, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh
18	Ex. Ka-18	Photo Nash dated 22.11.2001 of Anoop Rai, proved by PW-6, SI Virendra Pratap Singh
19	Ex. Ka-19	Challani (Form no.13), dated 22.11.2001 of deceased Anoop Rai, proved by PW-6, SI Virendra Pratap Singh
20	Ex. Ka-20	Police Form no.33, dated 22.11.2001 for PM examination of deceased Anoop Rai, proved by PW-6, SI Virendra Pratap Singh
21	Ex. Ka-21	Letter written to CMO dated 22.11.2001 for PM examination of Anoop Rai, proved by PW-6, SI Virendra Pratap Singh
22	Ex. Ka-22	Inquest Report of deceased Chandra Shekhar Rai, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh
23	Ex. Ka-23	Challani (Form no.13), dated 22.11.2001 of deceased Chandra Shekhar, proved by PW-6, SI Virendra Pratap Singh
24	Ex. Ka-24	Police Form no.33, dated 22.11.2001 for postmortem examination of deceased Chandra Shekhar, proved by PW-6, SI Virendra Pratap Singh
25	Ex. Ka-25	Photo Nash of Chandra Shekhar Rai, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh

26	Ex. Ka-26	Letter written to CMO dated 22.11.2001 for PM examination of Chandra Shekhar Rai, proved by PW-6, SI Virendra Pratap Singh
27	Ex. Ka-27	Inquest Report of deceased Bobby, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh
28	Ex. Ka-28	Photo Nash of Bobby, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh
29	Ex. Ka-29	Challani (Form no.13), dated 22.11.2001 of deceased Bobby, proved by PW-6, SI Virendra Pratap Singh
30	Ex. Ka-30	Police Form no.33, dated 22.11.2001 for postmortem examination of deceased Bobby, proved by PW-6, SI Virendra Pratap Singh
31	Ex. Ka-31	Letter written to CMO dated 22.11.2001 for PM examination of Bobby, proved by PW-6, SI Virendra Pratap Singh
32	Ex. Ka-32	Inquest Report of deceased Vikki, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh
33	Ex. Ka-33	Photo Nash of Vikki, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh
34	Ex. Ka-34	Challani (Form no.13), dated 22.11.2001 of deceased Vikki, proved by PW-6, SI Virendra Pratap Singh
35	Ex. Ka-35	Police Form no.33, dated 22.11.2001 for postmortem examination of deceased Vikki, proved by PW-6, SI Virendra Pratap Singh
36	Ex. Ka-36	Letter written to CMO dated 22.11.2001 for PM of Vikki, proved by PW-6, SI Virendra Pratap Singh
37	Ex. Ka-37	Inquest Report of deceased Vibhu, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh
38	Ex. Ka-38	Photo Nash of Vibhu, dated 22.11.2001, proved by PW-6, SI Virendra Pratap Singh
39	Ex. Ka-39	Challani (Police Form no.13), dated 22.11.2001 of deceased Vibhu, proved by PW-6, SI Virendra Pratap Singh
40	Ex. Ka-40	Police Form no.33, dated 22.11.2001 for postmortem examination of deceased Vibhu, proved by PW-6, SI Virendra Pratap Singh
41	Ex. Ka-41	Letter written to CMO dated 22.11.2001 for PM examination of Vibhu, proved by PW-6, SI Virendra Pratap Singh
42	Ex. Ka-42*	Inquest Report of deceased Leela Rai, dated 22.11.2001, proved by PW-8, SI Amrendra Kr. Rai
	Ex. Ka-42*	*Chik* FIR dated 22.02.2001
43	Ex. Ka-43**	Police Paper no.33, dated 22.11.2001 for postmortem examination of deceased Leela Rai, proved by PW-6, SI Virendra Pratap Singh
	Ex. Ka-43**	Carbon copy of the G.D. Entry no.21, Time 9.30, dated 22.11.2001 relating to Case Crime no.883 of 2001, under Sections 302, 307, 394 IPC, proved by PW-7, HC 138 Awadhesh Kumar Pandey
44	Ex. Ka-44	Photo Nash of Leela Rai, dated 22.11.2001, proved by PW-8, SI Amarendra Kr. Rai
45	Ex. Ka-45	Challani (Police Form no.13), dated 22.11.2001 of deceased Leela Rai, proved by PW-8, SI Amarendra Kr. Rai
46	Ex. Ka-46	Letter written to CMO dated 22.11.2001 for PM examination of Leela Rai, proved by PW-8, SI Amarendra Kr. Rai
47	Ex. Ka-47	Letter written to RI dated 22.11.2001 for PM of Vibhu, proved by PW-8, SI Amarendra Kr. Rai
48	Ex. Ka-48	Site Plan of the place of incident dated 22.11.2001, proved by PW-9
49	Ex. Ka-49	Memo regarding recovery of blood stained clothes, proved by PW-9, SO Ravi Chandra Mishra
50	Ex. Ka-50	Memo regarding recovery of blood stained and plain earth, proved by PW-9, SO Ravi Chandra Mishra
51	Ex. Ka-51	Memo regarding recovery of jewellaries, proved by PW-9, SO Ravi Chandra Mishra
52	Ex. Ka-52	Memo regarding recovery of blank containers of jewellaries, proved by PW-9, SO Ravi Chandra

		Mishra
53	Ex. Ka-53	Memo regarding recovery of shoes/ slippers, proved by PW-9, SO Ravi Chandra Mishra
54	Ex. Ka-54	Charge sheet, proved by PW-9, SO Ravi Chandra Mishra
55	Ex. Ka-55	Surgery Cases Sheet of injured Renu Rai dated 22.11.2001, proved by PW-10, Dr. J.D. Rawat
56	Ex. Ka-56	Photostat copy of Injury report of Renu Rai dated 22.11.2001, proved by PW-11, Dr. S.K. Srivastava
57	Ex. Ka-57	Report of Forensic Science Laboratory, U.P., Lucknow dated 17.08.2002
58	Ex. Ka-58	Report of Forensic Science Laboratory, U.P., Lucknow dated 17.08.2002

* Ex. Ka-42 is assigned to two documents, apparently by clerical error

** Ex. Ka-43 is assigned to two documents, apparently by clerical error

16. Thereafter, the statements of the appellants were recorded under Section 313 Cr.P.C. They denied the incriminating circumstances appearing in evidence against them and relied upon the following documents:

1) True copy of the Chik FIR;

(2) True copy of the site plan;

(3) True copy of the statement of PW-3, HC Awadhesh Kumar Pandey,

(4) True copy of the statement of PW-9, Ravi Chandra Mishra, Investigating Officer of the case.

17. The Trial Court after hearing both the parties and discussing the evidence and material on record found the appellants variously guilty of offences under Sections 396 and 412 IPC and sentenced each of them as above detailed, by the impugned judgment and order.

18. Aggrieved, the convicts have preferred these appeals.

19. Heard Shri Ashok Kumar Mishra, learned Counsel for all the appellants, Shri J.K. Upadhyay, learned A.G.A. for the State and Sri Rajendra Rai, learned Counsel appearing on behalf of the complainant.

20. Learned Counsel for the appellants, Sri Ashok Kumar Mishra, has assailed the prosecution case as one engineered by the police. He has impressed upon us the fact that the crime is one that has been perpetrated in an entirely different manner by offenders who would be very different than the convicts before us. According to him, the appellants have been framed by the police, either at the instance of the true offenders who might be acquaintances of the family or their kinsmen, or the prosecution is the result of an easy solution to a complicated crime that the police have contrived.

21. To all this end, learned Counsel for the appellants has drawn the Court's attention to some early signs of doubt about the prosecution case. It is pointed out by him that the First Information Report in this case was lodged by Ajay Kumar Rai, after an information he received from Anil Kumar Rai over telephone that some untoward incident had happened at the house of the informant's cousin, Rakesh Chandra Rai. He points out that Anil Kumar Rai is a cousin of the informants. The informant was at his shop in a village 25 kilometers away at the time he received this information, at 8 o' clock in the morning. He proceeded to the house of Rakesh Chandra Rai along with other members of the family, where they found a congregation of people outside the entrance door, that was bolted from within.

22. Learned Counsel for the appellants submits that discovery of the crime thereafter, by Ajay Kumar Rai and others is quite another matter. What is intriguing, according to Sri Ashok Kumar Mishra is the fact that Anil Kumar Rai, who was himself a cousin of Rakesh Chandra Rai did not move in with the aid of all those who were present there to discover what had befallen the inmates of the house, all of whom were his relatives. In a display of conduct, highly unnatural to meet a suspected emergency, he called another cousin of his, that is to say, Ajay Kumar Rai to come over and find out what had befallen the family.

23. Moving further with his submission that the prosecution story is suspect at its inception, learned Counsel for the appellants submits that it is not just that, that Anil Kumar Rai called up Ajay Kumar Rai to come all the way over to the place of occurrence to find out what had happened to the family who became victims of the crime, but he chose to call the first informant over in the face of an emergency, though the informant was located at a distance of about 25 kilometers from Gorakhpur in Village Chandi Gaon. It took Ajay Kumar Rai some 40 - 45 minutes to reach Gorakhpur, and some more to reach the place of occurrence. Once at the house of Rakesh Chandra Rai, the informant found Anil Kumar Rai and his brother Pramil Kumar Rai present, along with a big crowd of unrelated persons. Learned Counsel for the appellants submits that there was no earthly reason for Anil Kumar Rai or Pramil Kumar Rai, both of whom were cousins to Rakesh Chandra Rai, not to have acted swiftly and moved in with the others present to find out whatever had happened inside Rakesh's house, when everyone present suspected some mis-happening. In this regard, learned Counsel for the appellants has drawn attention of the Court to the evidence that figures in the cross-examination of Ajay Kumar Rai at page 63 of the paper-book.

24. Dwelling further upon the suspicious circumstances attending the earliest steps taken by the family to discover the crime leading to the First Information Report, it is pointed out by the learned Counsel for the appellants that Ajay Kumar Rai who deposed before the Trial Court as PW-1, has said in his examination-in-chief (as well as his cross-examination) that he and Anil Kumar Rai, on finding the main door to the house bolted, gained entry via the house of one H.N. Singh, located to the north of Rakesh's house. They did so after moving in to H.N. Singh's house through his main-gate and scaling the wall dividing the two premises.

25. Learned Counsel for the appellants has placed much emphasis on the fact that H.N. Singh, who would be the earliest independent witness about the manner of crime, or atleast its discovery, was never examined by the police, and of course, never examined as a prosecution witness. In this connection, the attention of the Court has been drawn to the examination-in-chief of Ajay Kumar Rai recorded during trial, that figures at page 58 of the paper-book, and his cross-examination at page 65.

26. It is submitted, thus, in substance by the learned Counsel for the appellants that the First Information Report does not at all disclose the true and the earliest account about discovery of the crime that has been perpetrated in a very different manner, and by assassins, completely unrelated to these convicts. The First

Information Report is a prelude to a complete story of falsehood that the prosecution witnesses have lateron come up with; including the story that the injured witness, Smt. Renu Rai, PW-3 has given out falsely on oath in her testimony.

27. Sri J.K. Upadhyay, learned A.G.A. and Sri Rajendra Rai, learned Counsel for the complainant, have refuted the aforesaid submissions of the learned Counsel for the appellants. They have said that the First Information Report is a very natural depiction of the behaviour of close relatives, where a number of their family members became victims of a heinous crime of this nature. There is nothing unnatural about the First Information Report, or to harbour suspicion about the prosecution case on its basis.

28. This Court would consider a little later in this judgment, this and the other submissions advanced on behalf of the appellants. It would be more profitable to record those submissions together with the prosecution's response before moving in to analyze the worth of the prosecution case.

29. There is then a whole lot of scathing criticism about the manner of the appellants' arrest and, more fundamentally, how these appellants came to be connected to the crime. Learned Counsel for the appellants submits that the manner in which the appellants have been shown to be arrested in connection with an NDPS Case near a place called *Baudh Sangrahalaya* on 12.12.2001, and then shown to be identified by Renu Rai, the sole survivor of the crime and an injured witness, who was passing by, riding pillion with PW-1, Ajay Kumar Rai and Anil Kumar Rai on way to the hospital, *ex facie*, makes it look like a foisted case. The arrest and the identification, both, that are said to have happened spontaneously, connecting the appellants to the crime, is hard to believe.

30. Learned Counsel for the appellants has laid particular emphasis about the prosecution case to the effect that on 12.12.2001 at 12.30 p.m., the surviving and injured witness, Renu Rai was accompanying PW-1, Ajay Kumar Rai and PW-2, Anil Kumar Rai to the hospital and as they approached a place called *Baudh Sangrahalaya*, they found near one Arjun's grove a large crowd of people. Upon seeing the crowd, they moved to the grove and there found the appellants in police custody. It is the prosecution case that they were arrested in connected with recovery of Narcotics *(Ganja)* and certain items of jewelry, that were until then not connected to any crime. Upon seeing the appellants, Renu Rai immediately identified them as the men who had pulled the dacoity at her home and brutally murdered her family members. In this connection, Sri Ashok Kumar Mishra has invited the attention of the Court to the examination-in-chief of PW-1, Ajay Kumar Rai which is extracted below:

"इसके बाद पुलिस घटना स्थल पर पहुंची। दिनांक 12.12.2001 को करीब साढ़े बारह बजे दिन में मै रेनू राय व अनिल कुमार राय के साथ अपने मामा के घर से रेनू को दिखाने अस्पताल जा रहे थे तो बौद्ध संग्रहालय के पास रामगढ़ परियोजना में बाई पास रोड के बगल में अर्जुन के बाग के पास भीड़ देखकर हम लोग वहां गये तो वहां हम लोगों ने देखा कि मुलजिमान हाजिर अदालत को पुलिस ने पकड़ा हुआ है उनके पास से गाजा और मेरे भाई राकेश चन्द्र राय के घर से हत्या कर लूटे हुये दो मंगल सूत्र, चांदी की बिछिया, और एक 1901 का सिक्का बरामद हुआ था जिन्हे रेनू ने पहचाना था

और अभियुक्तों को देखते ही उसने कहा था कि यही वे लोग हैं जो मेरे घर लूट पाट किये थे और हत्या किये थे।"

31. To the same effect, learned Counsel for the appellants has pointed out, is the account of identification and arrest of the appellants in connection with this crime by PW-2, Anil Kumar Rai, that finds place in his examination-in-chief, dated 20.08.2002. He has laid particular emphasis on the testimony of PW-3, Renu Rai, the injured and sole surviving witness, who also speaks in identical terms in her examination-in-chief about a wayside and spontaneous identification of the accused by her and their ensuing arrest. Learned Counsel for the appellants has referred to the concluding part of her examination-in-chief, dated 05.09.2002 and the substantial part of it recorded on the following day, i.e., 06.09.2002. The part of deposition of PW-3, referred to by the learned Counsel, recorded on 05.09.2002, reads to the following effect:

"12.12.2001 को दस बजे दिन में अनिल चाचा और अजय मौसा आये और वहां से सवा बारह बजे के करीब निकले डाक्टर के यहां जा रहे थे।"

32. The resumed deposition of PW-3, Smt. Renu Rai on 06.09.2002, that is in continuation of what is extracted above, reads thus:

"मामा के घर से निकले तो वहां से बाई पास रोड पर आये कुछ दूर आगे आकर फिर हम उत्तर की तरफ गये बौद्ध संग्रहालय के पास आई तो वहां पुलिस दिखी वहां पर रुकने के बाद मेरे चाचा और मौसा आपस में बात किये कि यहां पुलिस क्यों खड़ी है वहां से करीब एक सौ मीटर की दूरी पर काफी भीड़ दिखाई दी भीड़ देखने के बाद मेरे चाचा और मौसा वहां लेकर के गये। जब मैं वहां पर पहुंची तो वहां पर भीड़ थी पुलिस वालों ने छः आदमियों को पकड़ा था उनमें से पांच आज न्यायालय में उपस्थित हैं वहां जब मैने देखा तो मैने कहा कि यही वह पाँच आदमी है जिन्होंने मेरे बच्चों व माता पिता भाई व परिवार वालों को मार डाला।"

33. It is next urged by the learned Counsel for the appellants that the Investigating Officer, PW-9 in his cross-examination on behalf of appellants, Raju Mali and Jeewan Mali, dated 02.04.2003 has said that until 11.12.2001, there was no information or knowledge about the identity of the perpetrators. He was tipped off by an informer that some criminal elements were about the place at *Tara Mandal* (near *Baudh Sangrahalaya*). He has said that acting on the said tip off, he arrested the appellants on 12.12.2001 from *Tara Mandal*. He has specified their number to be five in the first instance, and has lateron, modified it to a figure of six. These men were arrested in connection with a case of recovery of narcotics. The recovery of narcotics had led to recovery of some unconnected items to the narcotics case that were pieces of valuable jewelry. While the Investigating Officer was interrogating the six men arrested in connection with the narcotics matter, more about the additional recovery, PW-3 arrived there along with PW-1 and PW-2, and identified the six men present as perpetrators of the present crime spontaneously. It is emphasized that in the evidence of the Investigating Officer, it has again been admitted that no member of the public witnessed the recovery, except the Rai Family. The relevant part of the evidence of the Investigating Officer, upon

which account Sri Mishra has laid great emphasis, is reproduced *infra*:

"दिनांक 11.12.01 तक कोई भी मुलजिम प्रकाश में नहीं आया था। रेनु राय से मेरी मुलाकात 9.12.01 को आजाद नगर में अजय राय वादी मुकदमा के घर पे हुआ था। फिर कहा कि रूस्तम पुर ढाल पर बयान लिया था। दिनांक 9.12.01 को रेनु का बयान लेने के बाद दिनांक 12.12.01 को मुलजिमान को तारा मण्डल से हम लोगों ने गिरफ्तार किया था। कुल पांच मुलजिम पकड़े थे। मेरे खास आदमी मुखबिर ने सूचना दिया था कि कुछ अपराधिक किस्म के आदमी तारा मण्डल के पास है। जिस व्यक्ति ने तारा मण्डल के पास कुछ अपराधिक व्यक्ति के बारे में होने का सूचना दिया था मैं उसका नाम नहीं बता सकता।

अजखुद कहा कि 6 मुलजिमानों को पकड़ा गया था। जिस व्यक्ति ने सूचना दिया था उसका नाम बताना उचित नही है। यह सूचना मुझे 10 बजे दिनांक 12.12.01 को मिली थी। यह सूचना मुझे राय गढ़ ताल चौकी पर मिली थी। इस सूचना पर तुरन्त हम लोग तारा मण्डल पहुंच गये और 6 व्यक्ति वहां बैठे मिले। मौके पर पब्लिक के काफी लोग वहां पहुंच गये थे। वहां मौजूद पब्लिक में से मुलजिमान की गिरफतारी का साक्ष्य नही है। बरामदगी का कोई साक्ष्य राय परिवार के अलावा वहां मौजूद काफी लोगों में कोई गवाह नही है। मुलजिमान हम लोगों को देख नहीं पाये होगें इसलिए भगे नही।"

34. Learned Counsel for the appellants has submitted that it is not about the fine details of the prosecution account coming from these three witnesses, pitted against the contradictions here and there about this account in their cross-examination that he emphasizes. According to him, this story about the surviving and injured witness, PW-3, Renu Rai, proceeding to the hospital or a Doctor along with her uncles Ajay and Anil in connection with her treatment, and suddenly on seeing the police or a crowd of people in a grove, close to the *Baudh Sangrahalaya*, abandoning course and moving in to find out what was afoot there, is inherently unbelievable. He submits that it is beyond comprehension that a vulnerable and shaken person, like Renu Rai, proceeding to a Doctor for a checkup, would suddenly change course on seeing the police or a crowd; to do so is not in keeping with normal or even a slightly variant standard of human behaviour. It is urged by him that on seeing the police along with a crowd, the natural tendency of any peace-loving and law abiding citizen is to move away as sights like these are in the common experience of men of ordinary prudence, sources of brooding trouble. No one wishes to barge into a crowd mixed up with the police to find out what has happened. According to the learned Counsel for the appellants, this is almost a universal reaction of persons circumstanced as the three prosecution witnesses. To add to it is the fact that they were a family, hardly emerged from the trauma of a big crime and tragedy. PW-1 and PW-2, according to their consistent account, had moved out with PW-3 to seek medical consultation. It is in these circumstances preposterous to suggest much less believe, in the submission of Sri Ashok Kumar Mishra that all three of them would move out to a sight that in common perception of men no source of attraction, recreation or curiosity.

35. The account of identification and arrest given by the Investigating Officer in his evidence, in the submission of the learned Counsel for the appellants, is also to its face, shaky and unreliable. In particular, he submits that the fact that the

Investigating Officer has spoken about arresting in the first instance five accused in connection with the narcotics case, and lateron correct himself to make it a figure of six, makes the entire prosecution case a riddle about the sixth man apprehended. This is so because the charge sheet in the case has been filed against five men alone, and there is no explanation in the submission of Sri Mishra as to what happened to the sixth man apprehended. The absence of a cogent explanation by the prosecution as to why the sixth man apprehended was not put up for his trial, renders the prosecution seriously doubtful. It is also pointed out by the learned Counsel for the appellants that the Investigating Officer has said in his cross-examination, dated 09.05.2003 at the instance of appellants, Shyam @ Sambhal and Rinku that the arrest took place a little before 12.30 p.m., whereas recovery of narcotics and other articles was made at 12.30 p.m. (on 12.12.2001). The arrest of all the appellants in connection with the narcotics case that were registered as five separate crimes against them was shown at 10.30 a.m. This according to the learned Counsel for the appellants shows that the time of arrest is not certain, which furthers the appellants' case that their implication in the crime was the result of manipulation done by the police in order to do a face saving exercise. The appellants have merely become scapegoats.

36. Learned Counsel for the appellants submits that the account of identification can either be utter falsehood or one that came about in a preplanned manner on a tip off from the police. He also submits that the possibility of this manner of identification and arrest being utterly false, never to have taken place that way is very high, bearing in mind the fact that about this identification and arrest, which involves some recovery also, no witness of the public has been associated; much less examined before the Court. On this part of his submission, Sri Mishra says that the absence of a public witness about this wayside and fantastic identification followed by arrest shows it to be the result of a concocted story conjured up by the police, in connivance with the first informant and the two other prosecution witnesses. There is no independent witness to corroborate it. It is urged that this kind of an inherently unbelievable identification and arrest, in the absence of some independent and corroborating evidence, makes the prosecution story unbelievable. It is also emphasized that since this identification and arrest is a very relevant fact, on the basis of which the appellants have been connected to the crime, the failure of the prosecution to prove it, knocks the bottom out of their case.

37. The next submission of Sri Ashok Kumar Mishra, learned Counsel for the appellants is closely connected to the one about the manner of identification and arrest. It is about recovery of some case property and the weapon of offence. It is urged on behalf of the appellants that it has clearly figured in the deposition of PW-1, that when he along with Renu Rai and Anil Kumar Rai reached the place where the accused had been arrested and they were identified by Renu Rai spontaneously, the police showed them some recovered articles of dacoity that they had already recovered from the accused. It is urged that this recovery of what have been dubbed as part of the dacoits booty was not recovered in presence of either PW-1, PW-2 or PW-3. There is no witness to this recovery, either from the complainant's family or amongst the public. This recovery was shown by the

police to have been made along with the recovery referable to the NDPS Case, in connection whereof the accused were shown to be falsely arrested from the grove near the *Baudh Sangrahalaya*. The recovered articles are attributed to a chance recovery, along with the recovered narcotics. It is only lateron, when the victim of the crime, PW-3 along with PW-1 and PW-2 arrived at the scene of occurrence and PW-3 is said to have spontaneously identified them, that they were shown the recovered articles of loot, which Renu Rai PW-3 is said to have identified. In this connection, learned Counsel for the appellants has drawn attention of the Court to the deposition of PW-1 during his cross-examination, dated 13.08.2002 at the instance of the appellants, Raju Mali and Jeewan Mali. This deposition is extracted below:

"रेनु अभियुक्तों को देखते ही पहचान गई और आवेश में आकर के उलझने लगी। पुलिस ने अभियुक्तों के पास से पहले से बरामद सामान दिखाया, ये सामान दरोगा जी रखे थे। दो मगंल सूत्र चांदी का जिसमें एक मगंल सूत्र टूटा हुआ, दूसरा मगंल सूत्र जिसमें चांदी के लाकेट में सीकड़ में सोने का पानी चढ़ा हुआ था और चांदी की बिछिया, टूटे मगंल सूत्र में मोती के दाने लगे थे जो काले रंग के थे और एक ज्ञान (हथौड़ी) भी बरामद हुआ था। साथ ही एक चादी का सिक्का 1901 का बरामद हुआ था जिसे रेनु ने पहचाना था।"

38. Likewise, PW-1 in his deposition dated 14.08.2002, that is part of his cross-examination at the instance of the appellants, Shyam @ Sambhal and Rinku has said to the following effect:

"मेरे सामने पुलिस के द्वारा कोई मंगल सूत्र या चाँदी का सिक्का बरामद नहीं किया था और मैं यह भी नहीं बता सकता कि किस अभियुक्त के पास से कौन सा सामान बरामद हुआ था। यह कहना गलत है कि मेरे सामने मुलजिम की निशान देही पर कोई सामान बरामद नहीं हुआ।"

39. Learned Counsel for the appellants has also drawn our attention to the deposition in the examination-in-chief of Anil Kumar Rai, PW-2, relating to recovery of the articles of loot. The aforesaid deposition recorded on 20.08.2002 reads as follows:

"हम लोगों के पहुँचने के पूर्व पुलिस ने इन बदमाशों के पास से दो मंगल सूत्र जिसमें एक मंगल सूत्र काले रंग की गुड़िया और चांदी का लाकेट व सिकड़ी जिस पर सोने का पानी चढ़ा था, दूसरा मंगल सूत्र जिसमें काले रंग की मोतिया और चार सोने की गुड़िया गुथी हुई थी और टूटा हुआ था। एक चांदी का सिक्का जिस पर 1901 अंकित था। बिछिया एक अदद बरामद किये गये थे।"

Again, on the following day, that is to say, on 21.08.2002, PW-2 spoke about the recovery of these articles in the following words:

"जो सामान दरोगा जी बरामद किये थे वह सब डिब्बों में अलग अलग मेरे सामने सील किये थे। वह सामान सील्ड हालत में अलग अलग डिब्बों में मेरे सामने है। जिसकी सील मुहर दुरूस्त है। न्यायालय की आज्ञा से वकील मलजिमान को दिखा कर सील खोला गया। सील खोलने पर एक डिब्बें में से काले रंग की मोतियों की माला (मंगल सूत्र) व चार सोने की गुरिया निकली मगंल सूत्र का धागा टुटा हुआ है। दूसरे डिब्बे से मंगल सूत्र मय लाकेट जिस पर सोने का पानी चढ़ा है मय सिकड़ी चांदी की जिस पर सोने का पानी चढ़ा हुआ है, व तीसरे डिब्बे में से एक जोड़ा चांदी की बिछिया व 1901 का एक सिक्का चांदी का निकला। जिन पर क्रमशः वस्तु प्रदर्श 1 ता 4 डाला गया। बरामदशुदा इन सामानों को देखकर रेनु ने कहा कि यह सब

सामान उसके है। इस सामानों को पुलिस ने इन मुलजिमान हाजिर अदालत से बरामद किया था। बरामदशुदा सामानों की लिखा पढ़ी हुई थी इसी स्थान पर हुई थी जिस पर मैने भी हस्ताक्षर बनाये थे वह फर्द मेरे सामने है जिस पर प्रदर्श क-3 डाला गया।"

40. Learned Counsel for the appellants has also laid emphasis on the deposition of PW-3, Smt. Renu Rai who has spoken about this recovery of the looted articles by the police from the arrested men, in her examination-in-chief on 06.09.2002, thus:

"जब मै चिल्लाने लगी और रोने लगी तो पुलिसवालों ने मुझे कुछ सामान दिखाया। दो मगंल सूत्र दिखाये व एक चांदी का सिक्का व एक जोड़ा बिछिया था जो पुलिस वालों ने मुझे दिखाया जो मेरा था। एक लोहे का हथोड़ा दिखाया। बरामद शुदा सामान जो डिब्बे में सर्व मुहर है खोला गया। बरामद शुदा सिक्के पर सन 1901 अंकित है।"

41. Learned Counsel for the appellants submits that the recovery is in two different parts, both of which are not only different about the nature and character of the articles recovered, but the legal incidents thereof. He submits that so far as the recovery of looted articles of property attributed to the appellants is concerned, this recovery from the evidence of the three witnesses of fact, as well as the recovery memo dated 12.12.2001, Ex. Ka-3, is not at all referable to a recovery under Section 27 of the Evidence Act. This recovery is one that the police claim to have been made from the appellants on the wayside, while they were being searched in connection with the NDPS Cases. That search had led to recovery of *Ganja* from their possession, and along with it, one or the other of the looted articles from three of the appellants as a matter of chance. It was not the kind of recovery that was made at the instance of the appellants who disclosed it ahead of the recovery, which then was made at their pointing out. The recovered articles according to the recovery memo, distinct and separate from the narcotics recovered, were shown to PW-3, Smt. Renu Rai, when these were already in the hands of the police, claimed by them to be recovered from the appellants. These articles were identified by Smt. Renu Rai as part of the looted property, but Smt. Renu Rai or for that matter PW-1 or PW-2 are not witnesses of this recovery.

42. Sri Mishra, learned Counsel for the appellants points out that a perusal of the recovery memo dated 12.12.2001, Ex. Ka-3 shows that it is signed by the accused, the police party, besides Ajay Kumr Rai, Anil Kumar Rai and Smt. Renu Rai. It is submitted by Sri Mishra that this recovery memo is a document, that is hardly of any worth. According to him, the reason is that this recovery was made by the police in connection with the NDPS Case, and, in fact, that the recovery of these articles was also shown in the NDPS Case Recovery Memo. Once the injured, PW-3 identified the appellants, as claimed by the prosecution, recovery memo, Ex. Ka-3 was drawn up, assigning the claimed articles of loot to the present crime. PW-1, PW-2 and PW-3, who have signed the recovery memo, have not witnessed the recovery. He submits that these articles of loot were picked up from the scene of crime, where a lot of jewelry lay strewn and foisted upon the appellants. There is absolutely no public witness of this recovery as would be evident from a perusal of the recovery memo, Ex. Ka-3. Learned Counsel for the appellants has also referred to the evidence

of PW-1, PW-2 and PW-3, which according to him, consistently shows that the police claimed to have already recovered these articles as part of the NDPS Case apprehension of the appellants and investigation. PW-3 lateron identified them as perpetrators of the present crime. The evidence of the three witnesses, thus, clearly shows that they were shown the claimed articles of loot, what the police had already recovered. None of the prosecution witnesses have stated that these articles of loot were recovered from the appellants in their presence. Also, the recovery of these articles is not endorsed by any other member of the public. The submission, therefore, of the learned Counsel for the appellants is that the entire recovery of the claimed articles of loot is planted.

43. We may now refer to the submission of the learned Counsel for the appellants regarding second part of the recovery. It comprises the weapon of offence, a stick made of guava tree wood, a rexine bag carrying a label of its make described as 'VIP' and the contents of the bag, that revealed a black coloured wallet with an identity card of Rakesh Chandra Rai, bearing his photograph issued by the Commissioner of Income Tax, Allahabad and a small diary, bearing the name of Chandra Shekhar Rai and his address. The bag aforesaid carried another small diary, also bearing the name of Chandra Shekhar Rai.

44. All these recovered articles claimed by the police have been shown through a separate recovery memo, also dated 12.12.2001, but bearing Ex. Ka-2. In the submission of Sri Mishra, this recovery is distinct and different from the first, not only about the contents, but the manner in which it has been made and its legal incidents. This recovery is shown to have been made after the appellants were identified by PW-3, Renu Rai. The appellants are then said to have made a disclosure and led way to the place where they had hidden these articles. It is claimed that they led the police along with PW-1, PW-2 and PW-3 to a place, where they left the main road and went into Arjun's grove. There, from under a shrub they recovered the rexine bag and the guava wood stick. The contents of the rexine bag carrying the wallet with an identity card of Rakesh Chandra Rai and the diaries of the other deceased Chandra Shekhar Rai, were identified by Renu Rai as those of her fathers and brothers. The bag was identified as that of her brother, Chandra Sherkhar Rai as well as the diaries, whereas the wallet was identified, together with the identity card, as her fathers, by PW-3. The recovered stick is claimed to be smeared with blood, one hand and a three quarters in length. All these articles are shown to be sealed on the spot with the recovery memo being thumb marked by the appellants, signed by the police party, besides Ajay Kumar Rai, Anil Kumar Rai and Smt. Renu Rai.

45. Learned Counsel for the appellants points out that this recovery memo is not signed by any member of the public, who were around and available in abundance. The recovery memo also does not mention that members of public were invited to sign the recovery memo which they declined. It is urged that the recovery memo also does not say that members of the public went along with the police party and witnessed the recovery. Sri Mishra submits that the entire recovery, on a reading of this recovery memo, Ex. Ka-2, is to its face a product of falsehood and part of a design to frame the appellants. In this

connection, apart from the contents of the recovery memo, through which we have been taken, Sri Mishra has drawn the attention of the Court to the examination-in-chief of Ajay Kumar Rai, dated 24.07.2002, where about this part of the recovery, that is subject matter of Ex. Ka-2, it is said by Ajay Kumar Rai, PW-1:

"मुलजिमानों ने कहा था कि पकड़े जाने के भय से हत्या में प्रयुक्त डण्डा व बैग झाड़ी में फेक दिया है आप कहे तो चल कर दे देवे। पुलिस इन अभियुक्तों को तथा हम लोगों को साथ लेकर झाड़ी के पास गई और अभियुक्तों के निशान देही पर हत्या में प्रयुक्ति अमरूद का डण्डा व बैग निकाल कर दिया जिसकी फर्द बनाई गई वह फर्द मेरे सामने है इस पर मेरा भी हस्ताक्षर है इस पर प्रदर्श क-2 डाला गया।"

46. Learned Counsel for the appellants has further laid emphasis about the testimony of this witness in his cross-examination at the instance of appellants, Raju Mali and Jeewan Mali, dated 13.08.2002, where he has said:

"जहाँ पर अभियुक्त पकड़े गये थे वहीं बगल से बाग के बाहर झाड़ी में से डंडा और एक बैग बरामद हुआ था। डंडा ढाई हाथ का था जो अमरूद का था। वहां जनता के काफी लोग एकत्र हो गये थे। पुलिस वालों ने मेरे सामने जनता के किसी आदमी की गवाही नहीं लिया था, मै रेनु व अनिल गवाह थे। इस सम्बन्ध में करीब 40-45 मिनट का समय लगा था। दरोगा का नाम आर0 सी0 मिश्र था और पुलिस के करीब 4-5 लोग थे, फिर वहीं से हम लोग डा0 संजीव श्रीवास्तव के अस्पताल चले गये।"

47. Likewise, learned Counsel for the appellants has referred to the deposition in the examination-in-chief of PW-2, Anil Kumar Rai, dated 21.08.2002, where about this part of the recovery, he has said:

"मेरे अलावा और किसने इस पर दस्तखत बनाया मुझे नहीं मालूम इसके बाद पुलिस ने मुलजिमान से पूछताछ की पूछताछ करने पे मुलजिमान ने पुलिस से कहा कि हत्या में प्रयुक्त डण्डा व बैग पकड़े जाने के भय से यही झाडी में फेंक दिया है कहिये तो चल कर दे देवे। इसके बाद मुलजिम आगे आगे उसके बाद पुलिस उसके बाद हम लोग व जनता गये और मुलजिमान ने अमरूद का डण्डा खून लगा हुआ और एक बैग निकाल कर दिया उस बैग को देखकर रेनु ने कहा कि यह मेरे भाई का है। बैग को दरोगा जी ने खोला जिसमें से दो डायरी एक आइडेन्टीटी कार्ड निकला डायरी चन्द्र शेखर राय का था और आइडेन्टीटी कार्ड राकेश चन्द्र राय का था।"

48. Learned Counsel for the appellants submits about this recovery that though this recovery, and not the one that relates to looted articles, is referable to Section 27 of the Evidence Act, it is as much false and the result of planting as the earlier one. In this connection, he lays particular emphasis on the fact that in the evidence of PW-1 and PW-2, there is no dearth of acknowledgment of the fact that members of the public were available in abundance and according to PW-2, they too had witnessed this recovery. However, the recovery memo is signed by the police party, the first informant, PW-1, the victim, PW-3 and PW-2, but by no member of the public. There is no earthly reason assigned, according to the learned Counsel for the appellants, why not even a single member of the public has signed this recovery memo, claimed as it is to be a recovery made within their sight. Learned Counsel for the appellants again emphasizes that the recovery memo does not carry any remark to the effect that members, one or more from the public present, were asked to sign and they refused. According to Sri Mishra, therefore, the recovery memo, that is

referable and sought to be proved with the aid of Section 27 of the Evidence Act, is also the result of a planted and foisted recovery.

49. It is next submitted by Sri Mishra, learned Counsel for the appellants that seven persons have been done to death in this crime. Of them according to the autopsy report, two, Chandra Shekhar Rai and Smt. Leelawati Rai died due to throttling, whereas the other five died due to head injuries. It is submitted on behalf of the appellants that according to the prosecution based on the account of the surviving victim, Renu Rai, PW-3, one of the appellants, Shyam @ Sambhal alone was armed with a stick *(danda)*. The other accused were not armed at all. He points out that a solitary stick *(danda)*, according to the prosecution account, was shown recovered at the pointing of the appellants. However, on reference to the F.S.L. for serological examination of the blood smeared recovered stick *(danda)*, the F.S.L. Examination Report, Ex. Ka-57, dated 17.08.2002 shows that the blood was disintegrated. He submits that there is no evidence of human blood being found on the recovered, alleged weapon of offence. He emphasizes that the recovered stick *(danda)* is admittedly the only weapon employed to bludgeon the victims, five of whom show that they died of head injuries. It is urged on the basis of the aforesaid evidence by the learned Counsel for the appellants that: the prosecution story is inherently unreliable, inasmuch as, it is beyond imagination that six or more assailants would enter a house to commit dacoity as scantly armed as the appellants here, where one of the entire group was carrying a stick *(danda)* with all others going bare handed; secondly, though the prosecution version based on an eye witness account by PW-3 shows it to be mostly an assault by a stick *(danda)*, two of the seven victims died of throttling, about which there is no explanation. It strongly suggests that the crime was perpetrated in some other manner and by someone else, than that testified to by PW-3; and, thirdly, that the F.S.L. Report, dated 17.08.2002, reported the blood found on the sole weapon of offence, shown to be recovered from the appellants to be disintegrated. The said stick *(danda)* cannot be connected to the crime. Also, it suggests strongly that the recovery was fake, false and planted.

50. Learned Counsel for the appellants has assailed the testimony of injured witness, Smt. Renu Rai, PW-3 as a product of an illegal identification. He submits that the appellants were shown to Smt. Renu Rai on 09.12.2001 at the Police Station illegally, three days ahead of their arrest in a fake NDPS Case, followed by a sham and spontaneous identification by PW-3 on the wayside. The appellants who were held in connection with NDPS Case were claimed to be spontaneously and coincidently identified by a passing Smt. Renu Rai, PW-3 as the perpetrators of this crime on 12.12.2001. It is submitted by the learned Counsel for the appellants that the appellants were already in illegal custody of the Police, some days before their arrest in connection with the present crime or even the NDPS Case. No test identification parade was ever organized, so as to ensure a true and forthright identification of the offenders by the injured witness. Rather, these men were virtually introduced to Smt. Renu Rai on 09.12.2001 at the Police Station, and three days later, they were shown arrested in connection with the NDPS Case only to be fantastically identified by Smt. Renu Rai, as she was passing by. It is urged by Sri Mishra that

the identification of the appellants on 12.12.2001 near the *Baudh Sangrahalaya*, where they were shown to be arrested in connection with the NDPS Case, was no identification at all. It is, according to the learned Counsel for the appellants, a pre-planned and scripted story by the police to connect the appellants to this heinous crime, after showing their arrest in an NDPS offence.

51. In this connection, our attention has been drawn by the learned Counsel for the appellants to the testimony of Smt. Renu Rai recorded on 18.09.2002, that figures as part of her cross-examination on behalf of the appellants, Raju Mali and Jeewan Mali. This testimony reads to the following effect:

"जब मै लखनऊ अस्पताल से वापस आई तो मुझे पुलिस थाने ले गई थी। पुलिस ने मुझे वहां आठ नौ बदमाशों को दिखाया वहां पर मुलजिमान हाजिर अदालत नही थे पुलिस मुझे आठ या नौ बजे दिन में ले गई थी। इन बदमशों में मेरी पट्टीदारी या रिश्तेदारी का कोई नही था। उसी दिन फिर मुझे रात के आठ नौ बजे पुलिस थाने ले गई और वहां नौ दस बदमाश थे और ये हाजिर अदालत मुलजिमान भी थे। दिन में ये मुलजिमान वहां नही थे रात में थे। मै वहां पर इन सारे बदमाशों को पहचानी थी और कहा था कि इन्ही बदमाशो ने मेरे यहां कान्ड किया है। उस रात मेरे साथ मेरे मौसा अजय कुमार राय और मेरे चाचा दुर्गेश राय थे। बौद्ध संग्रहालय मै जब गई थी उसके एक दिन पहले नौ तारीख को मुलजिमान को पहचाना था। उस रात में एक मुलजिम थाने में और था और जो मेरे घर में हुये घटना में शरीक था। परन्तु आज वह न्यायालय में नही है नौ तारीख को दरोगा जी ने पहचान के बाद मेरा signature करवाया था । मेरे अलावा और किसी का signature नही कराया था । थाने पर रात में नौ तारीख को मै बीस पच्चीस मिनट रही थी। फिर मै अपने चाचा मौसा के साथ घर चली आई। नौ तारीख के बाद फिर पुलिस मेरे यहां नही पहुची। दरोगा जी ने मेरा कोई बयान नही लिया। दरोगा जी ने वारह तारीख को मेरा बयान लिया था।"

52. Learned Counsel for the appellants has also drawn the attention of the Court to the deposition of this witness recorded on 19.09.2002, next following what has been extracted above. On the said date, her statement to the police that she was proceeding to the Hospital, along with Anil Kumar Rai and Ajay Kumar Rai from Shivaji Nagar Colony, was put to her. In response, she said in her cross-examination thus:

"मैने दरोगा जी को यह बयान नही दिया था कि "दिनांक 12-12-2001 को मै शिवाजी नगर कालोनी से अपने परिवार के अनिल कुमार राय व अजय कुमार राय के साथ अस्पताल जा रही थी"। यदि दरोगा जी ने मेरे बयान में उपरोक्त बातें लिखी है तो मै इसकी कोई वजह नही बता सकता।"

53. It is on the strength of this testimony of PW-3 that the learned Counsel for the appellants submits that there was absolutely no identification of the appellants on the wayside, near the *Baudh Sangrahalaya*. Nothing of the kind as said by the prosecution witnesses about identification, including PW-3, ever came to pass. The appellants were got identified by the police on 09.12.2001 at the Police Station, and lateron, shown to be arrested in Arjun's grove, near the *Baudh Sangrahalaya* in a fake NDPS Case. They were then foisted with illegal and fake recoveries said to be proceeds of the dacoity, as also weapons of the crime and

some other articles. They were shown to be arrested on a chance identification, that never happened. A bogus statement of Smt. Renu Rai, PW-3, was shown to be recorded on 12.12.2001, post the appellants' fake arrest. It is, in particular, emphasized by Sri Mishra that it is for this reason that none of the recovery memoranda bear signatures of members of the public, except those of Smt. Renu Rai, Anil Kumar Rai and Ajay Kumar Rai.

54. It is submitted on behalf of the appellants that the entire evidence of Smt. Renu Rai, PW-3, who is the prosecution's star witness, collapses under the weight of the fact that all the appellants were introduced to her as the offenders, prior to their sham arrest in the present crime and the antecedent arrest in the NDPS Cases.

55. Sri J.K. Upadhyay, learned A.G.A. and Sri Rajendra Rai, learned Counsel for the complainant have refuted the various contentions put forth on behalf of the appellants and have submitted that the categorical testimony of PW-3, Smt. Renu Rai, who is an injured witness, cannot be trifled with for lapses of investigation, even if they be serious lapses. They have submitted in one voice that the deposition of Smt. Renu Rai is consistent about the involvement of the appellants in the crime and she has described in graphic detail, what befell her family on the fateful night. It is emphasized by the learned A.G.A. as well as learned Counsel for the complainant that Smt. Renu Rai does not know the appellants or has any kind of acquaintance with them. She has no reason to falsely implicate them in a heinous crime.

56. We have carefully considered rival submissions advanced on behalf of both sides.

57. It would be convenient to consider under definitive heads the facts in issue or relevant facts that have been the subject matter of contention before us.

(1) The First Information Report and circumstances attending it

58. The submission of the learned Counsel for the appellants that the sequence of events and circumstances, leading to discovery of the crime and registration of the First Information Report, shows it to be a false account and a coverup for what was the truth about it, is to be seen with reference to the circumstances in which the First Information Report was registered. To the understanding of this Court the First Information Report came to be registered when Anil Kumar Rai and his brother, Pramil Rai, being cousins of the deceased, Rakesh Chandra Rai, were informed, or otherwise came to know from neighbours that there was an unusual quiet about the house in the morning of 22.11.2001. No one was moving there and the door was bolted from within. Sensing trouble, the neighbours along with these two kinsmen of Rakesh Chandra Rai had assembled outside his entrance, where the gate or the main door was bolted from within. Neither the neighbours or Anil or Pramil moved in to see what had happened to the inmates. Instead, he called up over telephone, Ajay Kumar Rai, who is somewhere described as a cousin of Rakesh Chandra Rai, but is in fact his brother-in-law (husband of wife's sister). He conveyed to Ajay Kumar Rai the circumstances that led him and others gathered outside Rakesh's premises to believe that

something untoward had happened to the inmates. Anil Kumar Rai asked Ajay Kumar Rai to come over immediately. Anil Kumar Rai waited for Ajay Kumar Rai to come over instead of moving in himself, along with others to render assistance to inmates of the house, whom everyone present believed to have suffered some ill-happening. Ajay Kumar Rai was located in a certain village Chandi Gaon, some 25 kilometers away from the Gorakhpur Headquarters. On receiving information, he immediately moved with other family members, but reckoning the distance between the village Chandi Gaon and Gorakhpur Headquarters, it took him about 45 minutes to reach Gorakhpur, and some more time to reach Rakesh Chandra Rai's house. It was, upon Ajay Kumar Rai's arrival that Anil Kumar Rai along with Ajay Kumar Rai, gained entry to the house of Rakesh Chandra Rai, after scaling a wall, separating his premises from those of one H.N. Singh, whose house the two entered through the main-gate. It is this conduct of Anil Kumar Rai and Pramil Rai, that has been the subject matter of scathing criticism about the First Information Report being the narrative of a false account and a coverup.

59. To our understanding, there is nothing unnatural about it all. The conduct of men on encountering a particular situation is to be evaluated going by the prevalent circumstances in a society. It is not that the conduct of Anil Kumar Rai, his brother Pramil Rai, in awaiting arrival of Ajay Kumar Rai before moving in to the house has to be judged with reference to some copy-book model of ideal behaviour. And, then every departure or a serious departure from it viewed as a circumstance casting suspicion over their conduct, or the first information they lodged. In contemporary times, and times not so contemporary also, the dis-motive of false implication by the police, or at least spending a torturous time being interrogated as a suspect outweighs the motive of ordinary and respectable men to rush in and rescue their fellowmen, or even relatives who might have become victims of a suspected crime or an accident. Under the circumstances, if Anil Kumar Rai or his brother, Pramil Rai thought that they better await the arrival of Rakesh Chandra Rai's brother-in-law, before anyone moved in to see what had happened, the conduct cannot be castigated as unnatural. It must be remarked that due to the fact that anyone who comes close to a suspected or potential scene of crime has to spend quite an unpleasant time, going by the hard handed, high handed and stereotyped investigation by the police, applying outmoded methods, many a life is lost, that could be saved by any good spirited and respectable man. In these circumstances, Anil Kumar Rai or his brother, Pramil Rai did not do anything unnatural in waiting for Ajay Kumar Rai's arrival, along with other members of the family.

60. It would be noticed that our assessment of the situation is in no way a hyperbole, if one were to look to the fact that even unconnected men who had congregated, may be neighbours or just passers by, also did not venture in to take the risk of finding out what had happened to the inmates of the house. No one ventured in until the closest of relatives to the family had arrived, so as to be all differently placed and sufficient in number to bear the brunt of an expected, rustic investigation by the police.

61. In our considered opinion, the conduct of Anil Kumar Rai, his brother,

Pramil Rai, all members of the public who had collected outside the house where the crime occurred, as well as that of Ajay Kumar Rai is not at all blameworthy or one that creates any doubt about the First Information Report, carrying a truthful account.

62. So far as criticism of the First Information Report based on non-examination of H.N. Singh is concerned, through whose main door Ajay Kumar Rai and Anil Kumar Rai went inside his house to gain access to the wall separating H.N. Singh's premises and those of Rakesh Chandra Rai, it may be a lapse of investigation on the part of the police, but in no way does it detract from the veracity of the First Information Report. It is true that H.N. Singh would be an independent witness about the manner of discovery of the crime on which the First Information Report is based, and logically ought to have been examined, but his non-examination would not throw the unqualified account of Ajay Kumar Rai and Anil Kumar Rai under any kind of doubt. On this score too, this Court is satisfied that there is nothing about the circumstances leading to the First Information Report or the manner in which the crime has been reported to be discovered, that may cast some legitimate doubt about the First Information Report.

(2) The manner of arrest and connecting the appellants to the crime on its basis

63. About this relevant fact, this Court has heard elaborate arguments on both sides. The learned Counsel for the appellants has been more emphatic about it. It would not be of much utility to recapitulate the appellants' contention about it for every fine detail, including the evidence on which the submissions are based. They have been recorded in the earlier part of this judgment where contentions of parties have been noticed. The manner of arrest is in the opinion of this Court a very relevant fact, because the arrest has ensued identification of the appellants by PW-3, Smt. Renu Rai. But, for the identification that is shown to be a chance occurrence, while the appellants were arrested in connection with an NDPS Case near the *Baudh Sangrahalaya* and PW-3, Smt. Renu Rai along with her uncles, Ajay Kumar Rai and Anil Kumar Rai suddenly alighting there *en route* to a Doctor, the appellants would not have been connected to the present crime.

64. It is true that persons of ordinary prudence and common men, like PW-1, Ajay Kumar Rai, PW-2, Anil Kumar Rai and PW-3, Smt. Renu Rai, would not be attracted or virtually drawn to a crowd of people in a grove, with police about the place. Learned Counsel for the appellants has laid much emphasis on this point that any person placed in the circumstances like the three prosecution witnesses would steer clear of troubles way, instead of plunging into it, as the prosecution witnesses have done. On the foot of this rather unusual behaviour, learned Counsel for the appellants has urged strongly, in conjunction with certain other relevant facts that either the prosecution witnesses were called over by the police to do a sham identification of the appellants who were already arrested and identified, or these witnesses never went to the place where the arrest is shown. No arrest in the manner shown was ever made.

65. In our opinion, it is indeed an exemplar of unusual behaviour that the prosecution witnesses circumstanced as

they were would be drawn to the rather unseemly sight of a crowd mixed up with the police. They were a family, not yet emerged from a serious tragedy. According to the prosecution, Smt. Renu Rai was proceeding to the Doctors or the Hospital, whatever it might be, to seek medical treatment for some of the persisting fallouts of the assault that she had suffered. There is no particular reason suggested by any of the three witnesses, about what attracted them to the place where the appellants had been apprehended. While they were on way to the Doctors, there would have to be some very special reason for these witnesses to do so, which is conspicuous by its absence in their testimony. The identification of the appellants in the manner it is described by PW-1 in his examination-in-chief, quoted hereinbefore, makes for an account that more than meets the eye. Some articles of loot along with recovered narcotics were said to be lying there, which the witnesses saw and recognized, whereas PW-3, Renu Rai spontaneously identified the six arrested men as the perpetrators of this crime who had committed dacoity and murder at her father's house. It does seem rather unusual and unconvincing that each of the six men present, whom PW-3 had seen during the short period of time that the family suffered the crime, and she too was injured, would spontaneously recognize everyone of them. They were not her acquaintances. At the most one man about whom she has said elsewhere, visiting her place during the day portraying as a beggar could be recognized, but to believe that all six would be identified with precision and spontaneity, defies all good logic.

66. The arrest of the appellants in the NDPS Case and while they were held in police custody, being investigated for the narcotics crime, the sudden appearance of the prosecution witnesses, including PW-3 there, accompanied with prior recovery of some articles of loot and then a post disclosure recovery of the weapon of offence, along with a bag carrying some diaries and wallet to connect it to two of the deceased, appears to be too unnatural and real to happen around. The entire circumstances attending the arrest and identification of the appellants smack of pre-planned action, if at all it happened that way. The part related to recovery of the articles of loot, which is not provable under Section 27 of the Evidence Act, besides the post disclosure recovery attributed to the appellants, are closely related facts, that would soon be dealt with in this judgment. But, on the evidence on record, we are convinced that the appellants were not arrested or identified in the manner the prosecution wants us to believe. They appear to have been arrested under different circumstances, and charged first in connection with the NDPS Case; and, lateron, in connection with the present crime, but not in the manner described. They have been identified also elsewhere by the appellants, and not the way the prosecution urges.

(3) Recovery of some looted articles and the weapon of offence

67. While the learned Counsel for the appellants has assailed the recovery as one that is completely fake, made up and foisted, learned A.G.A. and Sri Rajendra Rai, learned Counsel for the complainant have emphatically submitted that both recoveries have been proved beyond any shadow of doubt. In the submission of the learned A.G.A. and the learned Counsel for the complainant, the first part of the recovery carries with it the guarantee of

spontaneity, inasmuch as, the articles of jewelry looted were recovered during search in connection with the NDPS Case. These articles were, thereafter, spontaneously identified by PW-3, who appeared on the scene per chance. In the circumstances, according to the learned Counsel supporting the prosecution, there is no possibility of these recovered articles of loot being planted on the appellants. So far as the recovery of weapon of offence is concerned, it is submitted for the prosecution that the recovery is clearly one made in accordance with the provisions of Section 27 of the Evidence Act, after a disclosure made by the appellants and on their pointing out. There is no reason to doubt both sets of recoveries, that are embodied in the recovery memoranda, both dated 12.12.2001, Ex. Ka-2 and Ex. Ka-3.

68. The recovery of proceeds of dacoity attributed to the appellants is very different from recovery of the weapon of offence and certain other belongings that were recovered at the pointing of the appellants. The looted items of jewelry are said to be recovered from the appellants. Regarding these articles recovered, recovery memo, Ex. Ka-3 has been drawn up. This recovery memo has been drawn up after coincidental and spontaneous identification of the appellants by PW-3 in the grove, where they were held arrested in connection with the narcotics case. It attributes the recovery of a *mangalsutra* from the appellant, Shyam @ Sambhal with black coloured guria carrying a silver pendant in a gold polished chain, described as sikri. The appellant, Raju Mali was shown to be in possession of another *mangalsutra*, that carried black coloured beads with four gold *gurias* entangled in it. It is said to be in a dismembered state. Likewise, the recovery memo shows that from the appellant, Rinku a silver coin bearing the year of mint as 1901 was recovered, that bore the image of the King Emperor, besides two silver *bichhia* (a pair). It is mentioned in the recovery memo that these already recovered articles of jewelry when shown to PW-3, Smt. Renu Rai were identified by her immediately as her belongings and looted on the night of occurrence.

69. A perusal of the deposition of PW-1, dated 13.08.2002, that is part of his cross-examination at the instance of Raju Mali and Jeewan Mali extracted hereinbefore, clearly shows that these articles said to be recovered from the appellants, were shown as recoveries already made by the police. They were not recovered in the presence of PW-1 or PW-3. Likewise, PW-1 in his cross-examination on 14.08.2002 has categorically said that the police did not recover the *mangalsutra* or the silver coin in his presence. He could not say what article was recovered from each of the appellants. To the same effect is the deposition of PW-2 recorded on 20.08.2002, where he has clearly said that before the prosecution witnesses reached the place of arrest, the two *mangalsutra*, the gold coin and the *bichhia* (a pair) had already been recovered by the police from the appellants. Smt. Renu Rai, PW-3 who is said to have identified the accused on 12.12.2001, in the circumstances already detailed, has said about the recovery of this jewelry that belongs to her family in her examination-in-chief on 06.09.2002, that as she wailed and cried (upon identifying the appellants), the police showed her the two *mangalsutra*, the gold coin and a pair of *bichhia*, besides a hammer made of iron. It is, thus, evident that whatever was recovered as proceeds of the dacoity from the appellants, was not recovered in the

presence of the prosecution witnesses, who have signed the recovery memo. They have signed the recovery memo, Ex. Ka-3 because the police gave them to understand that these articles were recovered from particular appellants, assigning them possession of different articles. The recovery memo is also not signed by any member of the public who are said to be present in large numbers. This recovery memo is not made after a disclosure statement or at least a prior mention of it, followed by its recovery at the pointing of the appellants. All these articles are said to be chance discoveries while the appellants were searched and held in connection with the NDPS Case. This part of the recovery is, therefore, not relevant under Section 27 of the Evidence Act. That, however, does not mean that the recovery cannot or could not at all be proved. It would have to be proved in accordance with law. Whether it is proved by cogent evidence in this case is quite another matter.

70. It has figured in the cross-examination of PW-1, dated 13.08.2002 at the instance of Raju Mali and Jeewan Mali that at the scene of crime, much articles of jewelry lay strewn. For reasons that we shall presently indicate, we do not find this recovery of looted jewelry from the appellants made by the police, unwitnessed by any member of the public, to be at all reliable. There is a strong possibility that these articles were planted on the appellants, while they were searched and held in connection with the NDPS Case. The other part of the recovery relates to the weapon of offence and a rexine bag carrying two small diaries belonging to the deceased, Chandra Shekhar Rai and a wallet with an identity card of Rakesh Chandra Rai, kept in it. Regarding these recoveries, a separate recovery memo, Ex. Ka-2, also dated 12.12.2001 has been drawn up. These recoveries have been made pursuant to a disclosure statement by the appellants recorded in the recovery memo, Ex. Ka-3, where the disclosure statement has been recorded in the following words:

"इस घटना में प्रयुक्त डण्डा व मिला बैग जिसमें डायरी व पर्स वगैरह था शिनाख्त के भय से हम लोगों ने यही झाड़ी में फेंक दिया है।"

71. Now, Ex. Ka-2 which is the recovery memo relating to the weapon of offence and the rexine bag that was looted, has been recorded in the following words:

"गवाह मौके पर मौजूद श्रीमती रेनू राय w/o श्री रणजीत राय R/o वेला सुल्तान पुर PS घोषी जनपद मऊ हाल पता शिवाजी नगर कालोनी PS खोराबार गोरखपुर व श्री अजय कुमार राय S/o श्री ओपी राय सा0 चांदी PS बासगांव जनपद गोरखपुर व श्री अनिल कुमार राय S/o श्री लाल जी राय R/o 345/B आजाद नगर नहर रोड रूस्तमपुर PS कैण्ट गोरखपुर के समक्ष पकड़े गये अभियुक्त श्याम उर्फ शम्मल, राजू माली, रिंकू चौधरी, धन सिंह, जीवन माली ने आगे-आगे चलकर मुख्य सड़क के उत्तर तरफ अर्जुन के बाग में फेंका गया झाड़ी से निकाल कर वैग रिकसिन का कत्थई छींटदार जिस पर वी0 आई0 पी0 का लेवल टीन का चस्पा है जिसमें काले रंग की दो चैन लगी है तथा अमरूद का डण्डा दिया, बैग खोल कर देखा गया तो एक पर्स काले रंग का जिसमें राकेश चन्द्र राय का फोटो लगा पहचान-पत्र आयकर आयुक्त इलाहाबाद के दस्तखती व एक छोटी डायरी जिस पर चन्द्रशेखर राय का नाम व पता लिखा है तथा नीव प्लाई लिखा है तथा एक छोटी डायरी जिस पर श्री चन्द्र शेखर राय का नाम लिखा है जिसे देखते ही रेनू ने बताया कि यह मेरे भाई की डायरी व बैग है तथा पर्स में मेरे

पिता का पहचान-पत्र है उसी बैग में सभी डायरी व पर्स रखकर कपड़े में सील कर सर्व मुहर किया गया डण्डा का निरीक्षण किया गया तो डण्डे में खून का धब्बा लगा है डण्डे की लम्बाई करीब पौने दो हाथ है जिसे वजह सबूत कब्जा में लिया गया जिसे परीक्षण को ध्यान में रखते हुए एक कपड़े में सील कर सर्व मोहर किया गया।"

72. This recovery is relevant under Section 27 of the Evidence Act, being one made pursuant to a disclosure statement and also witnessed by the three prosecution witnesses. The prosecution witnesses are not in any way inimical to the appellants, or their prior acquaintances. Under usual circumstances, therefore, there should be no reason to distrust the fact that recoveries of these articles, that are subject matter of Ex. Ka-2 was made in their presence. It would again be quite another matter whether the weapon of offence is indeed one that was used in the crime or the fact that the bag recovered at the instance of the appellants, pursuant to a disclosure statement was after all a looted article that was thrown there, or under the circumstances of this case and the evidence that would be noticed hereinafter, the appellants were forced to make a false disclosure. And, lateron, planted articles by the police were shown recovered at their instance in the presence of the prosecution witnesses. In ordinary circumstances, it would be imprudent not to accept the recovery of the rexine bag, but other facts and evidence in this case impel us to doubt this recovery, if not altogether reject it. Those circumstances and evidence would be indicated shortly, in the totality of which the arrest, identification and recoveries, all have to be viewed.

73. So far as the weapon of offence is concerned, it is said to be a stick made of guava tree wood. It was found smeared with blood, according to the recovery memo, Ex. Ka-2. However, the serological examination report from the Forensic Science Laboratory, U.P., Lucknow, dated 17.08.2002, Ex. Ka-57, that is listed in the referred articles at serial no.6, has been found in the result to carry blood that was disintegrated, the origin of which could not be ascertained. The weapon of offence said to be recovered at the instance of the appellants cannot, therefore, be surely connected to the crime. So far as the rexine bag carrying the wallet and two diaries of two of the deceased in the crime is concerned, it is a recovery on the pointing of the appellants. It cannot be held proved, though not disapproved either. It falls in the category of a fact 'not proved' within the meaning of Section 3 of the Indian Evidence Act. The circumstances and reasons for us to doubt these recoveries too would be indicated, a little later in this judgment.

(4) Worth and value of the testimony of the sole surviving injured witness, PW-3, Smt. Renu Rai and its bearing, in particular, on the identity of the appellants as also recovery made from them

74. The prosecution have strongly depended upon the testimony of the sole surviving injured witness, Smt. Renu Rai, and say that it is enough by itself to convict the appellants. Sri J.K. Upadhyay, learned A.G.A. and Sri Rajendra Rai, learned Counsel for the complainant who have jointly canvassed the prosecution case before us have submitted that Smt. Renu Rai is the sole surviving and injured witness of the crime. She does not have prior acquaintance with the appellants, that may form basis to suspect a shadow of

cause for a false or motivated implication. Learned Counsel for the prosecution have impressed upon the Court the fact that looking to the enormity of the crime, where all members of Renu Rai's family were done to death before her eyes, including her three young sons, there is not the slightest reason to doubt her evidence which is clear, categorical and graphic. There is no reason why PW-3 would falsely implicate the appellants or anyone else, for that matter. It is urged further that being an injured witness, her presence at the scene of crime cannot be doubted. It is also emphasized that she is also not an injured witness of the kind who might have been marginally afflicted in the assault. Like, the other victims, she too suffered battery at the hands of the appellants and remained hospitalized in a critical condition at Lucknow for a number of days. Unlike, the other victims, she was fortunate to have survived. As such, in the submission of the learned Counsel appearing for the prosecution, her evidence comes with an inherent guarantee of truth. There is no way it can be disregarded. Her evidence is of sterling quality, and enough by itself to convict the appellants. The infirmities pointed out by the appellants go no far than lapses or may be failures of an inept investigation. But, none of those lapses are of a kind or nature that may eclipse the eye witness account of PW-3, which the Trial Court has rightly relied upon to convict the appellants. Learned Counsel for the appellants on the other hand has called the testimony of PW-3, Smt. Renu Rai, the product of an illegal identification, and, therefore, vitiated. The details of his submissions in this regard have been recorded hereinbefore and need not be recapitulated.

75. Smt. Renu Rai is indisputably an eye-witness to the gruesome crime and a seriously injured one at that. Her testimony in itself no doubt carries great weight, comes as it does with an inherent guarantee of truth to it. She is a witness who has lost all her family, including three minor sons. We do not have the slightest manner of doubt that she would have reason to falsely implicate anyone knowingly and much less, motivatedly or maliciously, in a crime of this enormity, kind and consequences unless her judgment were blurred by mistake or misguiding suggestion. The principle about a relative generally not deposing to implicate falsely an innocent man, or to shield the true offender, finds authoritative statement in an early decision of their Lordships of the Supreme Court in **Dalip Singh vs. State of Punjab, AIR 1953 SC 364**, where it is held:

"26.A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

27.This is not to say that in a given case a Judge for reasons special to that case and to that witness cannot say that he is not prepared to believe the witness because of his general unreliability, or for

other reasons, unless he is corroborated. Of course, that can be done. But the basis for such a conclusion must rest on facts special to the particular instance and cannot be grounded on a supposedly general rule of prudence enjoined by law as in the case of accomplices."

76. The same principle with a recount of an earlier authority on the point has been endorsed by the Supreme Court in Abdul Sayeed vs. State of M.P., (2010) 10 SCC 259. In paragraphs 28, 29, 30 & 31 of the report, it has been held:

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide *Ramlagan Singh v. State of Bihar* [(1973) 3 SCC 881 : 1973 SCC (Cri) 563 : AIR 1972 SC 2593], *Malkhan Singh v. State of U.P.* [(1975) 3 SCC 311: 1974 SCC (Cri) 919 : AIR 1975 SC 12], *Machhi Singh v. State of Punjab* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681], *Appabhai v. State of Gujarat* [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696], *Bonkya v. State of Maharashtra* [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113], Bhag Singh [(1997) 7 SCC 712 : 1997 SCC (Cri) 1163], *Mohar v. State of U.P.* [(2002) 7 SCC 606 : 2003 SCC (Cri) 121] (SCC p. 606b-c), *Dinesh Kumar v. State of Rajasthan* [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472], *Vishnu v. State of Rajasthan* [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302], *Annareddy Sambasiva Reddy v. State of A.P*. [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and *Balraje v. State of Maharashtra* [(2010) 6 SCC 673 :(2010) 3 SCC (Cri) 211].]

29. While deciding this issue, a similar view was taken in *Jarnail Singh v. State of Punjab* [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] , where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa v. State of Karnataka* [1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In *State of U.P. v. Kishan Chand* [(2004) 7 SCC 629 : 2004 SCC (Cri) 2013] a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan v. State of*

Haryana [(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214]). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

31. Ashfaq (PW 2) had given a graphic description of the entire incident. His presence on the spot cannot be doubted as he was injured in the incident. His deposition must be given due weightage. His deposition also stood fully corroborated by the evidence of Anees (PW 1) and Usman Ali (PW 4). The depositions so made cannot be brushed aside merely because there have been some trivial contradictions or omissions."

77. The principle about the high value of evidence of an injured witness is well acknowledged. A witness who has lost all her family in the crime carries a very high probative value, comes as it does with an inherent guarantee of truth about it. There is no reason to multiply reference to authorities on the point as the proposition involved is well settled. So far as the occurrence goes, the evidence of PW-3 carries graphic detail rendered in an unwavering manner. The deposition of PW-3, in her examination-in-chief on 05.09.2002, requires to be quoted for every word of it. It reads:

"बहलफ बयान किया कि आज से नौ माह से कुछ अधिक हुआ दिनांक 21-12-2001 को मै अपने तीन बच्चो वावी, विक्की और विभू के साथ शिवाजी नगर स्थित अपने पिता राकेश चन्द्र राय के घर पर थी । इस दिन शाम को मेरे यहां एक आदमी भीख मागने आया था यदि वह व्यक्ति जो मेरे घर में उस दिन भीख मागंने आया था यदि आ जाये तो मै पहचान सकती हूँ।

प्रश्न :- क्या वह व्यक्ति आज मेरे सामने न्यायालय में उपस्थित है ?

इस प्रश्न के द्वारा अभियोजन पक्ष के अधिवक्ता मुलजिम की शिनाख्त या पहचान कराना चाहते है जिस पर अभियुक्त के विद्वान अधिवक्ता ने विरोध किया कि विवेचना अधिकारी द्वारा दौरान विवेचना शिनाख्त की कार्यवाई नही कराई गई है ऐसी स्थिति में साक्ष्य के समय अभियोजन द्वारा शिनाख्त की कार्यवाई नहीं कराई जा सकती है।

न्यायालय द्वारा अभियुक्त के विद्वान अधिवक्ता का विरोध स्वीकार नही किया गया और अभियोजन पक्ष को अनुमति दी गई कि वह साक्षी द्वारा अभियुक्त की पहचान करा सकते है।

साक्षी द्वारा अभियुक्त हाजिर अदालत श्याम को पहचाना गया और कहा कि यही अभियुक्त मेरे घर पर भीख मांगने आया था।

अभियुक्त भीख मांगने आया और फिर चला गया। घटना की रात मेरे पिता के घर में, मै मेरे तीन बच्चे, मेरा भाई चन्द्र शेखर, मौसेरा भाई अनूप मेरी मां लीलावती राय, और मेरे पिता राकेश चन्द्र राय अपने अपने कमरों में सोये हुये थे। मै अपने तीनो बच्चों के साथ सीढ़ी के बगल वाले कमरे में सोई थी। एक बजे रात को मुझे चीख व धप धप की आवाज सुनाई दी और उससे मेरी नींद खुली। मेरी नींद खुली तो मै उठी मैने अपने कमरे की लाईट जलाई तब मैने

दरवाजा खोला तो देखा कि जो मुलजिम भीख मागंने आया था वह दरवाजे के सामने डंडा लेकर खड़ा था । उसके पीछे भी चार आदमी डंडा लिये खड़े थे। जो इस समय हाजिर अदालत है। अभियुक्तो को देखकर गवाह ने कहा कि यही मुलजिमान थे जिस पर अभियुक्तो ने अपना नाम राजू, धन सिंह, जीवन, रिंकू कुमार चौधरी बताया। जो आदमी मेरे सामने सबसे पहले खड़ा था उससे मैने पूछा कि तुम तो कल तीन बजे भीख मागने के लिये आये थे इस समय किस लिये आये हो उसने कहा कि कल भीख मॉगने आये थे इस समय लूटने आया हूँ इस पर मुलजिमान मेरे कमरे में घुसते है उसके बाद जो भीख मागने आया वह मेरे गले का मंगल सूत्र पकड़ता है और बाकी लोग बक्सा जो खुला हुआ था उसमें से कपड़े निकाल कर फेकते है बक्से में एक बैग में गहने रक्खा था उस बैग को निकाले और उसमें से गहना निकाल लिये और बैग फेंक दिये। जब मेरे गले से अभियुक्त मगंल सूत्र खीचं रहा था तो मैने कहा कि जो कुछ तुम्हे लेना है तुम ले लो तब तक भीख मागंने वाले के इशारे पर तो धन सिंह ने डंडे से मेरे हसुली की हड्डी पर डंडे से मारा और हसुली की हडडी टूट गई और मुलजिम ने मगंल सूत्र खीच लिया। इस पर मेरे बच्चे जग गये और रोने चिल्लाने लगे जो भीख मागने आया था उसने मेरे बड़े लड़के बावी को अपने हाथ में लिये हुये डंडे से मारा उसके बाद बाकी चारो मुलजिमानों ने मेरे तीन बच्चों को मारा तीनों बच्चो ने चिल्लाना बन्द कर दिया छोटा बच्चा नीचे गिर गया मैने इन लोगों से न मारने के लिये विनय किया लेकिन ये लोग नही माने। बच्चे इन लोगों के मारने से मर गये तीनो बच्चों की मौत हो गई इसके बाद भीख मांगने वाले ने मुझे डंडे से मारा और मै बेहोश हो गई फिर मै नही जानती कि क्या हुआ।

फिर मुझे जब होश आया तो मैने अपने आपको अस्पताल में पाया। सामने मेरे पति खडे थे मैने अपने पति से पूछा कि मै यहां कैसे आ गई तो उन्होने बताया कि तुम्हारी तबियत खराब थी इसलिये लखनऊ अस्पताल ले आया हूँ।"

78. But, the question is that notwithstanding the consistency of her account about the occurrence and identification of the appellants in Court, can it be said on the evidence of PW-3, Smt. Renu Rai that she was mal-influenced, misguided, or in one manner or the other, aberrated in her judgment about identifying the appellants? If for some reason she has erred in her judgment about the identity of the appellants, can her evidence be still classed as sterling so as to found a conviction. Normally, in a matter like the present one, where the identity of the offender or the offenders is completely unknown to the victim, the suspects ought to be put up for a test identification. The result of a test identification parade is relevant under Section 9 of the Evidence Act, and although, it is a procedure that rightfully belongs to the stage of investigation to lend the Investigator an assurance about the identity of the offender, it is of great worth in corroborating evidence of the identifying witness in the dock. There are, however, known exceptions to the rule where no test identification parade may be held. One is where the offender is a prior acquaintance of the witness or otherwise well-known to him/ her. The other is when the identity of the offender becomes known to the witness through some kind of a chance exposure of the offender, such as, publication of photographs in the Print or Electronic Media or the offender being somehow seen by the witness during various steps of investigation, or in some other manner.

79. It is no doubt ultimately identification by the witness in the dock, that is substantive evidence about the

offender's involvement. However, that is subject to the witness's assured capability of identifying the offender uncorrupted by suggestion, misplaced imagination or a mistake about the offender's identity of any kind of genre. It has also been held on high authority that notwithstanding the absence of a test identification to corroborate a witness's evidence about identification in the dock, the testimony in Court may still be good in cases where there are reasons for the witnesses to retain an enduring impression about the identity of the offender. In this connection, about the legal postulate, reference may be made to the decision of the Supreme Court in **Daya Singh vs. State of Haryana, (2001) 3 SCC 468**, where in the context of an offence under Sections 3 and 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987, an identification of the accused by two prosecution witnesses straightaway in the dock after a lapse of seven and a half years was held good. It was held in **Daya Singh** *(supra)*:

"11. At this stage we would first refer to the decisions upon which reliance is placed. In the case of *Soni* [(1982) 3 SCC 368 (1) : 1983 SCC (Cri) 49 (I)] this Court observed that a delay of 42 days in holding the identification parade throws a doubt on genuineness thereof, apart from the fact that it is difficult that after a lapse of such a long time the witnesses would be remembering facial expression of the appellant. In the case of *Mohd. Abdul Hafeez* [(1983) 1 SCC 143 : 1983 SCC (Cri) 139 : AIR 1983 SC 367] the Court while dealing with a robbery case observed that as no identification parade was held, no reliance can be placed on the identification of the accused after a lapse of four months in the Court. In the case of *Hari Nath* [(1988) 1 SCC 14 : 1988 SCC (Cri) 14 : AIR 1988 SC 345] the Court observed that evidence of test identification is admissible under Section 9 of the Evidence Act. But the value of test identification, apart from the other safeguards appropriate to a fair test of identification depends upon the promptitude in point of time with which the suspected persons are put up for test identification. If there is an unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself detracts from the credibility of the test. The Court further referred to (para 9) Prof. Borchard: Convicting the Innocent on the basis of error in identification of the accused. The learned author has observed:

"The emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally -- the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused."

12. In AIR paras 10 and 11, the Court has observed as under: (SCC p. 21, paras 19-21)

"19. The evidence of identification merely corroborates and strengthens the oral testimony in court which alone is the primary and substantive evidence as to identity. In *Sk. Hasib v. State of Bihar* [(1972) 4 SCC 773 : AIR 1972 SC 283] this Court observed: (SCC p. 777, para 5)

"... the purpose of test identification is to test that evidence, the

safe rule being that the sworn testimony of the witness in court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding.'

20. In *Rameshwar Singh v. State of J&K* [(1971) 2 SCC 715 : 1971 SCC (Cri) 638 : AIR 1972 SC 102] this Court observed: [SCC p. 718, SCC (Cri) p. 641, para 6]

"... it may be remembered that the substantive evidence of a witness is his evidence in court, but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial.'

21. It is, no doubt, true that absence of corroboration by test identification may not assume any materiality if either the witness had known the accused earlier or where the reasons for gaining an enduring impress of the identity on the mind and memory of the witness are, otherwise, brought out. It is also rightly said that:

"Courts ought not to increase the difficulties by magnifying the theoretical possibilities. It is their province to deal with matters actual and material to promote order and not surrender it by excessive theorising or by magnifying what in practice is really unimportant.' "

13. The question, therefore, is -- whether the evidence of injured eyewitnesses PW 37 and PW 38 is sufficient to connect the appellant with the crime beyond reasonable doubt. For this purpose, it is to be borne in mind that the purpose of test identification is to have corroboration to the evidence of the eyewitnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. Further, where reasons for gaining an enduring impress of the identity on the mind and memory of the witnesses are brought on record, it is no use to magnify the theoretical possibilities and arrive at conclusion -- what in present-day social environment infested by terrorism is really unimportant. In such cases, not holding of identification parade is not fatal to the prosecution. The purpose of identification parade is succinctly stated by this Court in *State of Maharashtra v. Suresh* [(2000) 1 SCC 471 : 2000 SCC (Cri) 263] as under: (SCC p. 478, para 22)

"We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."

14. In the present case, there is no lapse on the part of the investigating officer in holding the test identification parade. The appellant was arrested on 28-5-1988 and the identification parade was to be held on 2nd June, but on that day the accused refused to take part in the parade. For his arrest, PW 45 Resham Singh, DIG and PW

46 Bishan Singh, CIA Inspector have specifically stated that the appellant was arrested on 27-5-1988 by the Punjab Police and was brought to Kurukshetra on 28-5-1988 and was sent to judicial custody as he was to be identified. Further, there is no reason to disbelieve the evidence of Tahsildar who had gone there for holding the test identification parade of the accused. Learned Senior Counsel Mr Lalit repeatedly submitted that the investigating officer had not produced on record the statement of the accused recorded by Tahsildar and the report submitted by him and, therefore, no credence should be given to the evidence of Tahsildar. In our view, this submission is totally misconceived. It is true that if the investigating officer had produced on record the statement of the accused and the report submitted by Tahsildar, it would have corroborated his say. But in our view the evidence of such disinterested, independent, official witness does not require any corroboration. In cross-examination, the Tahsildar has specifically stated that he did not know the accused Daya Singh personally but the accused was identified by the jail authorities. He has also denied the suggestion that Daya Singh never refused for such identification parade and that he was deposing falsely. The Tahsildar was least interested in the prosecution or falsely involving the accused. Further, he is not expected to know the accused personally nor to remember his face for years. He was discharging his official functions and is not expected to memorise the identity of the persons whose statements he had recorded. There is no reason to hold that jail authorities have committed any mistake in producing Daya Singh before the Tahsildar for parade. Further, the evidence of Tahsildar that he had gone to Central Jail for identification parade gets corroboration from the evidence of PW 38 who also went to the Central Jail Ambala for identifying the accused, but they were informed that the accused had refused to participate in the test parade. It is to be stated that in such a situation, this Court in *Suraj Pal v. State of Haryana* [(1995) 2 SCC 64 : 1995 SCC (Cri) 313] held that substantive evidence identifying the witness is his evidence made in the Court and if the accused in exercise of his own volition declined to submit for test parade without any reasonable cause, he did so at his own risk for which he cannot be heard to say that in the absence of test parade, dock identification was not proper and should not be accepted, if it was otherwise found to be reliable. The Court observed that "it is true that they could not have been compelled to line up for test parade. But they did so on their own risk for which the prosecution could not be blamed for not holding the test parade". In that case also, the Court disbelieved the justification given by the accused for not participating in the identification parade on the ground that the accused were shown by the police to the witnesses. Same is the position in the present case."

80. It may be remarked here that this case is not concerned with the law about holding a test identification parade or what is the worth of it in establishing the identity of an unknown offender, who is identified in the dock by a witness or an injured witness for that matter. Here, the question is about the credibility of the witness, vis-a-vis, the identity of the appellants, though her credibility about the description of the offence cannot be in doubt. It is in the context of the credibility of PW-3 about identifying the appellants that this Court has looked into the law regarding identification of unknown offenders, which

has largely been laid down in the context of the requirement of holding a test identification parade, and the consequences of failure to do so in varying facts and circumstances of different cases. There is valuable guidance in the decision of their Lordships of the Supreme Court regarding identification of strangers by a witness for the first time in Court to be found in **Malkhan Singh vs. State of M.P., (2003) 5 SCC 746,** where it has been held:

"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad v. Delhi Admn.* [AIR 1958 SC 350 : 1958 Cri LJ 698] , *Vaikuntam Chandrappa v. State of A.P.* [AIR 1960 SC 1340 : 1960 Cri LJ 1681] , *Budhsen v. State of U.P.* [(1970) 2 SCC 128 : 1970 SCC (Cri) 343 : AIR 1970 SC 1321] and *Rameshwar Singh v. State of J&K* [(1971) 2 SCC 715 : 1971 SCC (Cri) 638].)"

(Emphasis by Court)

81. The same principle has been reaffirmed by their Lordships of the Supreme Court in a recent decision in **Raja vs. State By the Inspector General of Police, 2019 SCC OnLine SC 1591**, where it has been held:

"15. It has been accepted by this Court that what is substantive piece of evidence of identification of an accused, is the evidence given during the trial. However, by the time the witnesses normally step into the box to depose, there would be substantial time gap between the date of the incident and the actual examination of the witnesses. If the accused or the suspects were known to the witnesses from before and their identity was never in doubt, the lapse of time may not qualitatively affect the evidence about identification of such accused, but the difficulty may arise if the accused were unknown. In such cases, the question may

arise about the correctness of the identification by the witnesses. The lapse of time between the stage when the witnesses had seen the accused during occurrence and the actual examination of the witnesses may be such that the identification by the witnesses for the first time in the box may be difficult for the court to place complete reliance on. In order to lend assurance that the witnesses had, in fact, identified the accused or suspects at the first available opportunity, the TIP which is part of the investigation affords a platform to lend corroboration to the ultimate statements made by the witnesses before the Court. However, what weightage must be given to such TIP is a matter to be considered in the facts and circumstances of each case.

16. Again, there is no hard and fast rule about the period within which the TIP must be held from the arrest of the accused. In certain cases, this Court considered delay of 10 days to be fatal while in other cases even delay of 40 days or more was not considered to be fatal at all. For instance, in *Pramod Mandal v. State of Bihar*, (2004) 13 SCC 150 the accused was arrested on 17.01.1989 and was put up for Test Identification on 18.02.1989, that is to say there was a delay of a month for holding the TIP. Additionally, there was only one identifying witness against the said accused. After dealing with the decisions of this Court in *Wakil Singh v. State of Bihar*, 1981 Supp SCC 28, *Subhash v. State of Uttar Pradesh*, (1987) 3 SCC 231 and *Soni v. State of Uttar Pradesh*,(1982) 3 SCC 368(1) in which benefit was conferred upon the accused because of delay in holding the TIP, this Court considered the line of cases taking a contrary view.....

19. It is, thus, clear that if the material on record sufficiently indicates that reasons for "gaining an enduring impression of the identity on the mind and memory of the witnesses" are available on record, the matter stands in a completely different perspective. This Court also stated that in such cases even non-holding of identification parade would not be fatal to the case of the prosecution. Applying the tests so laid down to the present case, in view of the fact that each of the eyewitnesses had suffered number of injuries in the transaction, it can safely be inferred that every one of them had sufficient opportunity to observe the accused to have an enduring impression of the identity of the assailants. It is not as if the witnesses had seen the assailants, in a mob and from some distance. Going by the injuries, the contact with the accused must have been from a close distance.

24. As has been repeatedly laid down by this Court, what is important is the identification in Court and if such identification is otherwise found by the Court to be truthful and reliable, such substantive evidence can be relied upon by the Court. Considering the totality of circumstances on record, the presence and participation of the Accused Nos. 1 to 6, in our view, stood proved through the eyewitness account. We do not find any infirmity in the evidence of identification by PWs 1 to 5."

82. In the present case, this Court is not at all concerned, as said earlier, about the holding of a test identification parade. To say it again, it is the abiding anxiety of this Court to see whether PW-3, whose account of the occurrence cannot be doubted, has indeed identified the appellants without mistake. If it were a case where the appellants were identified by PW-3, Renu Rai for the first time in the dock, we would have not harboured the least of doubt about the veracity of her

evidence about these appellants. But, the evidence of this witness about the fixation of identity of the appellants is under the shadow of grave doubt. We have doubted the manner in which these appellants were spontaneously identified by a passing Renu Rai, along with her two uncles, while on way to the Doctors when she came across a crowd of people with the police there. We have viewed with some suspicion, the rather unnatural conduct of PW-3 as also PW-1 and PW-2, her uncles, Ajay Kumar Rai and Anil Kumar Rai in moving towards the gathered crowd and the police to find out what had happened, where it is said, she suddenly identified all the appellants held there, in connection with a narcotics case. The reason why we have doubted this part of the prosecution case, through which the appellants have been connected to the crime, is not just the manner about which Renu Rai along with PW-1 and PW-2 suddenly rushed to the place, where the police and the crowd were gathered. That suspicion stems from her very inconsistent evidence in her cross-examination about the date, time and manner in which she first identified the appellants.

83. The prosecution case consistently is to the effect that the appellants came to be connected to the crime for the first time on 12.12.2001 when they were coincidentally identified by Renu Rai, PW-3, near the *Baudh Sangrahalaya*, where they were held in connection with an NDPS Case. This stand has been stoutly taken by PW-1, the first informant and PW-2, Anil Kumar Rai, both of whom are said to have been with PW-3, Renu Rai, when she is claimed to have spontaneously identified the appellants, held in connection with the NDPS Case, near the *Baudh Sangrahalaya*. In fact, that is also the categorical stand of PW-3, Renu Rai in her examination-in-chief, recorded on 05.09.2002 and on the following day on 06.09.2002. There, she has very definitively supported the prosecution case of that spontaneous identification when she along with PW-1 and PW-2, while on way to the Doctor, changed course to see what was the big crowd about along with the police near the Baud Sangrahalaya. She has said specifically that it was there that she suddenly saw that the six men, whom the police had held (in connection with the NDPS Case), and of whom of five were present in Court that day, were these appellants who had done her children, father, mother and brother to death. This part of her evidence is extracted in paragraphs 31 and 32 (supra).

84. The Investigating Officer too has said in his dock evidence, also extracted in paragraph 33 (supra) to the effect that upto 11th December, 2001, none of the appellants had come to light. He has also said that he met Renu Rai on 09.12.2001 at the Azad Nagar Home of the first informant, Ajay Kumar Rai. He has said thereafter that he arrested the five appellants on 12.12.2001 from *Tara Mandal*, acting on a tip off from an informer. This bears reference to the incident, where he arrested the appellants in connection with a narcotics case, and later, Renu Rai suddenly appeared to identify the appellants. The appellants were, thereafter, also arrested in connection with the present crime. Thus, the consistent stand of the prosecution is that the appellants were arrested for the first time on 12.12.2001, and it was in connection with a narcotics case from a place, called *Baudh Sangrahalaya*, near the *Tara Mandal*, precisely at the grove of Arjun. Soon thereafter, Renu Rai appeared at the scene of occurrence, in the circumstances

indicated and spontaneously identified the appellants. There is absolutely no scope about the prosecution case for the appellants being seen, connected or identified to the crime prior to 12.12.2001.

85. Surprisingly, Renu Rai in her cross-examination, dated 18.09.2002, extracted in paragraph 51 (supra) has said in no uncertain terms that after she came back from Hospital, the police took her to the station. The police made her see about 8-9 suspects, but the appellants were not amongst them. This happened about 8-9 in the morning. The same day at about 8-9 in the evening, the police again took PW-3, Renu Rai to the station, where she was brought face to face with a total of about 9-10 suspects. She has said there that these appellants were amongst them. In the morning, they were not there. In the night, they were amongst the men who were shown to her. She has then gone on to say categorically that she identified all the appellants, who had pulled the dacoity at her home. That night, her uncles, Ajay Kumar Rai and Durgesh Rai were with her at the Police Station. It is then said in a very startling turn to her testimony that before she went to the *Baudh Sangrahalaya* (bearing reference to the claimed and sudden identification on 12.12.2001), a day before on 9th of that month, she had identified the appellants. It is also said that, that night there was one more of the perpetrators at the police station, who was *particeps criminis*, but was not present in Court. It is also said in no uncertain terms that on the 9th of the month, the Sub-Inspector after identification of these appellants had taken her signatures. She has also said that she had stayed at the police station on the 9th for a period of about 20-25 minutes. It is then said that after the 9th, the police never came to her. The Sub-Inspector took down her statement on the 12th.

86. The prosecution realizing their folly about this star witness, PW-3 testifying to facts in her cross-examination on 18.09.2002, that unmistakably show that the appellants' arrest shown on 12.12.2001 was all sham, and that appellants have been unlawfully shown to this prosecution witness at the Police Station on 09.12.2001, without holding a test identification parade, recalled her on 11.02.2003. Upon being recalled, this witness said in her evidence thus:

"जिस दिन यह घटना हुई थी उसके बाद मुलजिमान को दिनांक 12-12-01 को देखा था।"

None of the appellants chose to cross-examine PW-3 about this stand of hers on 11.02.2003, upon recall.

87. To our understanding, Smt. Renu Rai, PW-3, may be the worst of sufferers of a heinous crime and a seriously injured witness, but her testimony about the circumstances relating to a sudden identification and arrest of the appellants near the *Baudh Sangrahalaya* on 12.12.2001, when she was passing by, is false to its face. In fact, her stand during the cross-examination, dated 18.09.2002, removes the very basis of the identification and arrest of the appellants in connection with this crime on 12.12.2001. She has said in no uncertain terms that she was taken to the Police Station on 09.12.2001 twice - once in the morning at about 8.00 a.m., and then in the evening at about 8.00 p.m. She was shown the suspects privately and illegally, without holding a test identification parade on both occasions. She did not find any of the appellants

amongst the suspects in the morning, when she went to the Police Station. But, in the evening, she found six of them, including the five appellants. She identified them to the police, and was made to sign some papers. Her testimony during cross-examination on 18.09.2002 shows that PW-3, Renu Rai was not tricked by any shrewd cross-examiner into making a stray admission unwittingly and caught off guard. She has been emphatic and categorical that she identified the appellants on 09.12.2001 during her evening visit to the Police Station, in no uncertain terms. Once this is her stand, the story about the arrest of the appellants in connection with an NDPS Case near the *Baudh Sangrahalaya*, close to the *Tara Mandal* by the police, turns to utter falsehood. It leads to a certain inference that these men were in police custody on 09.12.2001, detained as suspects, who were illegally shown to PW-3.

88. We must remark here that this fact that the appellants were unlawfully got identified by the police, two days ahead their arrest being shown, at the Police Station by PW-3, privately and unlawfully without holding a test identification parade, is no lapse of investigation as the learned Counsel appearing for the prosecution want us to accept. It is a relevant fact that hits at the bottom of the prosecution case about the manner in which the appellants came to be identified and arrested, at the instance of the solitary injured witness of the occurrence, PW-3. This Court fails to understand what prevented the police from holding a test identification parade, if they had some suspects in hand and a surviving and injured witness to identify. There was no reason for the Police to go about this exercise in a clandestine and unlawful fashion and then come up with a bogus case of implicating the already identified appellants, while detained as suspects in an NDPS Case, attributing to them recovery of some articles, claimed to be proceeds of the dacoity. And, to weave around this bogus arrest in the NDPS Case, a fantastic story of spontaneous identification by Renu Rai as she was passing by the *Baudh Sangrahalaya*, renders the story untruthful beyond redemption. With this testimony of Renu Rai in the witness box on 18.09.2002, the entire story about the appellants' identification and arrest on 12.12.2001 becomes false to its face.

89. We must also remark here that the learned Sessions Judge on being encountered with this gaping flaw in the prosecution case, has chosen to describe the testimony of PW-3, Renu Rai recorded on 18.09.2002 as a "mistaken slip of tongue". We are not in agreement with the learned Sessions Judge at all. The categorical stand of Smt. Renu Rai in her cross-examination on 18.09.2002 is cast in too certain and detailed a description of the events at the Police Station on 09.12.2001 to pass off as a slip of tongue of any kind. It is on account of this irreconcilable flaw about Smt. Renu Rai's evidence, relating to identification of the appellants and the manner of their arrest that we have looked upon the recovery shown from the appellants, apart from other discrepancies, to be unreliable and untrustworthy. For the same reason, we have not been inclined to accept even that part of the recovery, that has been sought to be proved with the aid of Section 27 of the Evidence Act. Our opinion about the recovery, recorded in the earlier part of this judgment must be seen in togetherness with what we have concluded here, on the basis of Smt. Renu Rai's evidence, dated 18.09.2002.

90. We are mindful of the fact that Smt. Renu Rai is no ordinary witness. Her presence at the scene of crime and her account about it, cannot be doubted. But, her evidence about the appellants is eclipsed by a grave shadow of doubt. To add to it, her conduct in testifying to a false story of identification and arrest of the appellants on 12.12.2001 deprives her of the privilege of being an absolutely truthful witness, and her evidence of its character as sterling.

91. On this kind of evidence, in our considered opinion the identity of the appellants and their connection to the crime is under a shadow of serious doubt. Upon a consideration of the totality of evidence, we find and hold that the appellants are entitled to the benefit of doubt, and it would be unsafe to uphold their conviction.

92. In the result, the appeals **succeed** and are **allowed**. The impugned judgment and order dated 29.10.2003 passed by the Additional Sessions Judge, Fast Track Court no.4, Gorakhpur in Sessions Trial no.177 of 2002, State of U.P. vs. Shyam @ Sambhal and others, under Sections 396, 412 IPC, Police Station Khorabar, District Gorakhpur is hereby **set aside** and the appellants are **acquitted.**

93. The appellants are in jail. They shall be released forthwith unless wanted in connection with any other case and subject to fulfilling the requirements under Section 437-A Cr.P.C.

94. A copy of this judgment along with Trial Court record be sent to the learned Sessions Judge, Gorakhpur for information and necessary compliance. Judgment be certified and placed on record.

(2020)03-05ILR A167
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.03.2020

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No. 313 of 1986
&
Criminal Appeal No. 459 of 1986

Jata Shankar & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
R.P. Pandey, A Sinha, B.D. Misra, Jyotindra Mishra, Kapil Misra, Lalji Gupta, R N Srivastava, Rajeev Singh, Suresh Chandra Tiwari

Counsel for the Respondent:
Govt. Advocate

A. The motive for committing an offence in all cases has not of much importance, particularly where the prosecution case is totally based on direct evidences proof of motive becomes of less significance- If prosecution witnesses consistently have accounted for the material facts of incident without any repugnance or serious anomaly in their own statement or in their statements inter-se, except minor variation having no material alteration in the nature and genesis of the incident, they shall be treated as credible and reliable witness- Non production of torches by the Investigating Officer at the time of his examination in the court would not have any effect of corroding the prosecution case as the assailants were known to the witnesses and they were seen from the very near by the witnesses- The test identification parade is not a substantive piece of evidence- Necessity of test identification parade arises only in cases where the miscreants/assailants are

unknown- The witnesses either may be relative or independent must have to pass the test of credibility, truthfulness and reliability. The relative witnesses cannot be said disinterested but it is also true that a witness losing her relatives ,in place of the real culprit, will not falsely implicate someone else and save the real culprit.- if any, discrepancy occurs with regard to the direction of the wound caused by the fire arm injury and distance from the deceased when fired it would be immaterial on the strength of the ocular testimony of the witnesses and is not of such kind which can completely over rule the incident of firing upon the deceased by the accused-appellants-Option of prosecution to examine all its witnesses or some or any one of them to prove the case.

Held- Indian Evidence Act- Section 8- Motive- Plays an important role and relevance with regard to the substantive piece of evidence proving the incident in question with all certainty and the identification of the accused and their role.

Evidence Law- Indian Evidence Act - Section 9- Test identification parade- It is not a substantive piece of evidence. Necessity of test identification parade arises only in cases where the miscreants/assailants are unknown.z

Evidence Law-Indian Evidence Act- Section 118 - Reliability of Witnesses- The witnesses either may be relative or independent, must have to pass the test of credibility, truthfulness and reliability. A witness losing her husband and father in place of the real culprit will not falsely implicate someone else and save the real culprit – If prosecution witnesses consistently have accounted for the material facts of incident without any repugnance or serious anomaly in their own statement or in their statements inter-se, except minor variation having no material alteration in the nature and genesis of the incident, they shall be treated as credible and reliable witness.

The ocular evidence will prevail over the Ballistic evidence in case of contradiction between the two- If any discrepancy occurs with regard to the direction of the wound caused by the fire arm injury and distance from the deceased when fired it would be immaterial on the strength of the ocular testimony of the witnesses and is not of such kind which can completely over rule the incident of firing upon the deceased by the accused-appellants.

Evidence Law-Indian Evidence Act- Section 134- It is the quality of evidence and not the quantity which is important.

The prosecution cannot be compelled to produce all the witnesses unless it is shown that non-examination of a witness by the prosecution has prejudiced the case of the defence.

The accused-appellants remained unsuccessful to show even on preponderance of probabilities the case of defence that dacoity was committed on the date and time of incident in the house of informant and they were falsely implicated by the informant by reason of enmity while the prosecution proved its case against the appellants beyond all reasonable doubt. Accordingly, conviction and sentence of of Appellants u/s 302/307/34 of the IPC upheld. . (Para 27,36,39,43,44,49)

Criminal Appeal rejected (E-3)

List of case cited:

1. Iqbal & ors., Vs. St. of U.P., 2015 6 SCC 623

2. Manzoor Vs. St. of U.P. & Suleman Vs. St. of U.P,. 1982 (2) SCC 72

3. Jitendra Kumar Vs. St. of Har. with Sunil Kumar & anr. Vs. St. of Har., (2012) 6 SCC 204

4. Brahma Swaroop & anr. Vs. St. of U.P., (2011) 6 SCC 288

5. Machchi Sigh Vs. St. of Punj. & ors., (1983 3 SCC 470)(relied)

6. St. of U.P. Vs. Babu & ors. Manu/SC/1149/2003(relied)

7. Thoti Manohar Vs. St. of A.P., (2012) AIR SCW 3752(relied)

8. Avtar Singh Vs. St. of Har. & Kripal Singh @ Pala & ors. Vs. St. of Har. & ors., 2012 9 SCC 432(relied)

9. Hukum Singh & ors. Vs. St. of Raj., 2000 (41) ACC 662(relied)

10. Veer Singh & ors. Vs. St. of U.P,. 2014 2 SCC 455(relied)

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. These two criminal appeals arise out of the single judgment and order dated 3.5.1986 passed by the Learned special Judge, Unnao in Sessions Trial No.406 of 1985 under Section 302/34 and 307/34 I.P.C., Police Station-Maurawan, District-Unnao, whereby the accused/appellants have been convicted and sentenced to undergo imprisonment for life under Section 302/34 IPC and three years' rigorous imprisonment under Section 307/34 IPC.

2. The case of the prosecution in brief as emerging out from the contents of the F.I.R. and the evidences laid before the court is that the elder brother of the informant (Ram Praksh, PW-1) namely Sachidanand, resident of Village Korwa (Mawai), Police Station - Maurawan, District 'Unnao' was married to Meena Kumari, the daughter of accused appellant, Jatashankar in February 1983. Smt. Meena Kumari died of burn injuries as she caught fire while cooking food. Accused Jatashankar, his sons namely accused appellants Mukesh and Rakesh came under impression that the said Meena Kumari was intentionally burnt by her-in-laws. Consequently, the family of the accused persons developed tense relation with the informant's family on account of above incident. They used to remain in search of chance to take counter action against informant's family in vengeance. On 22.6.1985 at about 6:15 a.m. moving a written complaint, the informant Ramprakash informed the Station House Officer of Police Station- 'Maurawan' that in the preceding night of 21/22.6.1985, when his father Ram Asrey, Mother Smt. Naval kishori (PW-2) and his sister Kumari Girisa were sleeping on their cots in front of their house, Ramparakash (PW-1) was sleeping on the roof of the house and a lilted lantern was hanging as usually on the door of the house, at about 1:00 a.m. when the informant awakened to pee, he saw accused Jatashankar armed with a gun, Mukesh armed with a country made pistol (Katta), Rakesh armed with a 'Tabbal' and Raju, son of maternal aunt of Mukesh armed with a country made pistol (katta) had invaded on the door (sahan) of the house and were near the cot of his father. Accused Jata Shankar and Mukesh fired on his father from their respective weapons. Hearing the noise of gunshot his mother Naval Kishori (PW-2) and sister Kumari Girisa suddenly awakened from sleep and began to shriek for their rescue. On this, accused Mukesh fired upon Smt. Naval kishori also with intention to kill her. The accused Rakesh inflicted blows of the 'tabbal' on the head of Kumari Girisa, consequently both of them sustained injuries. Hearing the hue and cry, the neighbouring villagers Ram Shankar (deceased, victim in the incident), Jagannath and Pyare rushed up to the spot, flashing torches along with others. Ram Shanker was leading them, accused Mukesh and Raju @ Chandra Prakash fired on him, he turned and ran towards his house but fell down at the door of his house and died there. Feared of their lives the other villagers ran away from the spot. The accused appellants were searching the

informant-Ramprakash, climbing upon the roof with the help of a ladder, to kill him and his brother. They were shouting that they would take revenge of burning the daughter by killing the entire family. When they could not found the informant and his brother, they fled away from the spot seeing the villager gathering there. Ram Prakash (PW-1) went to Maurawan Police Station got scribed written report and submit the same to the Police Station on 6:15 a.m. of 22nd June 1985. The case was registered against the accused persons and investigated by Shiv Swaroop Tiwari (PW-8) and after completion of all the formalities charge sheet against accused persons has been submitted by him in the Court.

3. The Trial Judge, when the accused persons were produced before the court, framed charges under Section 302 IPC read with Section 34 IPC against all of them while accused Rakesh and Mukesh were charged under Section 307 IPC and accused Jatashankar and Raju for the charge under Section 307 IPC read with Section 34 IPC.

Witnesses of Prosecution Side

4. Prosecution in order to prove its case have produced 9 witnesses in the court namely:-

i. Ramprakash (the informant) as PW-1, who is the son of Ram Asrey, the deceased, victim of the incident.

ii. Naval Kishori (the wife of the deceased, Ram Asrey and mother of PW-1) as PW-2, she is injured in the incident.

iii. Dr. R. Prasad (Medical officer of Primary Health Centre Hilauli, who examined Kumari Girisa, daughter of deceased Ram Asrey, the injured in the incident) as PW-3.

iv. S.I. Tribhuvan Nath Singh (who prepared the inquest report of the dead bodies of Ram Asray and Ram Shankar pandey) as PW-4.

v. Dr R.K Suri (Medical Officer who had done medical examination of Smt. Naval kishori, PW-2 on 23rd June 1985 at 11:35 a.m.) as PW-5.

vi. Ameer Singh (the Head Constable who had prepared chick F.I.R., exhibit ka-12 and registered the case in the G.D exhibit ka-13) as PW-6.

vii. Dr S.P. Rastogi (District Hospital, Unnao who had conducted the autopsy of dead bodies of Ram Asray and Ram Shankar on 23rd June 1985 at 2:00 p.m. and prepared postmortem report exhibit ka-15 and 16) as PW-7.

viii. Shri Shiv Swaroop Tiwari (Station Head Officer incharge, Police Station 'Maurawan' who had done investigation and prepared site plan) as PW- 8 and other memo of seizure and recovery from the spot.

ix. Constable Ram Ashish Singh (who carried the dead bodies of Ram Asray and Ram Shankar in sealed condition to Merchury for postmortem) as PW-9.

Documentary Evidences

5. During trial following documentary evidences were laid before the court and proved by their respective witnesses. The written report submitted in Police Station Maurawan proved by PW-1 Ramprakash is exhibit Ka-1, the F.I.R. registered thereupon is exhibit ka-12, the postmortem of Ram Shankar is proved by PW-7 as exhibit ka-15, postmortem of Ram Asrey proved by PW-7 as Exhibit Ka-16, injury reports of Kumari Girisa proved by PW-3 is exhibit Ka-2, injuries report of Naval Kishori by PW-5 is exhibit ka 5, seizure memo of blood stained clothes of Kumari Girisa and Smt. Naval Kishori respectively

ka-17 and ka-18, the seizure memo of lantern from the spot by investigating officer is exhibit ka-19, site plan is exhibit K-20 prepared and proved by investigating officer, the bed sheet which was on the cot of Ram Asrey (deceased) at the time of incident was seized and memo was prepared by the investigating officer is Exhibit Ka-21, the seizure memo of 6 pellets found on the body of the deceased Ram Asrey and three empty cartridges found beneath his cot were prepared by investigating officer and proved in the court is exhibit ka-22, the collection of blood stained soil and plain soil by investigating officer from beneath the cot of Ram Asray and near the dead body of Ram Shanker Pandey was done and the memo prepared by the investigating officer proved in the court by him is exhibit ka-23 and 24. He found one empty cartridge in the field of Bhagwati, the memo prepared by him is exhibit ka-26, the ladder used by the accused persons was seen and memo thereof was prepared by investigating officer is exhibit ka-27, memo of torches prepared by the investigating officer is exhibit ka-30 and 31, the letters prepared for medical examination and proved by him is exhibit ka-28 and 29.

6. After getting examination of all the prosecution witnesses, the trial judge found the case of prosecution established on the basis of evidence of Ramprakash, PW-1, Smt. Naval Kishori, PW-2 and other prosecution witnesses. Para-16 of the impugned judgment of the Trial Judge reads as under:-

"It is established from the testimony of Sri Ram Prakash (PW-1) and Smt. Naval Kisori (PW-2) that the accused persons bore malice towards the deceased and the members of his family because the daughter of accused Jatashanker who was married to the son of Ram Asre (deceased) had died due to burn injuries and the accused persons had impression that she was intentionally burnt by the family members of Ram Asrey (deceased). The accused persons, therefore, armed with gun, country made pistols and Tabbal (a sharp edged cutting weapon). It is further proved from the testimony of these witness that accused Mukesh and Jatashanker had fired at Ram Asre who died instantaneously. On the sound of gun shots, Smt. Naval Kishori (PW-2) and Km. Girisha who were sleeping very close to Ram Asre (deceased) were awakened and as soon as they tried to raise alarm, accused Mukesh fired at PW-2 Smt. Naval Kisori and accused Rakesh assaulted Kumari Girisha with Tabbal. Consequently, both of them had suffered injuries. On the shrieks of these persons, the villagers including Ram Shanker (deceased) rushed to the scene of occurrence. Accused Raju and Mukesh fired at them. Consequently Ram Shanker had sustained injuries and died on the spot. Both these witnesses were cross-examined at a very great length by the learned defence counsel. In spite of lengthy and combersome cross-examination, they could not be shattered. Both these witnesses maintained their mental con-posture throughout and gave convincing replies to all the questions put to them. Had they not seen the occurrence and had they been examined after tutoring they must have collapsed under the weight of tiring trying cross-examination. I find both these witnesses most truthful and credible and do not discover any ground to reject their testimony."

Arguments advanced by learned counsel for the appellant, Sri Jyotindra Misra, Advocate (learned

Senior Designated) assisted by learned counsel Sri Kapil Misra, Advocate.

7. The accused appellants have assailed the impugned judgment of conviction and order of sentence on various grounds inter-alia in the appeal, namely learned trial judge has erred in law and facts in recording conviction and sentencing the appellants because the medical evidences show that prosecution story as narrated in the First Information Report is false. It is argued that prosecution has failed to prove it's case beyond all reasonable doubts as there are so many contradictions and discrepancies in the statements of PW-1 and 2 which make highly doubtful the PW-1 to be an eye witness, as he claims himself watching the incident from the roof of his house in the night of 21/22.6.1985. It is doubtful that he could see the incident in the light of lantern hanging on the door of house when his father deceased Ram Asrey, mother Smt. Naval Kishori and sister Kumari Girisa were sleeping on their cots. The night on the date of incident admittedly was a dark night and it was quite impossible for PW-1 to see any thing in the weak light of the lantern, as such identification of accused person by him was reasonably not possible.

8. Learned counsel further contended, reading over the statement of PW-1, that he stated to bear a torch at the time of incident and saw the accused persons in the flash of torch also, whereas neither in the First Information Report the torch is mentioned nor the torch, by investigating officer, was produced in evidence and proved during the trial. Learned counsel further raised a doubt as to the presence of PW-1 on the roof of the house along with his cot, in absence of any stair leading to the roof or without a ladder.

9. Learned counsel further argued that ocular evidence is in variance with the medical evidence which came out from the medical examination reports of the PW-2, (the injured witnesses) as well that of Kumari Girisa. The opinion of doctors who examined the said two injured person is not supporting the statement of said witnesses and as such their presence on the spot is doubtful. Learned counsel further argued that in the darkness of the night it was not possible for the PW-1 to recognize and identify the assailants who committed the crime in the fateful night of 21/22.6.1985. He argued in defence that some dacoits attacked the house of informant and in the course of dacoity Ram Asray and Ram Shankar were gunned down by the unknown assailants to whom the witnesses due to darkness of night could not recognize, informant only under apprehension falsely implicated the accused appellants that they might have attacked in vengeance. As such the entire case of prosecution is cooked, witnesses are uncredible and untrustworthy. The investigation officer had not held identification parade after the arrest of the accused, therefore, the identification of assailants who commit the offence could not be established.

10. Learned counsel to fortify his contention relied on the judgment in ***Iqbal and Ors. Vs. State of U.P.*** reported in ***2015 6 SCC 623*** particularly citing the para-10 and 11 of the judgment which runs as under:-

"10. In cases of dacoity, usually, the offence is committed by unknown persons with the criminal background. It is only in very few cases, the accused-dacoits are known to the victim. PW1-Patia Singh and PW2-Jay Singh have

stated that they had witnessed the incident from a distance of three and half yards. PW3-Begraj also stated that he had witnessed the incident from a distance of five-six yards in the feeble torch light. Admittedly, according to the witnesses, there was no electricity at the time of incident in their houses. They claimed that they could see the accused persons with the help of their torch lights. In the courts below, onbehalf of the accused persons, it was argued that the night of incident was an amavasya-new moon night. A perusal of calendar of that month in that year, it is seen that the intervening night of 21/22.09.1979 was a new moon night i.e. amavasya.

11. In our considered view, it is unbelievable that on a new moon night when it was pitch dark, the witnesses who were frightened and who were hiding themselves behind the walls in order to save themselves, could have seen actual faces of the accused persons just by flash of torch lights on their faces and in the light of lantern. Further, there were about 14-15 dacoits in number, all armed with deadly weapons and were continuously making ingress and egress in the house of the deceased, it becomes inconceivable as to how the witnesses standing at a distance in a feeble light would have been able to identify the dacoits."

11. Learned counsel for the appellants further relied on the judgment of Hon'ble Supreme Court in ***Manzoor Vs. State of U.P. and Suleman Vs. State of U.P.*** reported in ***1982 (2) SCC 72*** emphasizing the necessity of identification by the Investigating officer when incident happens in a dark night by some unknown assailants hiding their faces, para-12 of the judgment quoted by him reads as under:-

"12. There is then the evidence of P.Ws. 1 and 2, the home-guards of whom only P.W. 2 had identified the appellants in the identification parade held on 17.11.1978. The four home-guards including P.Ws. 1 and 2 are stated to have flashed their torch lights and to have seen the two persons running away from the scene of occurrence after they had heard the alarm of the injured Gul Bahar near the railway line. The torches have not been produced in evidence, and the investigating officer P.W. 12 would say in his evidence that he saw those torches 30 and returned them to the home-guards. It is not known why the investigating officer P.W. 12 thought it fit to return the torches with the aid of which the home-guards are stated to have seen the two persons running away from the scene of occurrence though that will be a relevant piece of material evidence in the case. P.W. 12 has stated that after recording the statement (Ex. Ka. 11) of the deceased Gul Bahar at the District hospital, Saharanpur he went to the mela and recorded the statements of the four home-guards. This evidence of P.W. 12 shows two things, namely (1) that the home-guards would have been on duty at the mela in the night of 22/23.9.1978 40 and could not have been on patrol duty, moving about near the railway line or the lime kiln which is stated by the P.W. 12 to be situate one furlong away from the mela, as P.Ws. 1 and 2 would have it, and (2) that none of the home-guards could have accompanied the injured Gul Bahar from the petrol pump where the First Information Report (Ex. Ka. 1) is stated to have been recorded to the Police Station,

for if any home-guard had accompanied the injured Gul Bahar to the Police Station he would have been examined by the police at the Police Station itself in connection with this case and it would not have been necessary for P.W. 12 to have examined that home-guard only at the mela. The evidence of P.Ws. 1 and 2 that Ex. Ka 1 was recorded at the petrol pump is not reliable, for it is stated in Ex. Ka. 1 that one of the home-guards took down the deceased's statement and brought him to the Police Station after recording the report. From the statement in Ex. Ka. 1 that one of the home guards brought the deceased to the Police Station, it would appear that Ex. Ka. 1 could have been written only after the injured Gul Bahar had been taken to the Police Station and not earlier. It is to be noted that none from the petrol pump and the rickshaw-puller who is stated to have carried the injured Gul Bahar from the petrol pump to the Police Station has been examined as a witness at the trial. It is seen from the evidence of P.W. 12 that the home-guard did not give him the description of any of the culprits when he examined them and that he did not even ask them about it though it is stated in the report Ex. Ka 1 that the home-guards had seen the culprits thoroughly and identified them. If at the earliest opportunity the home-guards did not mention any identifying features of the culprits when they were examined by P.W. 12, it is difficult for us to believe how P.W. 2 could have identified both the appellants nearly two months later on 17.11.1978. It has to be noted that the appellants have stated in the trial court that they were shown to the witnesses before the identification parade was held. In these circumstances we are not impressed with the evidence of P.Ws. 1 and 2."

12. Learned counsel in the context of the case discussed in the above judgment of Hon'ble Supreme Court applied the finding given therein on the facts of the present case, saying that the torches have not been produced in evidence. It is obvious from the statement of the investigating officer in his evidence that he saw those torches and after preparing memo returned them to the villagers who arrived at spot flashing their torches. He further argued that for the reason of non production of torches during examination of investigating officer the story of seeing and identifying the accused persons in the flash of torches made by neighbouring villager of PW-1 is fictitious and unbelievable.

13. On the basis of arguments stated hereinabove and deferring the judgment of Hon'ble Supreme Court, the learned counsel for the appellant assailed the impugned judgment and order of sentence as erroneous in fact and law both, based on conjectures and surmises, suffering from mis-appreciation of evidence, by relying uncredible, untruthful and untrustworthy statement of PW-1 (Ram Prakash, the informant) and the injured witnesses PW-2, Smt. Naval Kishori.

Arguments in reply by Ms. Smiti Sahai, learned Additional Government Advocate:

14. In reply to the arguments of learned counsel for the appellant, learned A.G.A., Ms. Smiti Sahai submitted that the first information report by the informant (PW-1) is made quickly and promptly just after the happening of the incident without any unnecessary and unreasonable wastage of time. Therefore, it is a natural narration of incident without any exaggeration. In counter to the argument advanced by

learned counsel for the appellant relating to the non disclosure in the F.I.R. about the torch carried by PW-1 at the time of incident and the ladder/stairs leading to the roof, through which he went on the roof of the house in the night for sleeping, she argues that they are immaterial because first information report could not be an encyclopedia of the entire facts. She submitted that the FIR made by the PW-1 is very much natural and spontaneous to communicate the police officer about the fateful incident happened with his family members on the date and time and place of the incident and also that who have committed the same and why.

15. Learned A.G.A. relied on the judgment of Hon'ble Supreme Court in ***Jitendra Kumar Vs. State of Haryana*** with ***Sunil Kumar and Anr. Vs. State of Haryana*** reported in (2012) 6 SCC 204 on the point, 'purpose and nature of the First Information Report'. Para 18 of the said judgment reads as under:-

"18. The Court has also to consider the fact that the main purpose of the FIR is to satisfy the police officer as to the commission of a cognizable offence for him to conduct further investigation in accordance with law. The primary object is to set the criminal law into motion and it may not be possible to give every minute detail with unmistakable precision in the FIR. The FIR itself is not the proof of a case, but is a piece of evidence which could be used for corroborating the case of the prosecution. The FIR need not be an encyclopedia of all the facts and circumstances on which the prosecution relies. It only has to state the basic case. The attending circumstances of each case would further have considerable bearing on application of such principles to a given situation. Reference in this regard can be made to State of U.P. Vs. Krishna Master and Ors. [(2010) 12 SCC 324] and Ranjit Singh and Ors. Vs. State of Madhya Pradesh [(2011) 4 SCC 336]."

16. Learned A.G.A further argued reading over the testimony of PW-1 and PW-2 that the deceased, Ram Asrey, his wife Smt. Naval Kisori and daughter Ms. Girisa were sleeping on their respective cots in sahan just in front of the door of the house, while the accused appeared on the spot, it is proved by the evidences that a lantern was hanging on the door. It is also proved by the evidences that the PW-1, the son of the deceased (Ram Asrey) namely Ram Prakash was sleeping on the roof of the house, at that moment when he awakened from sleep to pee he saw the accused persons near the cot of his father, armed with fire arms, seeing this he raised alarm, watching the entire incident from the roof of the house.

17. Learned A.G.A laid emphasis on the presence of eye witnesses namely PW-1 and PW-2 at the time of commission of offence by accused appellants, as the PW-2, Naval Kisori (wife of the deceased, Ram Asrey) is an witness, who herself had sustained fire arm injuries during the same incident. She further stressed on evidentiary value of her testimony that the same deserves to be put on a higher pedestal of credibility than that of others and cannot be discarded on trivial inconsistency if any. She further argued that the prosecution witness PW-2's injuries are examined by Medical Officer PW-5, who proved his report in the court. PW-2 since is a rustic villager, therefore, the lapse of time from the date of incident till the date of recording of evidence is of utmost consideration when minor and trivial

inconsistencies in her statements, if occurs, without having any material bearing upon the fact in issue. Learned A.G.A in support of her argument relied on the judgment of Hon'ble Supreme Court in ***Brahma Swaroop and Another Vs. State of U.P. (2011) 6 SCC 288 particularly on para 28*** of the judgment which are quoted hereunder:-

"28. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". (Vide: State of U.P. v. Kishan Chand & Ors., (2004) 7 SCC 629; Krishan & Ors.v. State of Haryana, (2006) 12 SCC 459; Dinesh Kumar v. State of Rajasthan, (2008) 8 SCC 270; Jarnail Singh & Ors. v. State of Punjab, (2009) 9 SCC 719; Vishnu & Ors. v. State of Rajasthan, (2009) 10 SCC 477; Anna Reddy Sambasiva Reddy & Ors. v. State 2 of Andhra Pradesh, AIR 2009 SC 2661; and Balraje @ Trimbak v. State of Maharashtra, (2010) 6 SCC 673)."

18. Learned A.G.A further emphasized on the reliability, trustworthiness and truthfulness of the witnesses namely PW-1 and PW-2 as their statements are fully corroborated with the medical evidences and testimony of investigating officer (PW-8). She argued that on facts, it could not be said that the witnesses are planted witnesses. They are natural witnesses and incident narrated by them is untutored, unrehearsed and corroborated by other materials proved by evidences on record.

19. Learned A.G.A lastly argued on the explanation submitted by accused appellant as their defence against the evidences proving the case of prosecution that on the date of incident some unknown assailants committed dacoity in the house of informant, who could not be identified, therefore, due to the reason of enmity, informant falsely implicated the accused-appellants, she submitted, the alleged dacoity committed in the house of the informant on the date and time of the incident was not asked from the investigating officer (PW-8) during his examination in trial nor it was proved as a defence to create doubt on the prosecution case.

20. We anxiously heard and considered the respective arguments raised by learned counsel for the appellant and learned A.G.A. Since the judgment before us, is of conviction and sentence, impugned in the present appeal, therefore, the entire evidence led by the prosecution, oral and documentary must be re-appreciated carefully. Before re-appreciation of the evidence available on record of the trial, we formulate following two questions for determination in appeal.

(1) Whether the prosecution has successfully proved it's case by prosecution witnesses beyond all reasonable doubts. and

(2) Whether the accused appellants by setting their defence against the proved case of prosecution, has been successful in showing the same on the preponderance of probabilities, so as to cast upon the prosecution case a reasonable doubt?

21. It is the cardinal rule of our criminal jurisdiction that the burden in the web of proof of an offence would always lie upon the prosecution, to prove, all the facts constituting the ingredients, beyond

reasonable doubt. If there is any reasonable doubt the accused is entitled to the benefit of reasonable doubt.

22. In the present appeal the testimony of eye witnesses PW-1 (Ram Prakash) and injured eye witness PW-2 (Naval Kisori) are of utmost importance. While appreciating the evidence of any witness claiming to have seen the incident, the court is to consider and look for the following factors appearing in the entire testimony of the witnesses.

(i) presence of the witness on the spot.

(ii) witnesses having seen the incident.

(iii) credibility of the witnesses.

23. Prosecution to prove its case produced two witnesses of fact namely Ram Prakash (the informant) as PW-1, who watched the entire episode that happened in unfateful night of 21/22.6.1985, and his mother Naval Kisori the wife of Ram Asrey (deceased victim of the incident) as PW-2, who is an injured witness. They narrated the story of the incident in their examination in chief. The defence in cross-examination tested their veracity by putting questions to shaken their credibility and trustworthiness. They have also stated the motive of the appellant for commission of the offence in question. Since in the First Information Report the motive is stated, therefore the evidence of prosecution witnesses is to be seen in the context of motive also if found proved.

Motive

24. The motive for committing an offence in all cases has not of much importance, particularly where the prosecution case is totally based on direct evidences proof of motive becomes of less significance. In the present case the prosecution has set a motive and got it proved by the testimony of PW-1. PW-1 as eye witnesses of the incident. They have stated the motive of the accused-appellants categorically and specifically in the FIR also. The motive as set in the FIR is reiterated by PW-1 without any variation in the examination-in-chief during trial. The statement of PW-1 began on 11.12.1985, after the date of occurrence 21/22.6.1985 that is to say after an interval of about seven months. At that time witness was about 18 to 20 years, his cross-examination was done on 1.2.1986. Since, then about three months more have been elapsed, then also the teenager witness PW-1 and his mother PW-2 firmly stated the motive in cross-examination by defence counsel. PW-1 stated, "after the death of my sister-in-law from burn injuries the accused began to move applications against his family members to the effect that they have burnt her to death (the statement is extracted and highlighted from the testimony of PW-1 Page-2 Para-6 dated 1.2.1986). The injured witness PW-2, wife of the deceased, Ram Asrey namely Naval Kisori in her examination-in-chief has stated in very clear words that the accused-appellants were shouting that they would be taking revenge of their daughter's death from the entire family and were searching her children. This statement in chief of PW-2 remains constant as she has not been cross-examined on this point by learned counsel for the defence. As such since the very inception right from the lodging of F.I.R. the motive imputed upon the accused-appellants for the commission of offence is stated by PW-1 and PW-2 in their deposition before the Court. As such the motive behind commission of offence

imputed upon the accused-appellants stands proved by the substantive evidence. The argument of learned counsel for the accused-appellants that if the accused-appellants came under any impression in 1983 when the death of Smt. Meena Kumari, occurred by reason of burn in her in-laws' house, could not be imagined, reasonably to survive till the date of incident 21/22.6.1985, after a considerable lapse of time of more than one and a half years. The arguments of learned counsel is not tenable in the light of the explanation submitted by accused appellant Jatashanker, when he was confronted with this substantive piece of evidence under Section 313 of the Cr.P.C. He replied, 'it would be wrong to say that he had enmity. He further added 'she was burnt by in-laws'. He admitted in last question under Section 313 Cr.P.C. put before him while replying the same that he had moved complaint with regard to the death of his daughter from burning caused by her-in-laws, due to this they (informant's family) had enmity. As such in view of the substantive piece of evidence with regard to motive led by the prosecution and as expressed by the accused-appellant Jatashanker, he was under impression even on the date of submitting explanation under Section 313 Cr.P.C. that his daughter was burnt to death by her-in-laws, is found proved as a strong motive for the commission of offence.

25. The incident of burning resulting into death of Smt. Meena Kumari within one year from marriage is admitted to both the parties. It is also admitted that accused-appellant, Jatashanker moved several complaints for action against in-laws of Meena Kumari, but the same remained of no avail. In such circumstances a frustrated father, quite naturally, as it is proved, to have hatched enmity and vengeance with the in-laws' family to take revenge of his daughter's death. Admittedly he was under impression that his daughter was burnt to death by her in-laws, as comes out from his explanation given by him under Section 313 of the Cr.P.C.

Presence of the witnesses on spot and their credibility.

26. The argument advanced on behalf of the accused-appellant doubting the presence of witnesses on spot is founded on the following contentions-

(i) There was a dark night on the date of incident i.e., 21/22.6.1985 at about 1:00 a.m.

(ii) There was no sufficient source of light wherein the incident could be watched by PW-1, Ram Prakash allegedly from the roof of the house.

(iii) The presence of torches with the neighbouring villagers is mere a story as no independent witness was examined.

(iv) The presence of lantern allegedly hanged on the door is not proved by reason of inconsistent statements of PW-1, PW-2 and PW-8.

(v) Prosecution failed to establish identity of accused after their arrest by holding a test identification parade.

27. If prosecution witnesses consistently have accounted for the material facts of incident without any repugnance or serious anomaly in their own statement or in their statements inter-se, except minor variation having no material alteration in the nature and genesis of the incident, they shall be treated as credible and reliable witness.

28. The incident as reported by the informant to the police is prompt one after

commission of offence at 1:00 a.m. in the night of 21/22.6.1985, was registered in the Police Station- Maurawan at 6:15 a.m. The second fact, important for consideration, is that the accused-appellant who were reported as assailants are relatives and not the persons unknown to the informant. Thirdly, it is also to be kept in mind that the informant, Ram Prakash (PW-1) was an 18 years old boy, normally residing in the house along with parents reasonably will be supposed to remain in the house in night. He has proved by his testimony before the court that he was sleeping on the roof. His presence in the house at the time of incident is established by evidence, through his uncontroverted and uncontradicted testimony before the Court. PW-1 has proved that when he awakened under compulsion of the call of nature to pee at 1:00 a.m. he saw the accused-appellants, Jatashanker his sons Mukesh and Rakesh and their cousin brother (son of maternal aunt of Mukesh) Raju near the cot of his father armed with their respective weapons. He has also deposed before the court that all were known to the informant, therefore, they could easily be identified by him from their shape and size of the body postures, gestures and even the manner of movements, etc. irrespective of the fact that the incident happened in night.

29. Another eye witness PW-2, one of the victim of the incident as injured from the firing of the accused-appellant, Mukesh is examined on 1.2.1986, she is a rustic villager, also a lady witness who lost in the incident her husband. She has also identified the accused appellants, as they were very near to her, in the course of commission of offence, therefore, her statement accounting for the incident is believable for the reason of her presence on the spot and having been injured in the incident. The cause of injury sustained by her in the course of incident is stated by PW-1 and PW-2 also. PW-1, Ram Prakash states even in the F.I.R. that "while on the noise of fire my mother and sister awakened and began to cry, Mukesh fired upon mother with intention to kill her and accused-appellant Rakesh inflicted the blow of *"tabbal"* on the head of Kumari Girisa, sister of the informant. In his statement before the Court, PW-1- Ram Prakash stated on oath in examination-in-chief the same fact as reported by him in the F.I.R. by saying that "when accused Mukesh and Jatashanker fired on his father (Ram Asrey, the deceased victim), hearing the noise of fire his mother and sister awakened, they were crying and screaming. The accused-appellant, Mukesh fired on the mother, while Rakesh inflicted the blow of 'tabbal' on head of his sister Kumari Girisa. In cross-examination, he stated in para-8 of the statement that in the sahan before his house, there was no boundary and that was an open space, the accused were standing at the distance of 4 to 5 hands from the cot of father. When the accused-appellant fired upon his father the mother and sister of the informant tried to flee away from the spot but accused intercepted them, Rakesh caught hold the sister, Kumari Girisa and Mukesh caught hold the mother, Naval Kisori. Mukesh began to beat them and fired only one shot on mother and no fire was made upon sister, Kumari Girisa.

From the testimony of witnesses PW-1 and PW-2 it comes out -

(a) the witnesses PW-1 and PW-2 being the family members naturally in the night, when the incident happened, were in their house sleeping in open Sahan in front of door of the house due to hot night in summer on their respective places told in the statement.

(b) The cot of PW-2, Naval Kisori was in the eastern side of cot of Ram Asrey whereas Kumari Girisa was sleeping on cot lying on western side. As such they were very near to the cot of deceased Ram Asrey when the accused fired on Ram Asrey.

(c) PW-2, Naval Kisori is injured in the same incident by reason of fire from country made pistol made by accused-appellant- Mukesh upon her just after Jatashanker fired on Ram Asrey when he was sleeping.

(d) PW-1, Ram Prakash was sleeping on the roof of the house and when awakened, he saw from the roof, the accused appellants near the cot of his father and he remained there throughout watching the entire incident. He saw accused-appellant armed with gun and Mukesh armed with a country made pistol. They fired upon his sleeping father from their respective weapons. He found his father died when he came down from the roof after the accused fled away. He also deposed in the court about Mukesh and Raju who fired on Ram Shanker Pandey (deceased) who hearing the noise of fire and hue and cry of PW-2 and her daughter, he rushed up to the scene of crime along with other neighbouring villagers. Ram Shanker Pandey died of the fire arm injury made by Mukesh and Raju.

All the above proved fact established the presence of witnesses PW-1 and PW-2 on spot.

30. In similar set of facts before Hon'ble The Supreme Court in the case of ***Machchi Sigh Vs. State of Punjab & Ors.*** reported in ***(1983 3 SCC 470)*** evidences showed and established the natural presence of the witnesses in the house. Para 25 and 30 thus reads as under:-

"25. The presence of Smt. Sabhan at her own house at night time is but natural. Her husband and her grand-son have been killed. She is the lone survivor of the household. Her evidence therefore assumes great importance. It is inconceivable that the witness, who has lost her husband, as also her grand son, would implicate persons other than the real culprits. The only argument pressed into service was the stock argument regarding insufficiency of light. It was negatived by the courts below. We have already dealt with and negatived this argument for reasons indicated earlier. Her evidence furthermore shows that appellant Kashmir Singh had flashed his torch at her husband (Wanjar Singh) and at her grand-son (Satnam Singh). That she herself remained alive to tell the tale was a stroke of luck. The appellants had shot at her but the rifle shot hit the bullock instead of hitting her. The culprits were naturally, in a hurry to get away. They would not have waited to ascertain whether she was hit. Her evidence remains unshaken. The Courts below have, therefore, rightly considered it to be creditworthy and safe for being acted upon.

30. The order of conviction (passed by the Sessions Court and affirmed by the High Court) is inter-alia based on the dying declaration of Mukhtiar Singh. He was fired at and injured soon after midnight in the early morning of August. 13. He was removed to hospital on that very day. His police statement (which has been subsequently treated as a dying declaration) was recorded on the 16th i.e. three days after the assault. He died on the 18th, two days later. The evidence shows that he was in fit condition to make a statement and his statement was truly and faithfully recorded. His statement has been considered to be genuine and true by the

Sessions Court and the High Court. We are of the same opinion. It is true that the dying declaration has not been recorded by a magistrate. But then the evidence shows that Mukhtiar Singh was making good recovery and having regard to the condition of his health, no danger to his life was apprehended, it was in this situation that a magistrate was not summoned. Thus, no fault can be legitimately found on this score. Besides, the only question of importance now is as regards the creditworthiness of the statement which has been recorded. Since this statement has been found to be genuine and true nothing can detract from its value. The evidence provided by the dying declaration is by itself good enough to support the order of conviction. But this is not all. Also available is the evidence of PW 37 Ujagar Singh and his daughter-in-law, Munibai (PW 38). The evidence of these two witnesses lends full corroboration to the dying declaration of the victim, and has been rightly relied upon by the Sessions Court and the High Court. We have no reason to view the evidence askance. The presence of these two witnesses in the household was natural. Their evidence shows that on hearing the report of gun they had concealed themselves behind a herd of cattle andhad witnessed the incident from there. We have no reason to disagree with the view of the Sessions Court and the High Court that their evidence is reliable. There is no substance in the argument that the culprits could not have been identified as the light shed by the lantern was not adequate to enable identification. We have already spelled out our reasons for repelling this contention. The finding of guilt is thus fully supported by evidence. We accordingly confirm the same unhesitatingly. Two of the five appellants (viz : Machhi Singh and Jagir Singh) have been sentenced to death. We will deal with the question of sentence in so far as they are concerned after a shortwhile. In regard to the remaining three, viz : Phuman Singh, Jagtar Singh and Kashmir Singh son of Wadhawa Singh, the sentence imposed by the courts below for the offence under Section 302 read with 149 of IPC; and other offences, must be confirmed. Their appeals will stand dismissed."

Source of light on the spot and argument as to the inconsistent testimonies

31. It is highlighted by learned counsel for the accused appellant that there was no source of light and the prosecution has failed to prove the existence of lantern lilted on the spot of incident. PW-1 has stated the place of lantern, hanging on the door of the house in front of which three peoples namely Ram Asrey (the deceased victim), his wife Naval Kisori, PW-2 and Kumari Girisa their daughter were sleeping on their respective cots. PW-1 in his statement has stated that lantern was hanging out on the door on a *"Chabutra"* of 3-4 feet height and covered with a *"Chappar"* in northern side of the door on a peg, whereas PW-2, Naval Kisori stated in her statement the place of lantern out of the door in its southern side in *"Kutiya"*. The PW-8 (Investigating Officer) had shown the lantern hanging at a place shown in the site map as "L", we perused the site map and found that there are two houses of deceased, Ram Asrey one situated in northern side another in southern side, in between these two houses the place adjacent to the southern house is shown where the cots were lying on which deceased, Ram Asrey along with his daughter and wife was sleeping. In oral examination before the court also it is

stated by the witnesses PW-1, PW-2 and the PW-8 has also shown outside the door, the three cots, in the middle as letter "A" cot of Ram Asrey is shown and in the east the cot of Naval Kisori is shown as letter "B". The cot of Kumari Girisa is shown in the west as letter "C". The place shown as letter "L" is the place where the lantern was hanging is just in the right side of main door of the southern house that is to say in the east of the open space (Sahan).

32. The statement of PW-1, that lantern was hanging outside the house in northern side and the statement of PW-2 that lantern was hanging on her south direction outside the door proved the position of open space (Sahan) correct, both the witnesses are indicating the same place as shown by the Investigating Officer in his site map. Since they were at different places while watching the incident, their narration of the incident is as they saw from their respective directions.

33. The PW-1 was watching the incident from the roof of his house which is situated in the map in the southern side while the place of incident is in the north of the said house therefore, he told the place of lantern at northern side of the door whereas the cot of PW-2, Naval Kisori was lying on the north south direction and while she awakened with the noise of fire, lantern was on her south direction hanging on the wall of the southern house shown as "L" by the Investigating Officer. Therefore, here seems no inconsistency in the narration of PW-1, 2 and 8 respectively Ram Prakash, Naval Kisori and Investigating Officer with regard to the place of lantern where it was hanging.

34. Learned counsel for the appellant argued about the contradiction that PW-1 in F.I.R. has not stated about a torch in his hand while he was seeing the incident in question in night, in the examination-in-chief PW-1 for the first time stated in his statement before the court that a torch was in his hand while he watched the incident from roof. Secondly, the torches shown in the hands of neighbouring villagers who rushed upto the place of incident hearing the hue and cry of the informant's family members, were also not produced in the court, though the Investigating officer in his statement before the court stated on oath that he saw the torches, prepared memo thereof and returned the same to the witnesses. The torches were not produced during the trial. In the absence of production of torches during the trial the Investigating Officer proved only the seizure memo whereupon Exhibit-30 and 31 were marked before the trial judge.

35. In his examination, the PW-8, the Investigating Officer has not given any justification why the torches were returned to the witnesses and not produced in the court. In the absence of production of torches, the statement of the PW-1 Ram Prakash about carrying in hand a torch while watching the incident from his roof and as reported in the FIR in the hands of neighbouring villagers who rushed towards the place of incident flashing torches might be an improvement on the part of investigating officer, as every Investigating Officer tries to strengthen the case of prosecution. But in view of the circumstances of the present case non production of torches by the Investigating Officer at the time of his examination in the court would not have any effect of corroding the prosecution case as the assailants were known to the witnesses and they were seen from the very near by the witnesses. Secondly, the existence of light

emitting from the lantern is also proved, therefore, identity of accused when established, the non production of torches is of no effect.

Test identification parade whether necessary in the facts of the case.

36. When the presence of the witnesses PW-1 and PW-2 on spot is proved and established by evidences the incident and the role of the accused appellants in commission of the crime cannot be discarded in view of the fact that all the accused persons were known to the witnesses PW-1 and PW-2 as they were relatives to them. It is not impossible to see even in the night for an 18 year old boy who is not reported with any ailment of eyes, to see from his roof the entire incident and also not impossible for the PW-2 the wife of deceased, Ram Asrey who herself was on the scene of crime very near to the deceased, Ram Asrey and the assailants to see and identify them. In the aforesaid circumstances, the question of test identification parade, if not made by the investigating officer the same would have no adverse effect on the testimony of PW-1 and 2. Moreover, the test identification parade is not a substantive piece of evidence. Necessity of test identification parade arises only in cases where the miscreants/assailants are unknown, the crime is committed in the night, the assailants are numerous, they have hide themselves with muffled faces during the commission of crime and the witnesses too are under shock and fear to hide themselves in safe places. In such circumstances, the test identification parade is needed after arrest of suspected miscreants otherwise in the circumstances of present case the test identification parade is unnecessary. The case laws relied on by learned counsel for the accused-appellants have no application in the scenario of facts in the present appeal.

37. Hon'ble Supreme Court in ***State of U.P. Vs. Babu & Ors.*** reported ***Manu/SC/1149/2003*** in para 7 has held as under:-

"7. Apart from the mention about the torchlight, one important aspect which cannot be lost sight of and which is of relevance and great significance is that the accsed persons are known to the witnesses. When the persons are known, identification is possible from the manner of speech, manner of walking and gesticulating and special features of a person like the physical attributes. The reason indicated to discard PWs 1 and 3 is to the effect that PWs 2 and 9, though they were closely related to the deceased, did not support the prosecution version. That cannot per se be a ground to discard the evidence of other witnesses, one of whom was also a relative, and the other an independent witness. As noted above, the High Court has not discussed the evidence of PWs 1 and 3 to point out any vulnerability. The conclusion arrived at is without reason. Since the High Court has acted on surmises and conjectures, the judgment is indefensible."

38. In similar set of facts before Hon'ble The Supreme Court in ***Machchi Singh Vs. State of Punjab*** reported in ***(1983) 3 SCC 470*** in para 5 has held as under:-

"5. The most serious criticism pressed into service by learned Counsel for the appellants in each of the appeals is common. Instead of dealing with the

identical criticism, in the identical manner, repeatedly, in the context of each matter, we propose to deal with it at this juncture. The criticism is this. It was a dark night. Electricity had not yet reached the concerned village at the material time. In each crime the appreciation of evidence regarding identification has to be made in the context of the fact-situation that a lighted lantern was hanging in the court-yard where the victims were sleeping on the cots. The light shed by the lantern cannot be considered to be sufficient enough (such is the argument) to enable the eye witnesses to identify the culprits. This argument has been rightly rebuffed by the Sessions Court and the High Court, on the ground that villagers living in villages where electricity has not reached as yet, get accustomed to seeing things in the light shed by the lantern. Their eyesight gets conditioned and becomes accustomed to the situation. Their powers of seeing are therefore not diminished by the circumstance that the incident is witnessed in the light shed by the lantern and not electric light. Moreover, identification did not pose any serious problem as the accused were known to the witnesses. In fact they were embroiled in a long standing family feud. As the culprits had not covered their faces to conceal their identity, it was not difficult to identify them from their facial features, build gait etc. Light shed by the lantern was enough to enable the witnesses to identify the culprits under the circumstances."

The witnesses being relative whether interested.

39. To shatter the credibility of prosecution witnesses PW-1 and 2, learned counsel for the appellant argued that they are related witnesses and there is no independent witnesses whereas the name of neighbouring villagers who rushed to the spot hearing hue and cry of Ram Prakash (PW-1), Naval Kisori (PW-2) and Kumari Girisa as well the noise of fires, namely Jagannath S/o Kedar Nath Pandey and Pyare S/o Ramdas Pasi along with the other neighbouring people of the village armed with lathi flashing torches reached on the spot. Ram Shanker Pandey was leading them. It is proved by the evidences of PW-1 and PW-2 that the accused-appellant Mukesh and Raju fired on Ram Shanker Pandey, he sustained gun shot injury, turned back to his house and died on instantly. Seeing this the rest of the villagers fled away under the fear of their lives from the spot. The gruesome manner of crime and cruelty on the part of the accused-appellants as seen by the villagers was sufficient to keep them away not only from the assailants but the victims also. Under such circumstance only the near relatives like the wife of deceased victim Ram Asrey and his son if left alone to depose in the court against the accused-appellants during their trial then this is not a matter of surprise. The witnesses either may be relative or independent must have to pass the test of credibility, truthfulness and reliability. No doubt the relative witnesses cannot be said disinterested but it is also true that a witness loosing her husband like PW-2 and father like PW-3 in place of the real culprit will not falsely implicate someone else and save the real culprit who killed the nearest and dearest of such witnesses before their eyes. Here again the motive under Section 8 of the Evidence Act has to play an important role and relevance with regard to the substantive piece of evidence proving the incident in question with all certainty and the identification of the accused and their role.

Corroboration from medical evidence.

40. The injuries sustained on the body of PW-2, Naval Kishori was examined by

the Medical Officer District Hospital, Unnao on 23.6.1985. Dr. R.K. Suri, the Medical Officer who is examined in the trial has PW-5 has proved the injury report of PW-2, Naval Kisori as follows:-

"1. Multiple fire arm wound of entry in an area of 17 c.m.x15 c.m. present over upper part of right scapular including right shoulder each measuring .25 c.m.x.25 c.m. hard substance palpable at some places underneath the wound. No blackening and charring present margins inverted. Injury kept under observation.

2. Multiple fire arm wound of entry in an area of 8 c.m.x4 c.m. present over right side of the neck behind the right ear. Each measuring .25 c.m.x.25 c.m. Hard substance palpable under neath the wound margins inverted. Injury kept under observation.

3. Lacerated wound 3.5 c.m.x.5 c.m. present over anterior aspect of right leg middle part. wound is infected.

4. Lacerated wound 1.5 c.m.x1c.m. over the anterior aspect of the left leg .6 c.m. below the left knee joint.

Injury no.1 and 2 were caused by some fire arm and 3 and 4 were caused by some blunt object. Injury no.1 and 2 were kept under observation and advised X-ray for pellets, while injury No.3 and 4 are simple ."

The injury report has proved by PW-5 in his writing and under signature. He opined that injury no.1 and 2 are fire arm injuries which might have occasion in between night of 21/22.6.1985 at about 1:00 a.m. He also opined that if the depth of wounds would become a slight more, result might have been fatal. In cross examination also he confirmed the injuries no.1 and 2 caused from the fire arm like country made pistol.

Likewise the injuries sustained by Kumari Girisha caused to her from the blow of *"tabbal"* inflicted on her head by accused-Rakesh, as stated in evidences before the court by PW-1 and 2, was also examined by Dr. R. Prasad (PW-3) on 22.6.1985. The medical officer M.O.I/C P.H.C., Hilauli which reads as under as Exhibit ka-2:-

"Examination of Injuries:- 1/= A 4 Cms x 1/2 cm x scalp deep wound present on the right side of head posterior-Anterior/Anterio posterior in direction, 10 cm above the right ear fragus Margins irregular clots of blood present (lacerated wound)

Nature:- Simple

Duration about 18 hours (Eighteen hours) day old.

Caused by Head blunt object R."

PW-3 has opined in his report that injuries suffered by Kumari Girisha were approximately 18 days old and caused by some blunt object. This injury report is proved in the court by Dr. R. Prasad as PW-3. He proved the report to have been prepared in his handwriting and signature. He explained that the injuries might have been caused from the reverse end of the *"tabbal"* because such injuries are in nature seems to have been caused by some blunt object. It would be relevant to extract from the statement of PW-1. Ramprakash, deposed before the court in it's concluding part that a *"tabbal"* is a tool like Axe (Kulhari). From the statement of Dr. R. Prasad, PW-3 it becomes clear that one side of the tool like *"tabbal"* is sharp edged whereas it's reverse side has blunt end like Kulhari.

Corroboration from the facts and materials in evidence proved by Investing Officer, PW-8

41. Another witness from whose evidence before the court the fact of presence of witnesses PW-1 and PW-2 on spot found corroboration is the investigating officer namely Shiv Swaroop Tiwari, who is examined as PW-8. P.W.-8 collected the blood stained soil from beneath the cot of deceased, Ram Asray and near the body of the deceased Ram Shankar Pandey prepared memo thereof and proved in the court as Exhibit-Ka-24 and 25. Likewise this witness seized the blood stained bed sheet from the cot of Ram Asrey whereupon he was killed by accused-appellant causing fire arm injury, prepared memo and proved in the court as Exhibit-21. He further recovered empty cartridges from beneath the cot of deceased, Ram Asrey, prepared memo and proved in the court as Exhibit Ka-22. The Investigating Officer, PW-8 further seized the blood stained cloth of Kumari Girisa and PW-2, Smt. Naval Kisori prepared memo and proved in the court as Exhibit-18 and 17 respectively. The investigating officer registering the F.I.R. on the basis of written report submitted by the PW-1, Ramprakash proceeded on spot and found the dead bodies of Ram Asrey and Ram Shankar Pandey on spot.

Post Mortem Report

42. The post-mortem of the body of Ram Shankar Pandey was done at 2:00 p.m. on 23.6.1985 by Dr S.P. Rastogi. It would be important here to mention that house of Ram Asrey as shown in the map by PW-8 is neighbouring to the house of deceased Ram Shanker Pandey. The external examination and antemortem injuries is given herein extracting from the post mortem report which is proved in the court by Dr. S.P. Rastogi as Exhibit ka-15. Likewise he did autopsy on the dead body of Ram Asrey on the same date at about 2:30 p.m. memo prepared by him and proved in the court as Exhibit Ka-16. He found the fire arm injuries on the body of Ram Shankar Pandey and Ram Asrey were fatal injuries which caused the death.

Antemortem injuries and opinion of Dr. S.P. Rastogi mentioned in Post Mortem Report of Ram Shanker Pandey and Ram Asrey are as follows-

Ante Mortem Injuries of Ram Shanker Pandey

Fire arm entrance wound multiple in number present on right side upper part abdomen in an area 9 c.m. x 13 c.m. present 7 c.m. below right nipple and 12 c.m. above the umblicus, 5 c.m. right to midline. Each wound is 0.3 cm x 0.3 cm. size inverted margin, oval in shape, some are muscles deep and some are abdominal cavity deep, Blackening and tatooing present around the wound, on probing direction of wound is from right, obliquely upward medially backward.

On opening the chest cavity, right side of chest cavity following of 200 ml of fluid and clotted blood. Right lung lacerated four chots recovered from the right lung substance and 10 small shots recovered from the right lobe of liver. Right lobe liver lacerated Pentoneal cavity full of 500 ml. fluid and clotted blood and two pieces of wading recovered from the liver substance Eight small shots recovered from the skin and muscle substance.

Opinion as to cause and manner of death.

Died due to shock and haemorrhage as a result.

Ante Mortem Injuries of Ram Asray

1. Abraded contusion 2 cmx 2 cm present below the right lower eye lid 1 cm midial to the lateral angle of right eye.

2. Contusion 2 cmx 2 cm left side cheek 2 cm left to the lateral angle of mouth.

3. Abraided contusion 2 cm x 2 cm present on left side fore arm 2 cm poximal to left wrist joint.

4. Lacerated wound 17 cm x 7 cm x bone deep, obliquely in nature present right upper arm front aspect, 10 cm below the right shoulder joint, running obliquely reaching upto right elbow joint. Muscle lacerated badly, bone fractured, 10 small shot recovered from the muscle of the right upper arm. No blackening and tattooiing present inverted margins irregular margins.

5. Fire arm entrance wound 4 cm x 4 cm present on left side scapula, 6 cm below from the spin of scapula, 5 cm above the lower angle of scapula 8 cm from the left axilla. No blackening and tatooing present. Oval in shape inverted margins chest cavity deep, on proving obliquely medically from back to front. On opening the chest cavity. Left side chest cavity full of fluid and clotted blood 300 ml. Left lung lacerated middle part. 13 small shots recovered from the left lung substance.

Opinion as to cause and manner of death

Died due to shock and haemorrhage as a result of fire arm antemortem injuries.

43. The medical evidence is not in variation with the statement given in the court by the eye witnesses PW-1 Ramprakash and injured eye witness PW-2, Naval Kishori. The statement of both the above two witnesses find further corroboration from the materials collected from the spot by PW-8 are proved in the court. The recovery of dead bodies of the victims of the incident namely Ram Asrey and Ram Shanker Pandey from the spot and post-mortem report amply prove the fatal injuries caused by fire arm convince and give confidence to believe the presence of PW-1 and 2 on spot during the incident therefore, their statements that they have seen the incident could not be disbelieved. They are trustworthy for the simple reason that the role assigned by both the prosecution witness namely PW-1 and PW-2 to the accused-appellant and the manner in which they committed ofence from their respective weapons resulting into the death of Ram Shankar Pandey and Ram Asrey is not suffering from any embellishment, falsity and exaggeration. Moreover the PW-2 is an injured witness, therefore, her testimony stands on a higher pedestal of credence. Deposition of an injured witness should be relied upon unless there are strong grounds for rejection of his/her evidence on the basis of any major contradiction or discrepancy because his/her presence on the scene stands established. Since the testimony of aforesaid two witnesses are not suffering from any contradictions, inconsistencies therefore, we hold the aforesaid witnesses worthy of credence and wholly reliable.

44. The questions asked in cross-examination from PW-1 and PW-2 about the direction from the deceased of accused assailants while they fired upon Ram Asrey and on Ram Shanker Pandey. The distance between the deceased and assailants were also asked from both the witnesses as learned counsel for the defence tried to carve out some discrepancies from answers given by the aforesaid witnesses with regard to the symptoms and shape of wounds caused by fire shot on the body of

deceased. But no such discrepancies could be elicited from answers which may shatter the case of prosecution regarding killing of Ram Asrey and Ram Shanker Pandey caused by fire arm injury. PW-1, Ramprakash in page-14 of his cross-examination has stated that accused persons had fired from a distance of 4 to 5 hands (approximately 8 feet), therefore, there is no blackening and tatooing around wound. As such the statement with regard to the fire arm injury on the body of Ram Asrey (deceased) is not in variation with the post mortem report. It is also important to note that in firing upon Ram Asrey heavy projectile like gun was applied by accused Jatashanker whereas Mukesh his son applied country made pistol for firing on the deceased. The blackening depends on the quality of gun powder also. As regards blackening around the injuries on Ram Shanker Pandey (deceased), PW-1 stated that accused Mukesh and Rakesh fired on him with their respective weapons, the country made pistol, when he was rushing up to the scene of crime leading the neighbouring villagers flashing the torches. When it is proved that number of fire arms were used in the present case, multiple fire arm wounds are found on the body of Ram Shanker Pandey is also a corroborative evidence for the fact stated as ocular witness by PW-1, some country made cartridges which had sub standard gun powder of rough quality does not completely burnt and which can be into existence the blackening around the wound even if the fire made from a distance of more than 4 to 5 feet. The above finding made by Trial Judge is correct. The quality of gun powder may cause blackening when shot is made even from a distance of 8 to 10 feet cannot be ruled out. Moreover, Ramprakash is the eye witness who had seen the entire incident from his roof and when the same occurred, on the ground it was not possible for him to observe the correct distance and direction from the roof. As such if any, discrepancy occurs with regard to the direction of the wound caused by the fire arm injury and distance from the deceased when fired it would be immaterial on the strength of the ocular testimony of the witnesses and is not of such kind which can completely over rule the incident of firing upon the deceased Ram Asrey and Ram Shanker Pandey by the accused-appellants.

45. Hon'ble Supreme Court in ***Thoti Manohar Vs. State of Andhra Pradesh*** reported in ***(2012) AIR SCW 3752*** in para-30 has held as under:-

"30. The learned counsel for the appellant has endeavoured hard to highlight certain discrepancies pertaining to time, situation of the land, number of persons, etc., but in our considered opinion, they are absolutely minor in nature. The minor discrepancies on trivial matters not touching the core of the matter cannot bring discredit to the story of the prosecution. Giving undue importance to them would amount to adopting a hyper-technical approach. The Court, while appreciating the evidence, should not attach much significance to minor discrepancies, for the discrepancies which do not shake the basic version of the prosecution case are to be ignored. This has been so held in State of U.P. v. M.K. Anthony[7]; Appabhai and another v. State of Gujarat[8]; Rammi alias Rameshwar v. State of Madhya Pradesh[9]; State of H.P. v. Lekh Raj and another[10]; Laxman Singh v. Poonam Singh[11] and Dashrath Singh v. State of U.P.[12] No evidence can ever be perfect for man is not perfect and man lives in an

imperfect world. Thus, the duty of the court is to see with the vision of prudence and acceptability of the deposition regard being had to the substratum of the prosecution story. In this context, we may reproduce a passage from the decision of this Court in State of Punjab v. Jagir Singh Baljit Singh and Karam Singh[13], wherein H.R. Khanna, J., speaking for the Court, observed thus:-

"A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

46. On the basis of above discussions with regard to the facts, evidences and materials placed and proved by the prosecution, the answer to the first point framed hereabove for our determination is that prosecution has been successful in proving it's case against the accused-appellants in trial beyond all reasonable doubts.

Non production of all the injured witnesses

47. The appellant raised contention casting doubt as to the prosecution's failure that out of two prosecution witness of the incident who are injured namely Kumari Girisha and Smt. Naval Kishori only Smt. Naval Kishori was examined as PW-2, whereas Kumari Girisha was not produced before the court for examination. This argument may have some force only in case the non-production of one of the injured witnesses caused prejudice to the case of defence. Here PW-2, Naval Kisori and Kumari Girisha both are the near relative to the deceased Ram Asrey. The medical examination report as proved by PW-5, Dr. R. Prasad is proved. From the medical examination report it becomes amply clear that injured Kumari Girisa was a girl of teenage about 15 years old and the incident as happened is sufficiently proved by the PW-2, (mother of Kumari Girisha and wife of the decease Ram Asrey). This is on the option of prosecution to examine all its witnesses or some or any one of them to prove the case.

48. Hon'ble the Supreme Court in ***Avtar Singh Vs. State of Haryana and Kripal Singh @ Pala & Ors. Vs. State of Haryana & Ors.*** reported in ***2012 9 SCC 432*** in its para-19 has held as under:-

"19. The law on this aspect can be succinctly stated to the effect that in order to prove the guilt of the accused, the prosecution should make earnest effort to place the material evidence both oral and documentary which satisfactorily and truthfully demonstrate and fully support the case of the prosecution. Where there were several persons stated to have witnessed the incident and the prosecution examined those witnesses who were able to depose the nature of offence committed more accurately leaving no room for

doubt about the involvement of the accused in the occurrence and the extent of their involvement with specific overt act and also were able to withstand the cross-examination by maintaining the sequence and the part played as originally stated, it will be wholly irrelevant and unnecessary to multiply the number of witnesses to repeat the same version."

49. The prosecution while opening it's case during trial has option to state by what evidence it proposes to prove the guilt of the accused, therefore, one cannot compel the prosecution to produce any witness to which the prosecution has not examined. Further Section 134 of the Indian Evidence Act also emphasizes on the quality of evidence and witness, not on the quantity. Section 134 of Indian Evidence Act, 1972 runs as under:-

"134. Number of witnesses.--No particular number of witnesses shall in any case be required for the proof of any fact."

50. Hon'ble the Supreme Court in ***Hukum Singh & Ors. Vs. State of Rajasthan*** reported in ***2000 (41) ACC 662*** in para 12 has discussed the option of prosecution to examine its own witnesses and the effect of such non-examination in given circumstances, which reads as under:-

"12. When the case reaches the stage envisaged in Section 231 of the Code the Sessions Judge is obliged to take all such evidence as may be produced in support of the prosecution. It is clear from the said Section that the Public Prosecutor is expected to produce evidence in support of the prosecution and not in derogation of the prosecution case. At the said stage the Public Prosecutor would be in a position to take a decision as to which among the persons cited are to be examined. If there are too many witnesses on the same point the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the court can be saved from repetitious depositions on the same factual aspects. That principle applies when there are too many witnesses cited if they all had sustained injuries at the occurrence. The Public Prosecutor in such cases is not obliged to examine all the injured witnesses. If he is satisfied by examining any two or three of them, it is open to him to inform the court that he does not propose to examine the remaining persons in that category. This will help not only the prosecution for relieving itself of the strain of adducing repetitive evidence on the same point but also helps the court considerably in lessening the workload. Time has come to make every effort possible to lessen the workload, particularly those courts crammed with cases, but without impairing the cause of justice."

51. Honorable the Supreme Court in ***Veer Singh & Ors. Vs. State of U.P***. reported in ***2014 2 SCC 455*** in para 21 and 22 has held as under:-

"21. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity multiplicity or plurality of witnesses. It is not the number of witnesses but -quality of their evidence which is important as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. Evidence must be weighed and not counted. It is quality and not quantity which determines the

adequacy of evidence as has been provided under Section 134 of the Evidence Act. As a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. (Vide: Vadivelu Thevar and Anr. vs. State of Madras AIR 1957 SC 614; Kunju @ Balachandran vs. State of Tamil Nadu AIR 2008 SC 1381; Bipin Kumar Page 21 21 Mondal vs. State of West Bengal AIR 2010 SC 3638; Mahesh and Another vs. State of Madhya Pradesh (2011) 9 SCC 626; Prithipal Singh and ors. vs. State of Punjab and anr. (2012) 1 SCC 10; Kishan Chand vs. State of Haryana JT 2013 (1) SC 222 and Gulam Sarbar vs. State of Bihar (Now Jharkhand) - 2013 (12) SCALE 504).

22. In the present case we are left with the sole testimony of injured eye-witness PW4 Harbans Kaur. She has lost all the members of her family in the attack during the occurrence. -There is no reason for her to falsely implicate any of the accused in the case. On the contrary she would only point out the correct assailants who are responsible for killing her family members. We are of the considered view that the testimony of PW4 Harbans Kaur is cogent, credible and trustworthy and has a ring of truth and deserves acceptance. All the 12 victims of the occurrence died of homicidal violence is established by the oral testimony of the doctors who Page 22 conducted autopsies on their bodies and the certificates issued by them to that effect."

52. The prosecution no doubt has strict burden to prove its case beyond all reasonable doubts. In the present case, the prosecution by its witnesses proved the case beyond all reasonable doubts. The defence has tried to cause some doubt on the very genesis of the incident saying 'on 21/22.6.1985 a dacoity was committed by some unknown assailants in the house of informant wherein Ram Asrey and Ram Shanker Pandey were killed and Naval Kisori and Kumari Girisa sustained injuries'. In cross examination from PW-1 only a suggestion was given to him by learned counsel for the defence, is it right to say that a dacoity was committed in his house and he falsely implicated the accused appellant, he firmly stated, no this is wrong. He denied another suggestion given to him impliedly that after the incident some articles from his house were not found. He firmly stated that he knows about everything which were present in his house and all those things were present as such after the incident. Likewise PW-2 was also given a suggestion that was there a dacoity committed in her house? She firmly denied. This is important here to discuss that when a defence has been specifically taken by the accused-appellant though no strict proof of such defence is required but if the case of prosecution is proved beyond all reasonable doubts, then onus lies on the accused to prove it's case of defence atleast on preponderance of probabilities.

53. In the case in hand while the prosecution witness denied flatly the suggestion as to the commission of dacoity in the house of informant on the unfateful night of 21/22.6.1983 at about 1:00 a.m. and proved beyond all reasonable doubt the commission of offence by the accused-appellant, then an opportunity was available with the accused-appellant to make query in cross examination with PW-8, the Investigating Officer, about commission of dacoity if any on the date of incident whether reported to him. But not a single question was asked from the Investigating Officer to this effect. Ram Shanker Pandey who died of gun shot

injury in the incident was not family member of the informant. He was neighbour, proved to rushed to the scene of incident on hearing the noise of fire and hue and cry of injured witnesses. The Investigating Officer was not asked any question about any different cause of his death than reported by the informant. In this way it cannot be said that atleast on preponderance of probabilities the accused-appellants have shown their case set in defence as probable. As such the accused-appellants could not cast any doubt as against the proved case of prosecution.

54. We therefore in answer to the second point framed by us for determination in appeal, hold that accused-appellants against the proved case of prosecution beyond all reasonable doubt remained unsuccessful to show even on preponderance of probabilities the case of defence that dacoity was committed on the date and time of incident i.e., 21/22.6.1985 in the house of informant and they were falsely implicated by the informant by reason of enmity. Thus, they failed to cause any reasonable doubt against the case of prosecution.

55. We are therefore, of the opinion that the case of prosecution, proved by its witnesses beyond all reasonable doubt, is found sufficient to record conviction by the Trial Judge and award of sentence of life imprisonment under Section 302/34 I.P.C. and imprisonment for three years under Section 307 I.P.C. read with Section 34 I.P.C. to the accused-appellants.

56. Criminal Appeal No. 313 of 1986 **(Jata Shanker & Ors. Vs. State of U.P.)** and Criminal Appeal No. 459 of 1986 **(Raju @ Chandra Prakash Vs. State of U.P.)**, both arise out of the judgment and order dated 03.05.1986 passed by learned Special Judge, Unnao in Sessions Trial No. 406 of 1985, are **dismissed**, Conviction and sentence of accused-appellants, namely, Jatashanker, Mukesh, Rakesh and Raju @ Chandra Prakash for life imprisonment under Section 302/34 I.P.C. and rigorous imprisonment for three years under Section 307/34 I.P.C. is hereby confirmed. The accused-appellants, namely, Jatashanker, Mukesh, Rakesh and Raju @ Chandra Prakash are on bail. Their bail bonds and surety bonds are rejected and sureties are discharged.

The accused appellants are directed to surrender before the court of Chief Judicial Magistrate, Unnao within 15 days from the date of order. In case, they do not surrender within the aforesaid time, the Chief Judicial Magistrate, Unnao in order to ensure compliance shall adopt all coercive measures in accordance with law and send them to Jail for undergoing sentence of imprisonment.

Copy of the judgment be sent to Sessions Judge, Unnao to ensure compliance under intimation to this Court. Copy of the judgment be also provided to the accused-appellants.

Office is directed to enter the judgment in compliance register maintained for the purpose in the Court.

(2020)03-05ILR A192
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.05.2020

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 318 of 1996

Arvind Singh ...Applicant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri G.C. Saxena, Sri N.K. Singh, Sri Devendra Pratap Singh[*A.C*]

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

A Evidence Law - Evidence Act (1 of 1872)-Section 3 - Rule of Presumption ofinnocence of accused - Guilt should be proved beyond shadow of any doubt – by cogent and reliable evidence - trial courts should give finding on the basis of legal proof after making objective assessment of the evidence – Guilt is nota matter of inference - Serious and heinous crime requires more strict proof- seriousness of offence itself is no ground for conviction - *Held* – Trial court wrongly swayedaway by the factof murder of the deceased (Para 25)

B. Criminal law-Indian Penal Code (45 of 1860)-Section 302 - Murder - Evidence Act (1 of 1872)- Section 8 - Motive - Absence of motive - Motive isanecessaryelementofcrime - where allegedeyewitnesses is not credible & presenceof the witness is doubtful - not alleging any motive, even a small reason forthe offence,certainly goestotherootoftheprosecution case - Held - none of the fact witnesses examined by prosecutionwere present and had seen the incident - absence ofmotive forthe offencebecomessignificant (Para 21)

C. Evidence Law- - Evidence Act (1 of 1872)-Section 118 - Chance witness - Reliability - Murder case - Reasonfor achance witnessbeing presentonthespotandhistestimonyrequires cautious and close scrutiny. (Para 20)

D. Evidence Law- - Evidence Act (1 of 1872)- Section 3 - Appreciation of evidence of eye witness - the court should consider the entire testimony of the witness and look for the factors such as - whether the witness was present on the spot - whether the witness had seen the incident - whether the witness is credible (Para 19)

PW3 & PW5Akhilesh(brother of deceased) examinedaseyewitnesses - Both claim that they came togetherto Rurafrom Kanpur bysame train together withthedeceased - PW5 Akhilesh, the brother ofthedeceaseddidnothimselflodgetheFIR and went back to Kanpur - Held - Not lodging the FIR and not coming for cross examinationandalsotheconduct that he did not stay there and went backtoKanpurissounusual that his presence appears tobe suspicious atthe time of incident - PW5 evidence isnot readable againsttheaccused (Para 18, 19)

Appeal allowed (E-5)

List of cases cited :

1. Raj Kishore Jha Vs St. of Bihar 2003(47)ACC1068(SC)

2. Chittarlal Vs. St. of Raj. (2003)6SCC397

3. Kallu Vs. St. of Har. AIR2012SC3212

4. Ramesh Vs St. of UP 2010 (68)ACC219(SC)

5. JarnailSingh Vs St. of Punjab 2009 (67)ACC668(SC)

6. Rang BahadurSingh Vs St. of UPAIR2000SC1209

7. St. of UP Vs Ram Veer Singh 2007 (6) Supreme164

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

1. Heard Sri Devendra Pratap Singh, learned Amicus Curiae for the appellant, Sri Ajit Ray, learned AGA and perused the record.

2. This criminal appeal has been preferred against the judgment and order dated 20.02.1996, passed by Vth

Additional Sessions Judge, Kanpur Dehat, in Sessions Trial No. 26/89 (State v Arvind and others), under Sections 302 and 120B IPC, Police Station Roora, District Kanpur Dehat by which the accused-appellant namely Arvind Singh has been convicted and sentenced for the offence under Section 302 IPC for life imprisonment along with fine of Rs. 1000/- and in default of fine one year additional rigorous imprisonment, whereas he has been acquitted from the charge under Section 120B IPC.

3. Brief facts of the case is that a first information report was lodged by Munnu Singh (Home Guard) in respect of a criminal incident dated 24.08.1988 at 08:45 PM. The informant is a Home Guard in the village Maizu Mau, Police Station Roora, was on surveillance duty with Home Guards Ghasite Lal, Pancham Lal and Govind Singh in the town and when they were coming from the side of canal to the railway station, at about 08:45 PM, reached in front of town area office on the road. They heard somebody crying *Bachao-Bachao* from the side of shop of Naresh Kumar. All ran towards the sound raising alarm. They saw that on the road side two persons having *Gandasa* and axe were assaulting a person. They challenged and seeing them, both the persons ran towards the north of the street and despite efforts made by them, they could not be caught. They saw two persons in the light of torch and electricity and can identify them if they come before them. They saw that a person was lying dead on the spot sustaining injuries. The injuries were bleeding. Many persons reached there and seeing the deceased they said that the deceased person was Aditiya Kumar son of Krishna Bihari Dixit of town Roora. The informant, leaving behind the other Home Guards there, gave an oral information in the police station and on the basis of it, the offence was registered under Section 302 IPC against two unknown persons. On investigation, names of accused persons Arvind Singh, Babua and Sunil Singh came in light. The dead body was taken into possession, inquest report and necessary papers for postmortem was prepared, the dead body was sealed and sent to the District Hospital, Kanpur Nagar for postmortem. The torch of the guard was taken into possession, memo was prepared and the torch was delivered back to him. Blood stained and plain earth was collected from the spot and was kept in two separate containers which were sealed and memo was prepared. After taking the evidence of the witnesses and completing the investigation, charge sheet was submitted against all the three accused persons for the offence under Sections 302 and 120B IPC. Charges were framed for the aforesaid offences against all the accused persons who denied charges and claimed trial. It appears from the impugned judgment that after six witnesses were examined, accused Jaipal Singh @ Bauwa absconded and the trial court separated his file by order dated 29.01.1993, registered as ST No. 26A/89 and thereafter the statement of other witnesses were recorded. On completion of the prosecution evidence, the Statement of the two accused persons were recorded under Section 313 CrPC who put forward the case of denial and stated that they have been falsely implicated in the case due to enmity and with the consultation of the police, the report was lodged. In defence, the accused persons have filed Ext. Kh-1 which is copy of FIR under section 171/332 IPC against Sone Lal, lodged by accused Ramswaroop for committing marpeet and causing obstruction in election process. The learned trial court has noted that accused is neither named nor it has any relation with him.

4. After perusing the evidence and hearing the counsel of both the parties, the learned trial court acquitted accused Sunil for the offence under Sections 302/120B IPC and also acquitted accused Arvind for

the offence under Section 120B IPC. Accused Arvind was, however, convicted and sentenced for the offence under Section 302 IPC.

5. Feeling aggrieved by the impugned judgment, the appellant has filed this criminal appeal challenging the impugned judgment stating that to be against the weight of evidence on record. The prosecution failed to prove the guilt beyond reasonable doubt and the awarded sentence is too severe, therefore, the impugned judgment is liable to be set aside and the accused-appellant is entitled for acquittal.

6. The prosecution has examined as many as seven witnesses in support. PW-1 Munnu Singh (informant) has proved his oral report and has given the evidence about the incident. PW-2 Govind Singh, Home Guard and PW-3 Rakesh Kumar Gupta are the witnesses of fact. PW-4 SI S.B. Mishra has proved the inquest report and other papers which were prepared for the purpose of sending the dead body for postmortem. He has also proved the memo of two slippers of the deceased and memo of blood stained and plain earth. PW-5 Akhilesh Kumar is also a witness of fact. PW-6 Dr. A. Rahman (Senior Medical Officer) has proved the postmortem report. PW-7 Inspector R.P. Singh is the Investigating Officer. All these witnesses have proved chik FIR Ext. Ka-1, inquest report Ext. Ka-2, challan dead body Ext. Ka-3, photo nash Ext. Ka-4, letter to CMO Ext. Ka-5, letter to RI Ext. Ka-6, sample seal Ext. Ka-7, memo of sleepers Ext. Ka-8, memo of blood stained and plain earth Ext. Ka-9, postmortem report Ext. Ka-10, site map Ext. Ka-11, memo of torch Ext. Ka-12, charge sheet Ext. Ka-13 and Material Exts. 1 to 3.

7. The submission of the learned Amicus Curiae for the appellant is that all the prosecution witnesses have given false evidence and the discrepancy and improvement made by them goes to show that they are not consistent and reliable. PW-5 is the brother of the deceased and has been examined as eye witness. He has not been produced for cross-examination and instead of lodging any FIR, he went back to Kanpur. It has also been submitted that the informant was declared hostile. Accused Sunil has been already acquitted by the learned trial court. On the other hand, learned AGA has submitted that the learned trial court on the basis of evidence on record has convicted the accused and there is no illegality in the impugned judgment.

8. At this stage, it appears necessary to look at the evidence of prosecution in this case. PW-1 Home Guard Munnu Singh (informant) has stated that on 24.08.1988, he was on surveillance duty in the town Roora with Home Guards Ghaseta Lal, Pancham, Ram Prasad and Govind. When they were coming back from the side of canal to the railway station through road, at about 09:00 PM, in the night, they heard the sound of *Bachao-Bachao* near the town area. They rushed towards the sound, whereupon, the assailants ran away. It was raining and in the dark night he could not see the assailants. After the incident, 5 to 10 persons gathered there and they recognized the deceased to be the son of Pandit Ji. This witness has been declared hostile.

9. PW-2 Home Guard Govind Singh has also stated that on 24.08.1988, when he along with Home Guard Munnu Singh, Ghaseta Lal, Pancham and Ram Prasad was coming from the side of canal and was going towards the town area, they heard the

voice of *Bachao-Bachao*. It was 09:00 PM and on hearing the voice, they rushed towards the voice making sound of *Pakdo-Pakdo*. He saw that Arvind with axe and Bauwa Singh with *gandasa* were assaulting the deceased Aditiya. They tried to catch them but they ran away from there. The witness has also stated that besides these two, accused Sunil Kumar was also there, who ran away towards the house of Ram Swaroop. They came back and found that Aditiya was lying dead. They saw the incident in the light of torch and electricity. Home Guard Munnu Singh went to give information to the police station.

10. PW-3 Rakesh Kumar Gupta has stated that on 24.08.1988, Aditiya Kumar was killed. On that day, he had come from Kanpur to Roora by Shatal (train) and was going to his house from Roora Station with Aditiya Kumar and Akhilesh. When they reached in front of the clinic of Dr. Naresh, accused Sunil stopped and started talking to Aditiya. At that time Arvind, Bauwa singh and Ram Swaroop Singh were also present. Accused Arvind having an axe, Bauwa with *gandasa* started assaulting Aditiya by *gandasa* and axe. Ram Swaroop exhorted to kill the deceased. This incident took place at about 08:45 PM. On being assaulted, Aditiya fell down. The incident was seen by him, Akhilesh and Prakash Gupta and the five Home Guards who challenged the assailant, whereupon, the accused persons ran away and behind them accused Sunil also rushed away on his cycle. The Home Guards chased them. The deceased died on spot and he went to his house. In the light of bulb and torch, he saw the incident and identified the accused persons.

11. PW-4 SI S.B. Mishra has stated that on 24.08.1988, he along with SO R.P. Yadav went to the place of occurrence and he prepared the inquest report and sealed the dead body. He also prepared necessary papers for postmortem and with the papers, handed over the dead body to Constables Rama Shanker and Brahama Nand for postmortem.

12. PW-5 Akhilesh Kumar is the brother of deceased. He has stated that on 24.08.1988, he and the deceased were coming from Kanpur by Shatal train to Roora and were going to their house. Rakesh and Prakash were also on the train who were also accompanying them. When they reached to the clinic of Dr. Naresh, accused Sunil stopped the deceased and started talking. Accused persons Arvind Singh,Bauwa Singh and one Ram Swaroop were also present there. Arvind Singh and Bauwa with axe and *gandasa* started assaulting the deceased. Ram Swaroop exhorted them to kill the deceased. The deceased was crying *Bachao-Bachao*, whereupon the Home Guards came and in the light of torch they saw the accused and the incident. Accused Sunil ran away towards the house of Ram Swaroop and remaining accused persons ran away towards the north. This incident took place at 08:45 PM. He has stated that his brother had died. He came back to Kanpur to inform his father.

13. PW-6 is Dr. A. Rahman has stated that on 25.08.1988, he was posted as Medical Officer, T.B. Isolation Hospital and at 02:10 PM, he conducted postmortem of the dead body of Aditiya Kumar and prepared the postmortem report which is Ext. Ka-10. The deceased must have died. The deceased must have died 3/4 day before and there may be six hours difference in either side. On external examination, it was found that the deceased

was average built, rigor mortise was present in the upper and lower limb. Mouth was closed but the right eye was open. The following ante-mortem injuries were found on the body of the deceased:

(1) 8 cm. X 1 ½ cm. X underline bone clean cut on right side of head, 7 cm. above right ear, directed downwards, backwards + to right, right parietal bone found clean cut. Edges clean cut. no fiver or tissue in the gap of wound.

(2) Incised wound 9 cm. X 1 ½ cm. X bone deep, 1 ½ cm. below + parallel to injury no. 1, same nature of wound.

(3) Incised wound 7 cm. X 1 ½ cm. X bone deep, 2 cm. above + behind right ear oblique downwards + backwards, edges clean cut.

(4) Incised wound 8 cm. X ½ cm. horizontal on back of head, underlying bone found clean cut, 3 cm. behind the injury no. 3.

(5) Incised wound 10 cm. X 2 ½ cm. X cavity deep, 4 cm. above injury no. 4 + parallel to it, edges clean cut.

(6) Incised wound 8 cm. X 2 cm. X on back of head vertically crossing the injury no. 5, edges + bone clean cut.

(7) Incised wound 8 cm. X. 2 cm. horizontally 2 cm. above back of left ear, edges + bone clean cut.

(8) Incised wound 16 cm. X 3 cm. X cavity deep of left side of head from the mid line of the forehead, 2 cm. down to mid line, edges + bone (temporal + left perital clean cut).

(9) Incised wound 3 ½ cm. X 2 cm. X alna side of right forearm, alna found cut, edges + bone clan cut.

(10) Incised wound 7 cm. X 3 cm. X bond deep of outside of left knee, clean cut, edges clean cut horizontally.

(11) Incised wound 2 ½ cm. X 1 ½ cm. X muscle deep, 2 cm. below injury no. 10, edges clean cut horizontally.

(12) Incised wound 4 cm. X 2 cm. X muscle deep in middle of left pop on literal region horizontally, edges clean cut.

The doctor has said that all wounds were clean cut edges and there was no interlocutory tissue in the gaps of the wound. In the internal examination, it was found that right parietal, left parietal + frontal bone were found clean cut under above lying injuries as mentioned. Membranes cut under injury nos. 5 and 8. Brain tissues out from injury no. 8. Both chambers of the heart were found empty. According to doctor, the death was due to shock and hemorrhage resulting out of ante-mortem injuries.

14. PW-7 R.P. Singh (Investigating Officer) has stated that on 24.08.1988 at 09:10 PM, in the night, the offence was registered on the oral report of Home Guard Munnu Singh and the chik was prepared by Head Constable Ram Baran. He went to the spot and took the statement of Munnu. Inquest report was prepared by SI S.D. Mishra on his direction and necessary papers were also prepared. The dead body was sealed and sent for postmortem. The statement of the inquest witnesses was recorded. By the statement of Home Guard Govind Singh, the name of accused persons came in light and on his identification the site map was prepared. The statements of other witnesses namely Bhagwan Singh, Om Prakash, Akhilesh and Rakesh Kumar etc. were recorded by him. The statement of Home Guards Ghasita Lal, Ram Prasad, Pancham Lal was also recorded. The torch of Home Guard Govind Singh was taken into possession and memo was prepared and torch was given back to him. On 05.12.1988, he was transferred and the investigation was given to SI T.P. Singh who submitted charge sheet against the accused persons. The witness has proved the charge sheet and GD report as he had seen SI T.P. Singh writing and signing.

15. Coming to the FIR which has been lodged by HG Munnu Singh orally in the concerned police station. On 24.8.1988, the incident allegedly took place at 8.45 PM and the FIR has been lodged on the same day at 9.10 PM and there appears to be no delay as the police station is situated at a distance of only 2 furlong. The place of occurrence as shown by IO is according to FIR and the same has been proved by all the fact witness. Place where dead body was found as described in the inquest report and from where blood stained and plain earth was taken also corroborated the place of occurrence. In the postmortem report, it has been mentioned that the deceased died at the time and date alleged by prosecution because of the twelve serious injuries found on the body of deceased which were caused by sharp weapon. The only thing which was to be determined by the trial court was whether the accused persons including appellant caused death of the deceased.

16. Five home guards who were on surveillance duty allegedly saw the incident and only two of them have been examined. Allegedly, they saw the assailants and could recognize them by face. They did not know the names of assailants. PW-1 Informant Munnu Singh has stated that after the incident, 10 to 5 persons reached there and recognized the dead person as Aditya Kumar s/o Krishna Bihari Dixit of town Rura. Clearly, no body could tell the name of the assailants, otherwise, named FIR must have been lodged. PW-2 Govind has also stated that after chasing the assailants, when they came back, 10-20 persons were gathered there who recognized and disclosed the name of the deceased. PW-1 has stated that it was rainy dark night and he could not see the assailants. He could not recognize the assailant as the moment they rushed towards sound, the accused fled away from there. He has stated in the cross-examination that despite electric bulb, there was power cut at the time of incident. The 5-10 persons who reached there came after the accused persons fled away from there. He has further stated that after report was lodged, it was not read over to him. He is illiterate and he just signed over the chick. This witness has been declared hostile as he has disowned the FIR by saying that FIR was not read over to him and that he did not see the assailant. Thus, PW-1 has stated nothing to support prosecution case showing involvement of the accused persons in the commission of the offence. He has clearly stated that because of darkness and rain, he could not see and recognize the assailants. It is clear from the above discussion that by the time FIR was lodged, the name of the assailants was not known and people reached after the incident.

17. PW-2 Govind Singh brings a shift and in examination-in-chief, took the name of accused Arvind with axe and Babua Singh with *gandasa* and has stated that they were assaulting Aditya. With these two accused persons, accused Sunil was also there who ran away by cycle from the side of the house of Ramswarup. It appears strange. In the FIR accused persons are not named. People gathered there came after incident. But, PW-2 has deposed as if he was knowing the accused persons and the deceased by their name and he said it to the informant. If it was so, there should have been a named FIR as there was nothing to prevent the informant to lodge named FIR against the accused persons. This gives a valid point to determine whether at the time of lodging FIR, the assailants were known to the witness. It has been nowhere stated by the witness that he was acquainted with

the accused persons prior to the incident. He has also not disclosed the name of any person who might have told the name of the assailants. During cross-examination, PW-2 has stated that they heard 'bachao bachao' when they were at town area office which was at the distance of 50 to hundred yards away from the spot and when they reached there, they found the deceased lying there. It was a cloudy whether but it was not raining and they chased the accused and on return, they found 15-20 persons gathered there and they told that the deceased is Aditya. He further states that from town area office, on hearing sound of 'bachao bachao' they shouted not to kill the deceased and then the assailants ran away. They all chased and behind their back he lit the torch and saw them from their back but could not see their face. The witness has tried to cover by saying that anybody can be recognized from the back. In our opinion, it is possible only when the accused is known and acquainted but in absence of such positive evidence, it cannot be believed that the witness could recognize the accused persons from the back in torch light in the cloudy dark night. The witness has said that when he lit the torch, the accused persons were not assaulting but running away. It goes to show that this witness even did not see the accused persons assaulting. The witness has said that at the time of preparing inquest report, he had disclosed the name of accused persons and it was mentioned in the inquest report. We have perused the inquest report and we find that the name of the accused persons is not mentioned therein. Moreover, PW-2 Govind is not a witness of inquest report. He has stated that he disclosed the name of the assailants to the informant. This also appears to be false as the informant has not named the accused persons in FIR. On the basis of above analysis of the evidence and apparent discrepancy and substantial improvement in the testimony, we are of the view that PW-2 is not trustworthy and reliable.

18. PW-3 Rakesh Kumar Gupta and PW-5 Akhilesh have been examined as eyewitnesses. Both claim that they came together to Rura from Kanpur by same train together with the deceased. There is no evidence on record that soon before the incident some train arrived there. It was necessary as PW-1 and PW-2 have not stated that these two witnesses were present and saw the incident. On the contrary the people reached there after the incident. Had they been present, they must have signified it to the Home Guards. But, there is nothing as such in the statement of any of the witnesses. They have stated the involvement of not only two accused Arvind and Babua Singh, but also of accused Sunil who stopped the deceased and started talking with him and of Ramswarup extorting the two main accused. On the contrary both have stated that the assailants ran away from there the moment the home guards reached. The most strange and unnatural conduct of these two witnesses is that PW-3 did not stay there and returned home, whereas, PW-5 Akhilesh, the brother of the deceased did not himself lodge the FIR and went back to Kanpur. None of them has stated that they disclosed the names of accused persons to the Home Guards. PW-5 has not even appeared nor has been produced for cross-examination and his evidence is not readable against the accused. Not lodging the FIR and not coming for cross-examination and also the conduct that he did not stay there and went back to Kanpur is so unusual that his presence appears to be suspicious at the time of incident. Both have stated that on being assaulted, when

the deceased fell down, the home guards reached. If it was so, there was no question of FIR being lodged against unnamed persons. PW-1 and PW-2 have not stated that at the time of incident, the brother of the deceased was present and he saw the incident. Had he been present at the time of incident, there could have been no occasion for PW-1 to lodge FIR. Normally, FIR is lodged by police when no one has either seen the incident or the assailants and deceased are unknown and not identified.

19. While appreciating the evidence of a witness claiming to have seen the incident, the court has to consider the entire testimony of the witness and look for the factors such as 1. whether the witness was present on the spot; 2. whether the witness had seen the incident and 3. whether the witness is credible. Pw-1 and PW-2 have not stated that PW-3 was present there at the time of incident. But, PW-5, the brother of the deceased, has not been produced for cross-examination and his statement cannot be read to support the claim of PW-3 that he came with the deceased and his brother together by the same train.. He did not come forward at the time of incident to disclose the name and identity of the accused persons. He himself has stated that he did not talk to any of the home guards and he straight forward moved towards his home. It is clear that the witness is not named in FIR nor the IO has marked the place in the site map from where he saw the incident. We are conscious of the settled proposition of law that it is not necessary that eyewitnesses should be necessarily mentioned in the FIR. It has been held in **Raj Kishore Jha v State of Bihar, 2003(47) ACC 1068 (SC) and Chittarlal Vs. State of Rajasthan, (2003) 6 SCC 397,** mentioning of names of all witnesses in FIR or in statements u/s 161 CrPC is not a requirement of law and non-mentioning of the name of any witness in the FIR would not justify rejection of evidence of the eye-witness. But, in the facts and circumstances of this case where the name of accused persons was not known till lodging of FIR and PW-1 and PW-2 do not state regarding presence of the witness and say that people gathered there after the incident, the non-mentioning of the name of PW-3 in FIR becomes significant to support the conclusion that there is no evidence to establish his presence at the time of occurrence.

20. There is no evidence that PW-3 or his family live close to the place of occurrence or at the alleged time he used to be there usually. It was rainy and cloudy season and unless for good reason, the witness was not supposed to be there. He came from train from Kanpur is a fact which is not supported by any evidence. The brother of the deceased was with him but as he has not been produced for cross-examination, his evidence cannot be read to support this fact. It shows that PW-3 was maximum a chance witness and it has been held by the Supreme Court in **Kallu v State of Haryana, AIR 2012 SC 3212, Ramesh v State of UP, 2010 (68) ACC 219 (SC)** and **Jarnail Singh v State of Punjab, 2009 (67) ACC 668 (SC)** that the reason for a chance witness being present on the spot and his testimony requires cautious and close scrutiny. If considered from that angle also, since he is a witness whose very presence at the time of incident has been found to be doubtful, his evidence cannot be relied to record conviction.

21. We also find that none of the fact witnesses have stated any motive for the offence. There was no quarrel between the deceased or his family and the accused

persons or their family earlier or at the time of incident. There is no evidence of community of interest or conflict of interest between two sides, nor it has been brought on record that there was any neighborhood jealous, group or local rivalry between them. The prosecution has based the prosecution on the basis of eye-witness account and direct evidence. It is true that absence, lack or inadequacy of motive goes to the back seat and is not significant in the cases based on direct evidence. But, the discussion so far shows that none of the fact witnesses examined by prosecution can be said to be present and had seen the incident. Therefore, absence of motive for the offence is significant. Motive is a necessary element of crime which prompts the offender to commit crime and it is not normal that an offence will be committed for no reason, small or big. Moreover, where the account of alleged eye-witnesses is not credible and the presence of the witness is doubtful, not alleging any motive, even a small reason for the offence, certainly goes to the root of the prosecution case.

22. There is yet another factor. The offence has been alleged to have been committed by axe and *gandasa*. The CD dated 3.9.1988 makes a mention that the accused persons were in jail by 30.8.1988, within 4-5 days from the date of incident. It appears on record that neither their statement was recorded by IO nor they were taken on police remand nor any effort was made to recover the axe and *gandasa* used for the commission of offence. The medical evidence shows that all the injuries found on the dead body were incise wounds and the doctor has stated that edges of all wounds were clean cut. Axe and *gandasa*, normally, are heavy sharp weapons. To ascertain that the nature of said injuries were possible by axe and *gandasa*, the recovery of weapon could have been useful. No explanation has been furnished by the prosecution why no such effort was made to recover the weapons. It appears to be a very material lapse committed by the IO because of which a relevant evidence could not be placed before the learned trial court which was necessary to arrive at a correct conclusion.

23. The criminal jurisprudence in the country is based on the principle that unless the guilt is established convincingly on the basis of evidence on record, none should be punished. In **Rang Bahadur Singh v State of UP AIR 2000 SC 1209**, the Supreme Court has observed:

"The time-tested rule is that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused. A criminal court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that the appellants were the real culprits."

24. Similarly, in **State of UP v Ram Veer Singh 2007 (6) Supreme 164** the Court reiterated the above principle and remarked as follows:

"The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice, which may arise from acquittal of the guilty is no less than from the conviction of an innocent."

25. In this instant case, the learned trial court appears to have been swayed

away by the fact of murder of the deceased. Guilt is not a matter of inference and it should be proved beyond shadow of any doubt by cogent and reliable evidence. The principle which governs the criminal jurisprudence is the presumption of innocence in favour of accused. Serious and heinous crime requires more strict proof and seriousness of offence itself is no ground for conviction. The trial courts have to give finding on the basis of legal proof after making objective assessment of the evidence. The FIR was against unknown persons and the informant was declared hostile. Another witness who was accompanying the informant could not convincingly state that he was acquainted with the accused persons. He only saw the accused persons from their back and appears to be more probable that he could not recognize them. There was no other witness according to him and therefore, the presence of PW-3 at the time of incident is falsified. The own brother of the deceased has not been produced for cross-examination. He did not lodge FIR went back to Kanpur. Both these witness did not participate in inquest proceeding or disclose their presence to the IO who came there soon after the incident. Therefore, the conduct of these witnesses is unnatural and it gives rise to the probability that they neither saw anything nor they were present. No motive has been alleged nor any enmity has been shown between two sides which also creates doubt on the prosecution case.

26. On the basis of above discussion, we find that the learned trial court has based it's judgment on totally untrustworthy and unreliable evidence ignoring inherent infirmities in the prosecution version and the material contradiction, inconsistencies and substantial improvement made by the fact witnesses. The learned trial court has acquitted the co-accused Sunil which shows that prosecution version was found incorrect at least in respect of one accused. As such there is apparent perversity and illegality in the impugned judgment and the same is not sustainable under law and is liable to be set aside.

27. Consequently, this criminal appeal is **allowed**. The impugned judgment dated 20.2.1996 passed in ST no. 26/1989 is set aside. The accused-appellant **Arvind Singh** is therefore acquitted from the charge under section **302 IPC.**

28. Sri Devendra Pratap Singh, learned Amicus Curiae shall be paid Rs. Ten Thousands only for the assistance and legal service provided by him in conducting this appeal for the accused-appellants.

29. Office is directed to transmit the lower court record along with a copy of this judgement to the learned court below for information and necessary compliance.

(2020)03-05ILR A202
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2020

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

Criminal Appeal No. 323 of 1983

Sonpal Singh & Anr.
...Appellants on Interim Bail
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Y.K. Shukla, Sri Sudhakar Yadav, Sri B.K.Tripathi

Counsel for the Respondent:

A.G.A.

Criminal law- Indian Penal Code -Section 376/511 — Appeal against conviction.

Held :-

Reliability of prosecution version –

Testimony of the victim not tally with the medical evidence and does not inspire confidences her conduct also not fair. (Paras 14 and 17)

Appeal allowed. (E-2)

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

1. Heard Sri Sri B.K. Tripathi, Advocate holding brief of Sri Sudharkar Yadav, learned counsel for the appellant no. 1 and Sri G.P. Singh, learned A.G.A. appearing for the State.

2. This appeal has been preferred against the judgment and order dated 24.1.1983 passed by VIth Additional District and Sessions Judge, Shahjahanpur in S.T. No. 544 of 1982 (State vs. Sonpal Singh and another), whereby appellant Sonpal Singh has been convicted under section 376 IPC and has been sentenced for three years R.I. and appellant Rampal has been convicted under section 376/511 IPC and has been sentenced for three years R.I.

3. As regards the appellant no. 1 Sonpal Singh, it is reported by the Chief Judicial Magistrate, Shahjahanpur vide report dated 11.08.2016 that he has expired about 15-20 years ago and after having conducted enquiry in that regard, the said report has been submitted, hence appeal of appellant no. 1 Sonpal Singh stands abated, therefore, before this Court only appellant no. 2 Rampal remains for consideration.

4. As per FIR, the prosecution case is that when the informant (PW1) was going on 16.01.1982 at about 5.00 p.m. along with lota to ease herself out and when she reached near the turn of southern 'med' of sugarcane field of Suresh Singh, the appellant no. 1 Sonpal Singh son of Gindu Singh and appellant no. 2 Rampal son of Jahan came from the front concealing themselves and Sonpal Singh had caught her waist from behind and had taken her forcibly in the said field where sugarcane was there and told her not to raise alarm. The appellant no. 2 Rampal was continuously threatening her that if she cried, she would be killed, therefore, because of fear she did not raise any alarm and both these appellants had thrown her on the ground and thereafter committed rape upon her. Appellant no. 2 Rampal was holding her hand and had closed her mouth while she was raped by appellant no. 1 Sonpal Singh and thereafter appellant no. 2 Rampal had also committed rape upon her and when Rampal was committing rape, her mouth became free and then she cried loudly, hearing this, Ashok Singh son of Shiv Narain Singh, Nek Pal Singh son of Zalim Singh and Rajju son of Lallu of the village came there and then both the appellants fled towards east leaving her. The said witnesses have seen the occurrence and had saved her from clutches of the accused. She had gone to the police station with her husband to lodge FIR.

5. On the complaint (Exhibit Ka-1), chik FIR was prepared at the police station (Exhibit Ka-4). Case Crime No.16 of 1982 was registered under section 376 IPC against both the appellants on 16.01.1982 at 20.00 hours. The entry of this case was

made in G.D. dated 16.01.1982 at report no. 47 which is Exhibit Ka-5. Investigation was assigned to S.I. Ram Charan Singh (PW6), who had conducted the investigation. During investigation, he prepared site plan, which is Exhibit Ka-6. Petticoat of the victim was also taken into possession, recovery memo of which is Exhibit Ka-2. Medical examination report is Exhibit Ka-3 and after having recorded statement of witnesses, he has submitted charge-sheet against the appellants under the above-mentioned sections, which is Exhibit Ka-7.

6. On the basis of evidence on record, charge was framed against the accused-appellant Rampal under section 109 read with section 376 as well as 376 read with section 511 IPC on 01.10.1982 to which he pleaded not guilty and claimed to be tried. Thereafter the victim Phoolmati was examined as PW1, Dr. Meenu Sagar, who conducted medical examination of the victim, has been examined as PW-2, Rajju son of Zalim has been examined as PW-3, who is witness of fact, Nek Pal Singh has been examined as PW4 who is also witness of fact. Thereafter, evidence of prosecution was closed and statement of accused Rampal was recorded u/s 313 Cr.P.C. on 04.01.1983 in which he has stated that the evidence which has come on record is false and has taken the plea of false implication due to village rivalry but no witness has been examined in defence.

7. Based on the above evidence, the trial court has convicted the accused-appellant which has been assailed before this Court.

8. Learned counsel for the appellants has argued that the scribe of the FIR Sri Krishna has not been examined. The appellant has been falsely implicated due to election rivalry. No injury has been found to have been sustained by the victim, which belies the occurrence because if such an occurrence of rape takes place, certainly victim would have suffered injuries on her private part and on other parts of the body, particularly when she was thrown down on the ground. The victim is a married lady. No specimen of vaginal smear was sent for medical examination to establish the perpetrator of crime, therefore, the accused deserves to be acquitted.

9. I have gone through the evidence on record. PW1, who is victim herself has stated that on 25.10.1982 i.e. about nine years ago when she was going to attend nature's call at about 5.00 p.m. she had left for field of sugarcane of Suresh Singh, which was lying towards east of her house, the accused Sonpal Singh had caught hold of her from behind while the accused Rampal had gagged her mouth and had dragged her inside the field of sugarcane and had committed rape upon her and threatened her that if she cried, she would be killed. While accused Sonpal Singh was committing rape, the other accused Rampal had kept her mouth closed and when accused Sonpal Singh had done dirty work, thereafter Rampal said that he would also do the same work and in the process her mouth became free and she got opportunity to cry loudly, hearing which Ashok Singh, Nek Pal Singh and Rajju came there, then accused fled from there. Thereafter, she came to her house and told all the details to her husband. He got report scribed by one Sri Kishan, who had written the same which was dictated to him and thereafter she had put her signature thereon which is Exhibit Ka-1 and the same was given at Police Station Jalalabad. The police had taken petticoat of her also in his possession

and the memorandum, which was prepared of the same, was signed by her. It is further stated by her that she was medically examined. About ten years ago she was married to Ram Ratan and her petticoat is material Exhibit-1 while recovery memo of petticoat is Exhibit Ka-2.

10. In cross-examination, she has stated that between her house and the place of incident there is Kolhu which was located about 2-4 paces away from the *'Med'* of field of Suresh Singh. When she was going for easing herself out about 10-20 persons were present at Kolhu. From the place of occurrence, the distance of Kolhu would be around 50-60 paces. Thereafter, she had responded to the court on query that the Kolhu was towards west of the field. The place where she had been dragged was towards south which is a very big field having area of about 4-5 bighas and having crop of sugarcane which was not very high. The height of the crop would have been about one hand. It was further stated by her that to the north of sugarcane field, there was crop of Jwar and to the south of it there was crop of Arhar. The accused had come from eastern side while she was sitting facing towards west. She was dragged about 2-3 paces. Both the accused had caught her hands and then within two minutes of her raising alarm, witnesses had reached there. As soon as the accused saw the witnesses coming, Sonpal Singh fled but witnesses had seen him. The witnesses had seen the accused from a distance of about 2-4 paces. He had fled towards eastern direction. She has further stated that Sonpal Singh had not fled towards south. Her clothes had not got torn. She had returned home at about 6.00 p.m. The witness Ashok Singh is son of Bua of Sri Kishan. Nek Pal Singh is cousin brother of Sri Kishan. Raja Ram is Chachiya Sasur. She had spoken to her husband for writing report but he said let the same be scribed by Sri Kishan. Sri Kishan has a godown. At about 8.00 p.m. she had departed for police station accompanied with Jaswant, Ram Chandra, Rakshpal, Raja Ram, Ram Ratan (husband of the victim). Sri Kishan, who had scribed the report, had not accompanied her to the police station nor Ashok Singh and Nek Pal had gone there. She had reached the police station in the night at about 12.00 O' clock where Chaukidar of the police station was found. She had handed over the written complaint to Munshiji as Inspector was not available there. From the police station at about 2.00 A.M. in the night she was sent to Shahjahanapur in a trolley which belonged to Sri Kishan, where her medical examination was conducted. She had not taken bath in the meantime. Her husband remained with her all along. Near her village, field of accused Sonpal Singh is also situated. She does not know whether Sri Kishan had purchased any field from Thakur of her village. She also does not know whether Sri Kishan was purchasing field from Sonpal Singh. When the accused had come to catch hold of her, they did not have their face covered nor were they having any Lathi. When she was thrown down on the ground, no bungles of her were broken. She does not go out from her house except for the nature's call. Sonpal Singh used to come to her Jeth's house for giving clothes, hence she used to recognize him. She had never gone to the field of Sonpal Singh, who was the only son of his father. She does not know anyone of village of Sonpal Singh. She has denied that Sonpal Singh had any animosity with Sri Kishan and because of that, at the instance of Sri Kishan, she was giving false statement. Accused Rampal was resident of village Patiura, which is about half mile

away from her house, which is situated in District Hardoi. She was not visiting the house of Rampal but Rampal used to come to her house. She had seen Rampal coming to her house. Her mother-in-law had pointed out that he was Rampal. She knew his name. At the time when he had gagged her mouth, she knew his name. About two months ago prior to this occurrence, her mother-in-law had told her the name of Rampal. On the date of occurrence, Rampal had not come to her house rather he was going from the road/ passage while she was sitting in 'Dalan', at that her mother-in-law had told her that Rampal was going. Her 'Dalan' was about 2-4 paces away from the road/passage. Rampal used to come to her village for washing of his clothes but had not come to her house. On the day when she had gone for nature's call, she was alone with a lota. When she was thrown down on the ground, her lota was left there only. By that time, she had already eased herself out in the field of Suresh Singh. The place where she was thrown down on the ground, was about two paces away from the place of defecation. The said field of sugarcane was very dense. When she was being dragged in the field, she did not get any abrasion from the leaves of the crop. Rampal was holding her hand and simultaneously he was also keeping her mouth gagged and she has also shown before the Court as to in what manner she was being carried. She had tried to get herself freed. When dirty work was done with her, her petticoat had become dirty. The place where she was thrown down on the ground, there was little grass existing. She had received injuries on her waist as well as her back but no bleeding took place, only pain was being felt. She was told by the accused that if she cried loudly, she would be killed and nothing else. It was not said *"Meri Jan Chillana Mat"*. She had not told the Investigating Officer that Sonpal Singh had told her that *"Meri Jan Chillana Mat"* and she could not tell the reason as to why the same was written by Investigating Officer. In committing rape upon her, Sonpal Singh took just a minute but during this period, she did not remain quiet. It is wrong to say that she was living on the land of Sri Kishan and that she does farming of his field on 'Batai'. After leaving the police station, at about 6.00 A.M. she reached Sahjahanpur and at about 8.00 A.M. her medical examination was conducted.

11. The statement of this witness is not inspiring much confidence because the same appears to be very unnatural. Her testimony to the effect that one accused was holding her and got her mouth gagged while she was being forcibly dragged inside the field of sugarcane where this offence is said to have been committed and thereafter the said accused continued to keep her in gagged condition till co-accused had committed rape upon her and that thereafter when co-accused had done dirty work, the accused-appellant had also said that he would do the same act and then she got an opportunity to scream loudly because her mouth was freed. When she screamed, then witnesses arrived there and they had seen the accused fleeing from there. It is admitted by her that the accused were not armed with any weapons nor even by a Lathi, therefore, she should not have any apprehension and could easily have cried out before the commission of alleged offence. Therefore, the narration made of this occurrence seems to be unnatural. It has also been stated by her that she was thrown down on the ground where there was little grass and the place where she had defecated, was just two paces away from the place where she was raped, also seems to be very unnatural that a person would do

such act close to the place where the excreta would be lying. Further, she has stated that she was thrown down on the ground, she had received injury on her back as well as waist but in medical examination, no such injuries have been found which seems to be a material contradiction.

12. Km. Meenu Sagar has been examined as PW2 who has stated that on 06.11.1982 she conducted medical examination at about 1.00 p.m. of the victim and found no mark of injury on her body as well as on her private part. Vaginal smear was taken and sent to District Hospital for examination. She has proved her report as Exhibit Ka-3.

13. In cross-examination, she has stated that she did not notice any injury on her waist nor on any other part of the body nor did she find any sign of rape. Opinion could be expressed within 24 hours as to whether rape was committed or not or on the basis of vaginal smear report.

14. During the argument, it has not come on record whether any report with respect to vaginal smear was found or not and this witness has testified that she had not noticed any injury either on her body or on her private part which is not in consonance with the statement given by the victim herself as according to her when she was thrown down on the ground, she had suffered injuries on her waist and back.

15. Rajju son of Lallu has been examined as PW3 and he has stated that about 10 months ago at 5.00 p.m. he was near the Kolhu and near him Netpal Singh and Ashok Singh were also present, who all had heard cry of Phoolmati which was coming from south eastern direction from the field of sugarcane, hearing which three of them rushed there and saw both the appellants and Phoolmati. Further, it is stated that he saw that Sonpal Singh had already raped Phoolmati in the said field where she was lying on the ground and Rampal was committing rape and the victim was lying in naked condition. When he challenged the accused, they fled leaving the victim in the said condition and thereafter she set right her clothes and went home and this witness returned to Kolhu.

16. In cross examination, this witness has stated that at the time of occurrence he was at Kolhu and he had reached at the place of occurrence only on hearing of voice of Phoolmati. Kolhu was 100 paces away from the place of occurrence. He had gone to the field of sugarcane straight from the place of Kolhu and within 2-4-6 minutes he had reached there and when he reached there, he saw that Sonpal Singh was holding the hands of Phoolmati and Rampal was doing wrong work. Rampal was holding her legs and was committing rape while Phoolmati told him that Sonpal Singh had already raped her. When he first time reached there, he had seen that Rampal was committing rape upon Phoolmati. It is not that because of shame Phoolmati did not utter anything to him. When he had reached at the place of incident, he had Lathi in his hand but he did not have any quarrel with Rampal and Sonpal Singh. These accused had fled from there just on seeing him. When they were hardly 6-7 paces away from the place of occurrence, the accused fled from there. The crop of sugarcane was of mans' height. Near the place of occurrence, the field of Sonpal Singh is also situated. Phoolmati is daughter-in-law of his brother and Ram Ratan is his real nephew. The house of scribe is near his own house. He does work

of farming. He has denied that due to him belonging to the party of Kishan and others, he was giving false statement. Further, he has stated that at Kolhu, sugarcane was being crushed. There was only one Kolhu and near it, he was sitting. The bangles of Phoolmati had not broken nor her sari was found torn nor soiled.

17. The statement of this witness is also not confidence inspiring because he has given statement contradictory to the prosecution case saying that when he reached there at the cry of victim, he found the accused-appellant Rampal committing rape upon her while as per prosecution case as well as statement of PW1, Rampal could not rape rather was holding her hands and keeping gagged mouth of the victim when she was being raped by co-accused Sonpal Singh and that when Sonpal Singh had finished raping, and the accused-appellant said that he would also do the same act, the victim got opportunity to cry loudly, hearing which the witnesses reached there which included PW3. Therefore, the testimony of PW3 is contrary to the prosecution version. His statement is that when he reached there having lathi with him, he did not even try to catch hold of the accused, which sounds also unnatural. Normal conduct would be for him to immediately chase the accused persons and catch hold up them. He has stated that he simply saw occurrence and when accused went away from there, he returned to Kolhu and the victim went home. Further he has stated that he did not see any soil or any tear on the sari of the victim which also seems to be unnatural that in a Kachcha place where the occurrence is said to have taken place, yet clothes of the victim would not get soiled and torn.

18. Nek Pal Singh has been examined as PW4. He has stated in examination-in-chief that about 10 months ago at about 5.00 pm, he was sitting near Kolhu along with Ashok, Raja Ram and one person of Dhanu caste called Dhanu Tanukool, Phoolmati had gone to attend nature's call along with lota in the field of sugarcane of Suresh Singh. After sometime, he had heard cry of Phoolmati and thereafter all of them went there and saw that Sonpal Singh was holding Phoolmati and was committing rape upon her, when he challenged the accused, they fled from there and Phoolmati also got up with shame. Thereafter, Phoolmati told him that she was firstly raped by Sonpal Singh and thereafter by Rampal. She also told them that when Sonpal Singh was committing rape, Rampal had gagged her mouth and was holding her hands and when Rampal was committing rape, her mouth was open because of which she could cry loudly.

19. In cross-examination, this witness has stated that they had challenged the accused from a distance of 8-10 paces and when he reached at the place of occurrence, Rampal was committing rape and Sonpal Singh was standing there only. He also did not find the clothes of victim torn.

20. The statement of this witness is also not inspiring confidence because he and PW3 both have stated to have reached the place of occurrence simultaneously and there is discrepancy between their statements because PW4 has stated that when he reached there, Sonpal Singh was holding Phoolmati and was raping her while according to PW3 when he had reached there Rampal was raping and not Sonpal Singh. This witness in cross-examination has also given different version stating that when he reached there for the first time, Sonpal Singh was holding the hands of victim while in examination in chief, he has stated that Sonpal Singh was holding the hands of victim and was also committing rape.

21. After having analyzed the above statements, I find that the version of the

prosecution does not stand proved because the prosecution version as per FIR is that when the victim had gone to ease herself out in the sugarcane of Suresh Singh at a little distance from her house, she was caught from behind by Sonpal Singh and at that time Rampal was also accompanying him and both of them had dragged her in the said field where rape was committed upon her by Sonpal Singh and before Rampal could rape her, she had liberty to cry loudly, hearing which the witnesses PW-3 and PW4 reached there and saw the occurrence. On minutely scanning the above testimony, I find that the said version does not stand proved for the reasons which have been disclosed after analysis of the statements made of each witness above. I also find that both the witnesses i.e. PW3 and PW4 who were said to be eye witnesses, are closely related to the victim, therefore, their testimony could be doubtful on this count also and they could give false statement. Their conduct is also not found to be natural in allowing the accused flee away from the place of occurrence despite being armed with a lathi. The conduct of the victim is also not found fair because her version is very unnatural that such kind of rape would be committed upon her at a place where excreta was lying and for other reasons also which have also been given above.

22. In view of the above, the trial court's judgment is not found in consonance with the evidence on record. The conviction of appellant no. 2 Rampal u/s 376/511 IPC deserves to be set aside and is accordingly set aside, he stands acquitted. The appeal stands allowed.

23. Record reveals that the accused-appellant is on bail, hence his sureties stand discharged.

24. Let a copy of this judgment along with lower court record be transmitted to the trial court for necessary action at his end in accordance with law.

(2020)03-05ILR A209
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 482 of 1991

Jagat Pal Singh & Anr.
...Appellants (In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri R.B. Sahai, Sri Manvendra Singh

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

A. Criminal Law-Indian penal code-Section 307/34 – Common Intention - Injured witness has clearly stated in his statement that appellant is only with *lathi* but no injury of *lathi* is inflicted on the part of the injured by invoking section 307 read with Section 34 IPC, it cannot be said that there was common intention of the appellant to attempt murder of the injured - Although it may be considered that the appellant was present at the place of occurrence but no overt act is done by the appellant.

Held- Mere presence of the accused at the place of the occurrence, without doing any overt act would not make him culpable with the aid of Section 34 of the IPC. (Para 30,31)

Appeal Allowed (E-3)

List of case cited:-

1. Kashmira Singh vs. St. of Punj., AIR 1994 SC 1651

2. Raja Gopal Swamy Konar vs. St. of T.N., 1995 SCC (Cri) 184

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Heard Sri Manvendra Singh,learned counsel for the appellants and Sri Ratendra Kumar, learned A.G.A.

2. This criminal appeal has been preferred by appellants- Jagat Pal Singh and Shyam Lal Singh against the judgment and order dated 25.02.1991, passed by IV Additional Session Judge, Fatehpur, in S.T. No. 136 of 1986 (State Vs. Jagatpal Singh and Shyam Lal), whereby convicting the appellant no. 1 under Section 307 IPC, for 3 years R.I. and fine of Rs. 2,000/- in default two months simple imprisonment on account of inflicting injury to Ram Manohar Singh, and for inflicting injury to Jai Karan Singh 2 months rigorous imprisonment and fine of Rs. 500/- in default of payment of fine 15 days simple imprisonment to him and convicting the appellant no. 2 Shyam Lal under section 307/34 IPC for rigorous imprisonment of 3 months and fine of Rs. 1,000/- on account of inflicting injury to Ram Manohar Singh in default 1 month simple imprisonment and inflicting injury to Jai Karan Singh one month rigorous imprisonment and fine of Rs. 500/- and in default of payment of fine 10 days simple imprisonment.

3. Brief facts of this case are as follows-:

4. P.W. 1 Phool Singh has lodged an FIR by means of written application **Ext. Ka 1** with the allegation that a dispute regarding agricultural field between the family of the complainant and family of the appellants Jagatpal and Shyam Lal about two years ago. It is further alleged in the FIR that on the date of incident i.e. on 05.07.1985 at about 8.00 a.m. the complainant, his cousin brother Jai Karan and Ram Manohar Singh watering his field, meanwhile, the appellant Jagatpal Singh armed with licensee gun and appellant Shyam Lal armed with lathi came there and objected for watering the field and when the first informant refused to stop for watering, due to this altercation take place, on exhortation of the appellant Shyam Lal, Jagat Pal fired shot from his licensee gun with the intention to kill his brother due to such fire Ram Manohar Singh and Jai Karan Singh have got injury. Munni Lal, Kallu and some villagers arrived at the place of occurrence with the assistance of villagers his licensee gun was snatched away. Meanwhile, the appellant Jagatpal managed to escape from the place of occurrence. After the incident, the complainant P.W. 1 Phool Singh reached at the police station with snatched gun of the appellant Jagatpal along with his injured brother and lodged an FIR.

5. On the basis of written report the chik FIR **Ext. Ka 2** was lodged at police station on 05.07.1985 by entering in GD No. Sl. No. 22 11.30 a.m.. The FIR was registered against the appellants Jagat Pal and Shyam Lal under Section 307 IPC and after lodging the FIR, the injured were sent to hospital for medical examination.

6. The injured Ram Manohar and Jai Karan were medically examined on 05.07.1985 at PHC Hathgawan by Medical Officer. The doctor have found following injuries on the persons of injured:-

Injuries of injured Ram Manohar:-

1. Multiple firearm wound of different size from 1/6 to ½ mussel deep

size in the area of Rt. Arm extending from Rt. Thumb to right upper mid arm. Blackening present, oozing of blood from the wound present. Swelling around the wound present.

2. Multiple gun shot wound injury of different size on 1/6 to ½ x 1/6 mussel deep size on the Rt. lateral chest extend from upper harden of right hip joint to middle point lateral chest. Oozing of blood present. Blacking present. Swelling around the wound also present. Advise X-ray.

Nature Advise:

All the injury kept under observation. X-ray, cause by some fire arm weapon.

Duration about ½ day old.

Injuries of injured Jai Karan Singh:-

1. One black spot size of ¼ x ¼ size on the upper herden left thigh 2" below the left injury region. Redness and swelling around the wound present.

Nature Advise:

injury kept under observation. Advise X-ray, cause of injury could not be detected.

Duration about ½ day old.

7. After lodging the FIR, the investigation of this case was handed over to the Investigating Officer Sri Ramesh Chandra Verma, who reached the place of occurrence and recorded the statements of witnesses, and prepared the site plan. During investigation recovery memo of alleged licensee gun Ext. Ka 4 was prepared by him.

8. After completing the investigation, investigating officer has submitted charge-sheet against the appellants Jagat Pal and Shyam Lal under section 307 IPC before the court concerned. After submitting charge-sheet the trial court framed the charge Ext. Ka .. against the appellants Jagat Pal and Shyam Lal.

9. The appellants denied the charge framed against them and claimed to be tried.

10. To substantiate the charge, the prosecution has examined 6 witnesses in all. P.W. 1 Phool Singh (complainant), who proved the written report as Ext. Ka-1, P.W. 2 Manohar Singh (injured), P.W. 3, Ram Saran Singh (scribe of the FIR), who proved the FIR as Ext Ka-2, G.D. Entry No. 20, time 11.30 a.m. as Ext. Ka-, recovery memo as Ext Ka-4. P.W. 4 Dashrath (public witness), P.W. 5 Munnil Lal and P.W. 6 Constable Prem Shankar Pandey, who proved site plan as Ext. Ka-5 and charge-sheet as Ext. Ka-6.

11. After completion of statements of prosecution, the statements of accused-appellants were recorded under section 313 Cr.P.. In their statements they denied all the allegation levelled against them.

12. The appellant Shyam Lal stated in his statement that at the time of occurrence he was not present at the place of occurrence, so he raised plea of alibi and the accused-appellant Jagat Pal has stated in his statement recorded under section 313 Cr.P.C. that on the date of occurrence his turn for watering to the field, but the

complainant and his brothers assaulted him with *lathi* and Axe (*kulhari)*, appellant exercise his right of defence to save himself he has shot fired from his licensee gun, which hit Ram Manohar and after this occurrence, he reached at the police station to lodge the FIR for injury inflicted upon him by the informant parties, but his report was not lodged. He further stated that he himself has medically examined.

13. After hearing both the parties, the learned trial court convicted the appellants as aforesaid.

14. During trial appellant no. 1 Jagat Pal reported to be no more. Hence the appeal against appellant no. 1 Jagat Pal was abated.

15. Only one appellant no. 2 Shyam Lal is surviving.

16. I have heard learned Sri Manvendra Singh, learned counsel for the appellant, Sri J.P. Tripathi, learned AGA for the State and perused the record.

17. Learned counsel for the appellant submitted that although the injured Ram Manohar and Jai Karan were medically examined, but the doctor, who prepared the injury reports which was not produced by the prosecution before the trial court, so the material evidence is withheld by the prosecution so the oral evidence is not corroborated by the medical evidence. He further submitted that there are material contradictions in the statements of witnesses, but the learned trial court without appreciating this fact has wrongly convicted the appellant.

18. It is also submitted that as per the allegation made in the FIR, only role of exhortation against the surviving appellant Shyam Lal was attributed, but neither active participation nor prior meeting of mind proved by the prosecution. Mere presence of the appellant in place of occurrence is not sufficient to invoke the provision of Section 34 IPC. Appellant Jagat Pal has clearly stated in his statement that he had exercise his right of private defence, but the learned trial court did not appreciate this fact and learned trial court has wrongly convicted the appellant. Due to this reason finding of trial court is totally perverse.

19. It is also submitted by learned counsel for the appellant that injured witness Jai Karan was material witness which is withheld by the prosecution and also submitted that all the public witnesses produced by the prosecution did not support the prosecution version and become hostile.

20. Learned AGA has vehemently opposed and submitted that by means of clinching evidence learned trial court also appreciated the evidence and the trial court has rightly convicted the appellant and there is no illegality and infirmity in the order passed by learned session court.

21. As no doctor was examined by the court during trial. Learned counsel for the appellant admitted the genuineness of the injury report under section 294 Cr.P.C. of injured Jai Karan Singh as Ext. Ka 7 and Ram Manohar Singh as Ext. Ka-8.

22. P.W. 1 Phool Singh has stated in his statement that when he was watering his field at the time, appellants Jagat Pal armed with licensee gun and Shyam Lal armed with lathi arrived at the place of occurrence, and when he refused for

watering the field, then on the exhortation of appellant Shyam Lal, appellant Jagat Pal shot fired from his licensee gun which hit the injured Ram Manohar and Jai Karan. In his cross-examination, P.W. 1 Phool Singh clearly stated that during altercation between injured Ram Manohar and Jai Karan, appellant-accused Shyam Lal armed with *lathi h*ad assaulted the injured, meanwhile appellant Jagat Pal shot fired on him and due to this, Ram Manohar sustained injury. He next submitted in his cross-examination that although the appellant Shyam Lal was present armed with lathi at the place of occurrence, but no injury was inflicted by the appellant Shyam Lal. This fact is also affirmed by perusing the injury report Ext. Ka-7 and Ext. Ka-8.

23. One of the star injured witness Ram Manohar has stated in his statement that appellant Shyam Lal was only objected for watering of the field, but assault was not committed by him. Except this version, nothing stated against appellant Shyam Lal.

24. One of the star injured witness Jai Karan Singh was withheld by the prosecution and no good ground is assigned for non-examination of the above witness, is also adverse effect of the prosecution version.

25. P.W. 4 Dashrath, named eyewitness of the FIR has stated in his cross examination that only role of exhortation has been assigned to the appellant Shyam Lal. He has stated that Jagat Pal fired gun shot and injured assaulted to the appellant by means of *lathi.*

26. P.W. 4 Munni Lal, named eyewitness who declared hostile and did not support the prosecution version.

27. Other witnesses namely P.W. 5 constable Prem Shankar Pandey and P.W. 4 were also examined by prosecution as secondary witness to prove the site plan Ext Ka 7.

28. By invoking section 34 IPC, the learned trial court convicted the appellant under section 307/34 IPC . Under Section 34 IPC reads as under:-

*"**Section 34** in The Indian Penal Code. [34. Acts done by several persons in furtherance of common intention. --When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.]"*

The act has committed by any one of them is done, is of the common intention, part A prior meeting of the present participation in respect of the overt act until it cannot be said that this is common intention and crime committed by any of them in furtherance of such intention.

29. In case of ***Kashmira Singh vs. Stat of Punjab AIR 1994 SC 1651,*** the common intention is to be inferred from the circumstances particularly the part played by the accused and the surrounding circumstances namely nature of the weapon used and the injury indicted as well as the meeting of the minds among the accused who are being held constructively liable.

In ***Raja Gopal Swamy Konar vs. State of Tamil Nadu 1995 SCC (Cri) 184***, Hon'ble Apex Court held that so far as A-2 is concerned he inflicted simple injuries with the stick on P.W. 2 and one on the deceased Ramaswamy. Therefore, common intention to kill the two deceased cannot be made out against him.

30. Case in hand injured witness has clearly stated in his statement that appellant

is only with *lathi* but no injury of *lathi* is inflicted on the part of the injured by invoking section 307 read with Section 34 IPC, it cannot be said that there was common intention of the appellant to attempt murder of injured Ram Manohar

31. On perusal of the entire evidence although it may be considered that the appellant Shyam Lal was present at the place of occurrence but there is no overt act is done by the appellant. The trial court wrongly convicted the appellant by giving lathi blow to the injured and prosecution is not able to prove the common intention as envisaged under section 34 IPC.

32. After considering the entire evidence and perusal of the record, I am of the opinion that the prosecution is unable to prove the alleged offence under section 307/34 IPC beyond reasonable doubt against sole surviving appellant Shyam Lal.

33. The **appeal is allowed.** The order dated 25.02.1991 is set aside and the appellant Shyam Lal is acquitted the charge levelled against him under section 307/34 IPC. The appellant is on bail. He need not to surrender before the Court. The sureties and bail bonds are discharged.

34. The office is directed to transmit back the record of the Lower Court with a copy of judgment and order of this Court for immediate compliance.

(2020)03-05ILR A214
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.03.2020

BEFORE

THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Appeal No. 491 of 1998

Santu Kori & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
S.S. Chauhan, Krishna Kr. Singh

Counsel for the Respondents:
Govt. Advocate, M. Naseeruallah, Mohammad Masood Hasan, Mohammad Naseerullah

A. It is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight and mind set of accused persons differs from each other.

Indian Evidence Act- Section 8- Motive- Where the case is based on direct evidence, motive loses its relevance.

B. Merely because witnesses are closed relatives of victim, their testimonies cannot be discarded, but Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible evidence.

Indian Evidence Act- Section 134- It is the quality and not the quantity of evidence which is important. Conviction can be recorded on the testimony of related witnesses provided the same is credible and corroborated from other evidence.

C. Discrepancies, variations and contradictions in prosecution case – If the same do not go to the root of case then accused-appellant is not entitled to get benefit of the same.

Indian Evidence Act- Section 3- Minor contradictions, improvements and

embellishments cannot be made a reason to discard the testimony of a witness.

D. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Sentence should reflects conscience of society and sentencing process has to be stern where it should be. Appellant's conviction under Section 307/34 I.P.C. confirmed but sentence modified to already undergone with fine imposed by trial court.

(PARA 23,28,29,33,34,36,37)

Criminal Appeal partly allowed. (E-3)

List of case cited:

1. Lokesh Shivakumar Vs. St. of Kar., (2012) 3 SCC 196

2. Dalip Singh Vs. St. of Punj., AIR,1953, SC 364

3. Dharnidhar Vs.. St. of U.P., (2010) 7 SCC 759

4. Ganga Bhawani Vs. Rayapati Venkat Reddy & ors, 2013(15) SCC 298

5. Sampath Kumar Vs. Insp. of Police, Krishnagiri, (2012) 4 SCC 124

6. Sachin Kumar Singhraha Vs. St. of M.P, 2019 (8) SCC 371

7. Smt. Shamim Vs. St. of (NCT of Delhi), 2018 (10) SCC 509

8. Sumer Singh Vs. Surajbhan Singh & ors, (2014) 7 SCC 323

9. Sham Sunder Vs. Puran, (1990) 4 SCC 731

10. M.P. Vs. Saleem, (2005) 5 SCC 554

11. Ravji Vs. St. of Raj., (1996) 2 SCC 175

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Accused-appellants Santu Kori, Murli and Lahuri (Now dead) and accused-appellant Jhinguri filed this criminal appeal challenging the judgement and order dated 29.8.1998 passed by Special Additional Sessions Judge, Faizabad in Session Trial No. 338 of 1991, State vs. Santu Kori and others, under Section 307 I.P.C. (Crime No. 307 of 1991), Police Station Kotwali Beekapur, District Faizabad whereby Trial Court convicted all the accused-appellants under Section 307/34 I.P.C. and sentenced them to undergo 7 years rigorous imprisonment with fine of Rs. 1000/- each and in default of payment of fine, they shall further undergo for 6 months simple imprisonment.

2. Brief facts of the prosecution case which need to be noted for disposal of the present appeal which are as under :-

On 3.8.1991 at about 9:00 PM, accused persons Santu Kori and Murli with Lathi, accused Jhinguri with Ballam and accused Lahuri with Farsa attacked Ram Tahal in sugar cane field causing serious injuries with intention to kill him.

3. On the basis of of written tehrir Ex.Ka-1 of PW-1 Sant Ram, Chick F.I.R. Ex.Ka-5 was registered under Section 307 I.P.C. against the accused persons, entry of case was made in general diary Ex.Ka-6.

4. Injured Ram Tahal was medically examined by Dr. K.U. Ahmad on 3/4.8.1991 at about 12:40 in the night. Doctor found 9 injuries on the person of injured Ram Tahal and prepared medical report.

5. S.S.I. Surjan Singh Sengar undertook the investigation, visited spot, prepared site plan, recorded the statement of witnesses, found sufficient evidence and submitted charge sheet against the accused-appellants under Section 307 I.P.C.

6. Case, being exclusively triable by Court of Sessions, was committed by Additional Chief Judicial Magistrate, Faizabad to Session Judge for trial which came to be transferred and decided by Special Additional Sessions Judge, Faizabad.

7. Trial Court framed charges against accused-appellants under Section 307/34 I.P.C. Accused persons denied the charges levelled against them, pleaded not guilty and claimed trial.

8. In order to substantiate its case, prosecution examined PW1-Ram Tahal (Injured), PW-2 Sant Ram, PW-3 Chandrabhan (independent witness), PW-4 Dr. A.K. Srivastava, PW-5 Dr. K.U. Ahmad, PW-6 Gayadeen Tiwari, Head Constable and PW-7 S.I. Surjan Singh Sengar, Investigating Officer of the case. PW-1, 2 and 3 are the witness of fact and other witnesses are formal witnesses.

9. Subsequent to closure of prosecution evidence, Trial Court recorded statement of accused-appellant under Section 313 Cr.P.C. explaining all incriminating and other evidence and circumstances. In the statement under Section 313 Cr.P.C., accused denied prosecution story in toto and subsequently stated that they were falsely implicated in the present case on account of property dispute.

10. Trial court after appreciating the entire evidence of prosecution and hearing of both the parties, convicted and sentenced the accused-appellant as stated above.

11. During the pendency of appeal, accused-appellant no. 1 Santu Kori, appellant no. 3 Murli and appellant no. 4 Lahuri have died. Their appeal stood abated. Only appellant no. 2 Jhinguri remained alive.

12. I have heard Sri Krishna Kumar Singh, learned counsel for the appellants and Ms. Parul Kant, learned AGA for the State at length and have gone through the record available on file with the valuable assistance of learned counsel for the parties.

13. Learned counsel for appellant no. 2 Jhinguri submits that the accused-appellant is innocent and has been falsely implicated in the present case. He has committed no offence. Only PW-1 Ram Tahal is injured in the incident, rest witnesses i.e. PW-2 and 3 are not independent witnesses. They are interested witnesses. The appellant is old person aged about 60 years and incident is of the year, 1991. There is no motive to accused to commit the present crime. There are several contradictions in the statement of witnesses so as to disbelieve their evidence. It is further contended that injured in incident Ram Tahal has also been died during the pendency of appeal. The present appellant and Dharmpal and Satyapal son of Ram Tahal entered into a compromise in the matter and compromise deed is also on file mentioning that criminal appeal be allowed for sentencing of already under gone.

14. On the other hand, learned AGA for the State opposed the submission made by learned counsel for the appellant and submitted that accused-appellant along with other co-accused (Now dead) assaulted the victim Ram

Tahal (Now dead) with Lathi, Danda and Ballam causing him serious injuries. Victim was medically examined and trail court after appreciating entire evidence rightly found him guilty, convicted and sentenced him.

15. Although time, date and place of incident, injuries found on the person of victim, respective weapon of accused-appellant are not disputed by learned counsel for the appellant. According to him, accused-appellant is not responsible for causing injuries to victim. He has been falsely implicated.

16. Only question remains for consideration is, "whether accused-appellant is responsible for causing injuries to victim along with other co-accused and Trial Court has rightly appreciated the evidence and found him guilty or not?"

17. Now I may proceed to consider the submissions of learned counsel for the parties and evidence briefly as well as legal points with few important decisions.

18. PW-1 Ram Tahal(Injured) deposed in his statement that on 3.8.1991 at about 9 PM, accused-appellants Santu Kori, Murli, Lahuri and Jhinguri assaulted him with their respective weapon. Accused-appellant Santu Kori and Murli was having Lathi in their hands while Jhinguri was having Ballam and Lahuri was having Farsa. All the four persons surrounded and assaulted him causing serious injuries. He sustained serious injuries and fell down on earth. On hearing his scream Sant Ram, Indra Pal and Ghanshyam came to spot, witnessed the incident and saved him. Accused was recognized in the light of torch.

19. PW-2 Sant Ram (real nephew of PW-1) deposed in his statement that on hearing scream of Ram Tahal, he reached to spot and saw that accused persons were assaulting him with Lathi, Dandal Farsa and Ballam.

20. PW-3 Indra Pal also supported the prosecution case and deposed that he reached the spot on hearing scream of Ram Tahal. He rushed to spot and saw in the light of Torch that accused Jhinguri with Ballam and Lahuri with Farsa and rest accused Santu and Murli with Lathi were assaulting Ram Tahal.

21. All the three witnesses withstood lengthy cross-examination but nothing adverse could be brought on record so as to disbelieve their statement.

22. Doctor conducted medical examination of injured Ram Tahal, found 9 injuries on the person of injured. He prepared medico legal report and opined that injury nos. 1, 2 and 5 have been caused by incisor like Farsa and injury no. 9 was caused by some pointed weapon like Ballam which is assigned to present accused-appellant.

23. So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved.

24. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196**, Court held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular

evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

25. So far as argument of relative witness and non-examination of independent witness are concerned, it is now well settled law laid down in **Dalip Singh v. State of Punjab, AIR,1953, SC 364** wherein Court has held :-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

26. In **Dharnidhar v. State of UP (2010) 7 SCC 759**, Court has observed as follows :-

"There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of ***Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199,*** *this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"*

27. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (Vide: ***Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308).****"*

28. It is settled that merely because witnesses are closed relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not protect actual culprit and make allegations against an

innocent person. However, in such a case Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible evidence.

29. In so far as discrepancies, variations and contradictions in prosecution case are concerned, I have analysed entire evidence in consonance with submissions raised by learned counsel and find that the same do not go to the root of case and accused-appellant is not entitled to get benefit of the same.

30. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy is minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

31. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

32. In **Sachin Kumar Singhraha v. State of Madhya Pradesh, 2019 (8) SCC 371,** Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

33. I, lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. **(See Smt. Shamim v. State of (NCT of Delhi), 2018 (10) SCC 509)**

34. PW-1, 2 and 3 supported the prosecution case. PW-1 Ram Tahal sustained 9 serious injuries on his body at the time of incident. Doctor conducted medical examination report and submitted that injury no. 9 was caused by some pointed weapon like Ballam and as per prosecution witness, accused-appellant was having Ballam at the time of incident. Medical evidence caused with ocular version.

35. Considering the entire facts and circumstances of the case, entire evidence led by prosecution, injuries found on the person of victim and legal preposition discussed herein before,I do not find any legallity or irregularity committed by Trial Court in the impugned order. Trial Court rightly found him guilty. Conviction of accused-appellant Jhinguri deserves to be and is maintained and confirmed.

36. So far as sentence is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

37. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalized. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide : (Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].

38. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, motive, nature of offence and manner in which it was executed or committed, weapon used by him in the commission of offence, compromise between the parties, **I partly allow** this appeal and confirm appellant's conviction under Section 307/34 I.P.C. but modify sentence to already undergone with fine imposed by trial court.

39. Lower Court record along with a copy of this judgment be sent back immediately to Trial Court through District Court concerned for compliance and further necessary action.

(2020)03-05ILR A220
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Jail Appeal No. 501 of 2018

Neeraj ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

From Jail, Sri Deepak Kumar, Sri Satyendra Narayan Singh, Sri Subash Chandra Pandey

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

A. Criminal Law-Dowry Prohibition Act-Sections 498A, 304-B, 302 IPC & 3/4 - The death of the deceased was done within 7 years of the marriage due to strangulation and death was occurred homicidal and not suicidal. Clearly established that the death of the deceased occurred within under normal circumstances.

If a married woman dies otherwise under normal circumstances within seven years of her marriage and it is shown that she was subjected to cruelty or harassment soon before her death by her husband or relative, such death will be called as dowry death.

B. Evidence Law-Indian Evidence Act, 1872- Section 8 -Conduct of any party is also relevant and the conduct of family members of the appellant all of them are fled away from the place of occurrence is also indicate the guilt of the appellant.

The subsequent conduct of a person in reference to the unnatural death of the deceased would be a relevant fact in determining his guilt.

C. Evidence law-Indian Evidence Act, 1872- Section 106 of the Evidence Act - Burden is on the appellant to establish those fact which disprove his guilt. If he fails to establish or explain these facts, an adverse inference of fact may arise against him.

Failure of a person to explain the facts specially within his knowledge will lead to an adverse influence being drawn against him.

D. The learned trial court although frame alternative charge against the appellant under section 302 IPC, but the learned trial court without assigning any cogent reason acquitted the appellant against the charge levelled under section 302/34 IPC. (Para 30,32,36,37)

Criminal Appeal rejected. (E-3)

List of case cited:-

1. Kashmir Kaur Vs. St. of Punj, AIR 2013 (SC 1039)

2. Sher Singh @ Pratapa Vs. St. of Har. 2015 (89) ACC 288 (SC)

3. Trimukh Maroti Kirkan Vs. St. of Maha., 2006(10) SCC681

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. This jail appeal has been preferred against the judgement and order dated 17.07.2018 passed by Additional Sessions Judge, Court No. 4, Moradabad, in S.T. No. 70 of 2013 (State Vs. Neeraj), arising out of case crime No. 481 of 2012, under Sections 498A, 304-B, 302 IPC & 3/4 of D.P. Act, Police Station-Bilari, District Moradabad convicting and sentencing the appellant u/s 498A for 2 years rigorous imprisonment and fine of Rs. 5,000/-, in default of payment of fine 2 months additional rigorous imprisonment, under section 304-B IPC, 10 years rigorous imprisonment and u/s 4 D.P. Act 1 year rigorous imprisonment and fine of Rs. 5,000/- in default of payment of fine two months rigorous imprisonment. Further order that out of recovery of fine 50% money shall be given to the brother of deceased Om Prakash @ Sonu and all the sentence shall run concurrently.

2. Brief facts of the case are that the complainant Om Prakash @ Sonu lodged

the FIR by giving written report with the allegation that his sister Lokesh aged about 24 years was married with appellant Neeraj five years back of the incident as per Hindu rites and rutuals. During marriage, he has given sufficient dowry according to his financial capacity, but appellant's family was not satisfied with dowry. Thereafter appellant Neeraj, his elder brother Mahendra, his wife Usha, mother-in-law Radha and father-in-law Dungar Singh used to harassment and torture to his sister by demanding motorcycle as additional dowry. Due to poor financial condition of the complainant's family they, were unable to fulfill their demand of motorcycle. Due to this appellant's family used to harass and assaulted her on two occasion due to nonfulmilment of demand of motorcycle they ompel his sister to leave the matrimonial home. Appellant had taken her back to his house after persuasion, but they continued to stick with their demand of motorcycle and often beat to his sister. On the fateful night of 20/21.09.2012 some unknown time her husband Neeraj, Mahendra, Usha, Radha and Dungar Singh had committed murder to his sister by hanging. The dead body was lying at the house of his brother-in-law in village Gataura and all family members including husband of the deceased fled away. On this allegation FIR Ext Ka-4 was lodged at police station Bilari by the complainant on 21.09.2012 at 04.30 p.m., as a case crime no. 481 of 2012, under sections 498A, 304B IPC and ¾ D.P. Act. The distance of the police station is 15 Kms.

3. Before the investigation of the case inquest was done by P.W. 7 Abhay Kumar Singh in presence of inquest witness. Inquest report was prepared by P.W. 7 Abhay Kumar Singh, Tehsildar, and cause of death could not be ascertained so as per opinion of Panch, the dead body was sent to the district hospital for autopsy of deceased Smt. Lokesh.

4. P.W. 3 Dr. S.K. Chaudhary has conducted the postmortem of dead body of the deceased on 22.09.2012 at 12.30 p.m. at District Hospital Moradabad, and prepared postmortem report Ext Ka-3, in which doctor found the age of the deceased was about 24 years and the eye and mouth of the decease was closed, bleed from both intestine. Face congested. Following antemortem injury were found on the person of deceased:-

1. Abraded contusion 15cm x 3cm front of neck extending to left side of neck 4cm below chin, 5cm below left year and 9cm below right ear of lobule subcutaneous tissue under injury mark ecchymosed.

2. Abraded contusion 7cm x 3 cm back of middle of left side of chest.

3. Abraded contusion 6cm x 3cm back of abdomen on left side, 16cm away from injury no. 2.

5. Hyoid Bone fractured. Larynx and Vocal Cords congested. Both lungs congested. Stomach (wall condition, Contents & smell) 200 grms pasty food material . Small intestine chyme & gasses was presemt.

Cause of death due to Asphyxia as a result of antimortem strangulation. Time of death about 1 and ½ day old.

The post-mortem report is on record and marked as Ext. Ka-3

6. Investigating officer, Pankaj Kumar Pandey, P.W. 4, after obtaining necessary

papers conducted investigation in this case and prepare site plan on behest of complaint-informant Ext. Ka-6. Primary investigation of this case was conducted by Pankaj Kumar Pandey. He also recorded the statement of complainant Om Prakash. Second investigating officer is P.W. 6 R.S. Gautam. During investigation he recorded the statement of other witnesses and after completing all formalities of the investigation submitted the charge sheet against the appellant Neeraj under section 498A, 304B IPC and Section ¾ D.P. Act., who proved the charge sheet Ext. Ka-7 and exonerated the other accused namely; Mahendra, Dungar Singh, Radha and Usha.

7. After completion of investigation charge-sheet submitted by him before the Chief Judicial Magistrate, Moradabad and Chief Judicial Magistrate, Moradabad, had taken cognizance on the charge sheet on 17.01.2013 and the case was committed before the court of session where it is registered as S.T. No. 75 of 2013 and the case was transferred for trial to the court of Additional District Judged Moradabad.

8. On 29.06.2013 the charge against the appellant was framed under section 498A, 304B IPC and Section ¾ D.P. Act and alternative charge under section 302 IPC was also framed and charge read over and explained to the appellant, and claimed to be tried.

9. To substantiate the charge levelled against the appellant, prosecution has examined 9 witnesses in all.

10. P.W 1 complainant Om Prakash @ Sonu, who is real brother of the deceased, who proved the written report as Ext. Ka-1 and Inquest report as Ext. Ka-2, P.W. 2 Smt. Sonam @ Renu, sister in-law of the deceased, P.W. 3 Dr. S.K. Chaudhary, who proved the post mortem report as Ext. Ka-3 and P.W. 4 HCP Jai Singh, who proved the chick FIR Ext. Ka-4 and GD entry Sl. No. 33/4.30 p.m. Ext. Ka-5 and P.W.5 Pankaj Kumar Pandey (first investigating officer), who proved site plan Ext. Ka-6 and P.W. 6 R.S. Gautam (second investigating officer), who proved charge-sheet as Ext. Ka-7.

11. After conclusion of the evidence of prosecution, statement of appellant was recorded under section 313 Cr.P.C. in which accused denied all the charges and stated that the witnesses wrongly stated before the court and also stated that he is innocent and has been falsely implicated in this case and the deceased Lokesh committed suicide on account of depression. In defence, no evidence was recorded on behalf of appellant.

12. After conclusion of the trial learned trial court acquitted the appellant under section 302 IPC and convicted him under sections 498A, 304B and Section ¾ D.P. Act as aforesaid.

13. Being aggrieved by the judgement and order of conviction dated 17.07.2018, this appeal has been filed by the appellant.

14. I have heard learned counsel for the appellant and learned AGA and perused the material available on record.

15. Learned counsel for the appellant submitted that the trial court has convicted the appellant admittedly on the basis of surmises and conjectures and has failed to appriciate the evidence available on record. He has further submitted that there are material contradictions in the testimony of prosecution witnesses and also submitted

that no independent witnesses was produced by the prosecution. One of the main contention of the learned counsel for the appellant is that the death of the deceased Lokesh Devi was suicidal and appellant has clearly stated in his statement that the deceased had committed suicide herself due to stress. Next submitted that the information of this incident has given by him to the parent of the deceased and thereafter the family member of parental house of the deceased arrived at his house and he was also present at the time of last rutuals of the deceased. It is also submitted that during autopsy no grievious injury was found on the person of deceased and also stated that the prosecution has clearly failed to establish that the death of deceased-Lokesh was subject to cruelty and harassment by the appellant. The prosecution failed to prove the charge levelled against the appellant beyond shadow of doubt. Lastly, learned counsel for the appellant submitted that the appellant is very poor person and languishing in jail at the commencement of trial.

16. Apart from arguing on the merits of the case, learned counsel for the appellant further contended although there is no evidence against appellant if court comes to the conclusion about guilt of appellant then a lenient view should be taken in sentencing him and his sentence should be reduced to minimum prescribed under section 304B IPC that is to say, seven years.

17. Per contra learned AGA contended that victim was died inside her matrimonial home. P.W. 3 Dr. S.K. Chaudhary clearly opined that the cause of death is asphyxia as a result of antemortem strangulation. In this case hyoid bone was fractured so medical report clearly shows that this is the clear case of homicidal death. Prosecution clearly established by cogent and credible evidence that deceased was died within seven years of her marriage and soon before her death she was subjected to mental and physical harassment and tortured by making demand of additional dowry. Prosecution is able to prove his case beyond shadow of doubt and appeal of appellant is liable to be dismissed.

18. A report was obtained from the District Jail Superintendent, Moradabad dated 11.02.2019 which shows that during trial the appellant was in jail from 25.11.2012 to 16.07.2018 (5 years 7 months and 22 days) and from 17.07.2018 to till date the appellant is detained in district Jail Moradabad. So presently appellant languishing in jail for a period of more than 7 years.

19. To appreciate the argument of the party and also the evidence it is necessary to look into the statutory provision of Section 304 B, 498A IPC and 13B of the Evidence Act.

20. Their Lordship of Hon'ble Supreme Court in **AIR 2013 (SC 1039) in case of Kashmir Kaur vs. State of Punjab** has explained the ingredients of offence under section 304B of IPC which reads as under:-

From the above decisions the following principles can be culled out:

a) To attract the provisions of Section 304B IPC the main ingredient of the offence to be established is that soon before the death of the deceased she was

subjected to cruelty and harassment in connection with the demand of dowry.

b) The death of the deceased woman was caused by any burn or bodily injury or some other circumstance which was not normal.

c) Such death occurs within seven years from the date of her marriage.

d) That the victim was subjected to cruelty or harassment by her husband or any relative of her husband.

e) Such cruelty or harassment should be for or in connection with demand of dowry.

f) It should be established that such cruelty and harassment was made soon before her death.

g) The expression (soon before) is a relative term and it would depend upon circumstances of each case and no straightjacket formula can be laid down as to what would constitute a period of soon before the occurrence.

h) It would be hazardous to indicate any fixed period and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113B of the Evidence Act.

i) Therefore, the expression "soon before" would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate or life link between the effect of cruelty based on dowry demand and the concerned death. In other words, it should not be remote in point of time and thereby make it a stale one.

j) However, the expression "soon before" should not be given a narrow meaning which would otherwise defeat the very purpose of the provisions of the Act and should not lead to absurd results.

k) Section 304B is an exception to the cardinal principles of criminal jurisprudence that a suspect in the Indian Law is entitled to the protection of Article 20 of the Constitution, as well as, a presumption of innocence in his favour. The concept of deeming fiction is hardly applicable to criminal jurisprudence but in contradistinction to this aspect of criminal law, the legislature applied the concept of deeming fiction to the provisions of Section 304B.

l) Such deeming fiction resulting in a presumption is, however, a rebuttable presumption and the husband and his relatives, can, by leading their defence prove that the ingredients of Section 304B were not satisfied.

m) The specific significance to be attached is to the time of the alleged cruelty and harassment to which the victim was subjected to, the time of her death and whether the alleged demand of dowry was in connection with the marriage. Once the said ingredients were satisfied it will be called dowry death and by deemed fiction

of law the husband or the relatives will be deemed to have committed that offence.

21. In this case prosecution examined P.W. 1 Om Prakash, as in his deposition he has stated that her sister Lokesh was married with appellant Neeraj about 5 years ago before the incident. His parent gave sufficient dowry in marriage as according to his status, but sometime after marriage her in-laws were not happy with the dowry given in the marriage. Family members of the appellant always taunted to the deceased Lokesh for being less dowry and started demand of motorcycle. He further stated that due to poor condition of his family he could not fulfill the demand of her in-laws. His sister was previously ousted from her matrimonial home for not giving motorcycle, thereafter, on being convinced in *punchayat* she was taken back to her matrimonial house, still they continued their demand of motorcycle. All her family members (in-laws) tortured her, but family members of the complainant kept patience. On intervening night of 20/21.09.2012 a call came from village Gataura and it was informed that his sister was killed by members of his matrimonial house. On telephonic information, complainant and other family members reached at the matrimonial house of his sister. The dead body of his sister was lying on the floor of the barandah and all the members in-laws family was absconded after the occurrence.

22. All these allegations a written report was submitted in police station and the case was lodged and the written report was proved by P.W. 1 as Ext. Ka 1. He further stated that he is one of the member of the inquest report and he also put the signature in inquest report as panch witness and proved the inquest report as Ext. Ka 2. It is also submitted that in-laws family captivated him. His father and his family members put thumb impression and signature of some papers and after that they absconded.

23. P.W. 2 Sonam @ Renu wife of P.W. 1 and bhabhi of the deceased. Statement of P.W. 1 is also corroborated with her. In her statement she has clearly stated that in-laws of the deceased tortured and harassed her on demand of motorcycle, when she reached on the spot along with her family members then no body was present at the time in laws house. She also stated in her statement that the deceased has resides with mother of the appellant. Only these two witnesses of facts were examined except P.W. 1 and P.W. 2. P.W. 3 is the doctor S.K. Chaudhary, who has clearly stated that this ante-mortem injury has been caused to the deceased before 1 to 1 ½ days of the postmortem. He has clearly stated that the death of the deceased Lokesh as a result of ante-mortem strangulation. This shows that the death of the deceased was homicidal and not suicidal.

24. P.W. 8 Rajaram, father of the deceased is also corroborated the statements of P.W. 1 and P.W.2.

25. Although, learned counsel for the appellant contended that the deceased committed suicide by hanging herself on account of depression, but no such any evidence is produced by the defence side that the deceased had committed suicide due to depression. The death of the deceased was not possible by hanging and strangulation, so as per the doctor, the case was homicidal not suicidal. Beside the injury on the neck two other injuries have also found antemortem injury on the body of the deceased. Dr. S.K. Chaudhary has

clearly stated in the cross-examination that the death of the deceased was done by pressing neck of the deceased and due to this asphyxia occurred. So the death of the deceased was not possible by hanging. There will be whole pattern issue in the mark which will not be given in the case of strangulation as per the Modi Medico Jurisprudence .

26. The prosecution also examined P.W. 4 Pankaj Kumar Pandey, First Investigating Officer, who has clearly stated that he prepared site plan and recorded the statements of witnesses present at the spot. Particularly he has clearly denied that the family members of the appellant was present at that time. In the statement he has also stated that he also recorded the statement of neighbours of the appellant. Nothing incriminate of hanging was also recovered by the police.

27. P.W. 6, Second Investigating Officer R.S. Gautam has stated that nothing any other important found in the statements of the witnesses and this witness only proved the charge-sheet against the appellant under section 498A, 304B IPC and Section ¾ Dowry Prohibition Act only against the appellant.

28. P.W. 7, Abhay Kumar Sigh, Nayab Tehsildar, who conducted the inquest report and panchayatnama, who proved as Ext. Ka-2.

29. P.W. 9 Satish Kumar, Inspector, who prepared the police papers, proved Ext. Ka-9 to 12.

30. On perusal of the entire record, it is reveals that the death of the deceased was done within 7 years of the marriage . It is also established by the evidence of the doctor that the death of the deceased was occurred due to strangulation and death was occurred homicidal and not suicidal. It is clearly established that the death of the deceased occurred within under normal circumstances.

31. Now, other point it has to be seen just before her death, deceased Smt. Lokesh was subjected to cruelty or harassment by her husband and other relatives of husband in connection with demand of dowry. This element and burden of prove in case of dowry deaths have been dealt with in detail by Hon'ble The Apex Court in ***Sher Singh @ Pratapa v. State of Haryana 2015 (89) ACC 288 (SC).*** The Apex Court held as under:

12. In our opinion, it is beyond cavil that where the same word is used in a section and/or in sundry segments of a statute, it should be attributed the same meaning, unless there are compelling reasons to do otherwise. The obverse is where different words are employed in close proximity, or in the same section, or in the same enactment, the assumption must be that the legislature intended them to depict disparate situations, and delineate dissimilar and diverse ramifications. Ergo, ordinarily Parliament could not have proposed to ordain that the prosecution should "prove" the existence of a vital sequence of facts, despite having employed the word "shown" in Section 304 B. The question is whether these two words can be construed as synonymous. It seems to us that if the prosecution is required to prove, which always means beyond reasonable doubt, that a dowry death has been committed, there is a risk that the purpose postulated in the provision may be reduced to a cipher. This method of statutory interpretation has consistently been

disapproved and deprecated except in exceptional instances where the syntax permits reading down or reading up of some words of the subject provisions.

13. In Section 113A of the Evidence Act Parliament has, in the case of a wife's suicide, "presumed" the guilt of the husband and the members of his family. Significantly, in section 113 B which pointedly refers to dowry deaths, Parliament has again employed the word "presume". However, in substantially similar circumstances, in the event of a wife's unnatural death, Parliament has in Section 304 B "deemed" the guilt of the husband and the members of his family. The Concise Oxford Dictionary defines the word "presume" as: supposed to be true, take for granted; whereas "deem" as: regard, consider; and whereas "show" as: point out and prove. The Black's Law Dictionary (5th Edition) defines the word "show" as- to make apparent or clear by the evidence, to prove; "deemed" as- to hold, consider, adjudge, believe, condemn, determine, construed as if true; "presume" as- to believe or accept on probable evidence; and "Presumption", in Black's, "is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted." The Concise Dictionary of Law, Oxford Paperbacks has this comprehensive yet succinct definition of burden of proof which is worthy of reproduction:

"Burden of Proof: The duty of a party to litigation to prove a fact or facts in issue. Generally the burden of proof falls upon the party who substantially asserts the truth of a particular fact (the prosecution or the plaintiff). A distinction is drawn between the persuasive (or legal) burden, which is carried by the party who as a matter of law will lose the case if he fails to prove the fact in issue; and the evidential burden (burden of adducing evidence or burden of going forward), which is the duty of showing that there is sufficient evidence to raise an issue fit for the consideration of the trier of fact as to the existence or non-existence of a fact in issue.

The normal rule is that a defendant is presumed to be innocent until he is proved guilty; it is therefore the duty of the prosecution to prove its case by establishing both the actus reus of the crime and the mens rea. It must first satisfy the evidential burden to show that its allegations have something to support them. If it cannot satisfy this burden, the defence may submit or the judge may direct that there is no case to answer, and the judge must direct the jury to acquit. The prosecution may sometimes rely on presumptions of fact to satisfy the evidential burden of proof (e.g. the fact that a woman was subjected to violence during sexual intercourse will normally raise a presumption to support a charge of rape and prove that she did not consent). If, however, the prosecution has established a basis for its case, it must then continue to satisfy the persuasive burden by proving its case beyond reasonable doubt (see proof beyond reasonable doubt). It is the duty of the judge to tell the jury clearly that the prosecution must prove its case and that it must prove it beyond reasonable doubt; if he does not give this clear direction, the defendant is entitled to be acquitted.

There are some exceptions to the normal rule that the burden of proof is upon the prosecution. The main exceptions are as follows. (1) When the defendant

admits the elements of the crime (the actus reus and mens rea) but pleads a special defence, the evidential burden is upon him to prove his defence. This may occur, the example, in a prosecution for murder in which the defendant raises a defence of self-defence. (2) When the defendant pleads automatism, the evidential burden is upon him. (3) When the defendant pleads insanity, both the evidential and persuasive burden rest upon him. In this case, however, it is sufficient if he proves his case on a balance of probabilities (i.e. he must persuade the jury that it is more likely that he is telling the truth than not). (4) In some cases statute expressly places a persuasive burden on the defendant; for example, a person who carries an offensive weapon in public is guilty of an offence unless he proves that he had lawful authority or a reasonable excuse for carrying it".

14. As is already noted above, Section 113 B of the Evidence Act and Section 304B of the IPC were introduced into their respective statutes simultaneously and, therefore, it must ordinarily be assumed that Parliament intentionally used the word 'deemed' in Section 304B to distinguish this provision from the others. In actuality, however, it is well nigh impossible to give a sensible and legally acceptable meaning to these provisions, unless the word 'shown' is used as synonymous to 'prove' and the word 'presume' as freely interchangeable with the word 'deemed'. In the realm of civil and fiscal law, it is not difficult to import the ordinary meaning of the word 'deem' to denote a set of circumstances which call to be construed contrary to what they actually are. In criminal legislation, however, it is unpalatable to adopt this approach by rote. We have the high authority of the Constitution Bench of this Court both in State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory, AIR 1953 SC 333 and State of Tamil Nadu v. Arooran Sugars Limited (1997) 1 SCC 326, requiring the Court to ascertain the purpose behind the statutory fiction brought about by the use of the word 'deemed' so as to give full effect to the legislation and carry it to its logical conclusion. We may add that it is generally posited that there are rebuttable as well as irrebuttable presumptions, the latter oftentimes assuming an artificiality as actuality by means of a deeming provision. It is abhorrent to criminal jurisprudence to adjudicate a person guilty of an offence even though he had neither intention to commit it nor active participation in its commission. It is after deep cogitation that we consider it imperative to construe the word 'shown' in Section 304B of the IPC as to, in fact, connote 'prove'. In other words, it is for the prosecution to prove that a 'dowry death' has occurred, namely, (i) that the death of a woman has been caused in abnormal circumstances by her having been burned or having been bodily injured, (ii) within seven years of a marriage, (iii) and that she was subjected to cruelty or harassment by her husband or any relative of her husband, (iv) in connection with any demand for dowry and (v) that the cruelty or harassment meted out to her continued to have a causal connection or a live link with the demand of dowry. We are aware that the word 'soon' finds place in Section 304B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304B or the suicide under Section 304B of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even

by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt. It seems to us that what Parliament intended by using the word 'deemed' was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt. This interpretation provides the accused a chance of proving their innocence. This is also the postulation of Section 101 of the Evidence Act. The purpose of Section 113B of the Evidence Act and Section 304B of the IPC, in our opinion, is to counter what is commonly encountered - the lack or the absence of evidence in the case of suicide or death of a woman within seven years of marriage. If the word "shown" has to be given its ordinary meaning then it would only require the prosecution to merely present its evidence in Court, not necessarily through oral deposition, and thereupon make the accused lead detailed evidence to be followed by that of the prosecution. This procedure is unknown to Common Law systems, and beyond the contemplation of the Cr.P.C."

32. It is well settled principle of law that once prosecution proved that where the death of the woman which was occurred otherwise under normal circumstances within 7 years of her marriage and she was subjected to cruelty and harassment by her husband and relatives of her husband soon before her death in connection with the demand of dowry, then heavy burden of proof lies upon accused to adduce evidence disbelieving his guilt, beyond reasonable doubt.

33. In the present case accused appellant-Neeraj has failed to prove beyond reasonable doubt that his wife Smt. Lokesh committed suicide due to depression.

34. In the present case in hand, when the family members and relative were arrived at the matrimonial house of the deceased then they saw that all of the family members of in-law had fled away from the scene of occurrence.

35. Section 8 of the Evidence Act is as under:-

Section 8 in The Indian Evidence Act, 1872

8. Motive, preparation and previous or subsequent conduct.--Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. Explanation 1.--The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act. Explanation 2.--When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant. Illustrations (I) of the evidence Act is relevant.

(i) A is accused of a crime. The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

36. Section 8 of Evidence Act is that any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, is also relevant and the conduct of family members of the appellant all of them are fled away from the place of occurrence is also indicate the guilt of the appellant.

37. It is also submitted by prosecution is that the death of the deceased Lokesh is within 5 years in the house of the appellant in view of Section 106 of the Evidence Act. This burden on the appellant to establish those fact which disprove his guilt. In other words, if he fail to establish or explain these facts, an adverse inference of fact may arise against him. In this case the appellant simply show that the deceased had committed suicide only due to depression, except this no defence witness is examined on behalf of the appellant to establish this fact that the deceased had committed suicide due to depression. Hon'ble Apex Court in the case of **Trimukh Maroti Kirkan vs. State of Maharashtra**, in para 17 of the judgement has held that:-

"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes placed in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

38. For the reasons aforesaid the prosecution is able to prove his case against the appellant. The appellant accused Neeraj for the offence punishable under section 498A, 304B and 4 of D.P. Act beyond shadow of doubt, so far as with regard to the prayer of the appellant for reduction of the sentence of appellant-accused is concerned it is not a case of suicidal death but the case is of homicidal death.

39. The learned trial court although frame alternative charge against the appellant under section 302 IPC, but the learned trial court without assigning any cogent reason acquitted the appellant against the charge levelled under section 302/34 IPC.

40. Thus, finding of the court below is totally whimsical and against the evidence on record, but as no appeal on behalf of the State for enhancement of sentence. In these circumstances, this Court is not inclined to interfere the judgement and order of the trial court.

41. Since there is no instigating circumstances in favour of appellant, so in these circumstances, it shall not be justified to interfere or reduce the sentence awarded to the appellant by the court below.

42. The appeal is liable to be dismissed and is accordingly **dismissed.**

43. The conviction and sentence of appellant Neeraj passed by Additional Sessions Judge, Court No. 4, under section 498A, 304B IPC and Section 4 D.P. Act are upheld. The appellant Neeraj is in jail and he served out the sentence awarded to him.

44. Office is directed to transmit the certified copy of this order to the court below along with the lower court record, for necessary compliance.

(2020)03-05ILR A232
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Jail Appeal No. 521 of 2018

Ramesh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Ved Prakash Pandey.

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

A. Criminal law-IPC Section 304 (II) I.P.C-Delay in lodging F.I.R. has been very satisfactorily and reasonably explained and in this case delay is not at all fatal for prosecution case-Statement of a relative or interested witness could not be thrown out only on the ground that the witness is relative or interested witness, rather, such statement is to be scrutinized with caution-Exception-4 to section 300 of the I.P.C.-Appellant only tried to pacify the matter between co-accused (acquitted) and deceased and there were no pre-mediation or pre-arranged plan to commit crime and incident has taken place all of sudden in spur of moment-No intention to commit such fatal assault on the deceased-Sentence of five years rigorous imprisonment reduced to three years rigorous imprisonment alongwith fine with default clause and compensation to the widow / complainant (wife of deceased).

Appeal partly allowed. (E-3)

Held- Where there is absence of any pre-meditation and the incident occurs on the spur of the moment, the weapon is not lethal and there is no repetition of assault after a single blow, the case would come within Exception 4 to Section 300 IPC.(Para 16,21,23,26)

List of case cited:-

1. Tara Singh & ors. Vs. St. of Punj., AIR 1991 SC 63

2. Nagappan Vs.. St. (by Insp.r of Police, T.N), (2014) 3 SCC (Cri) 660

3. Vikram Singh & ors. Vs. St. of Punj., (2010) 3 SCC 56

4. Sheesh Ram & ors. Vs. St. of Raj,. (2014) 3 SCC 689

5. Gopal Singh Vs. St. of U.P.,(1978) 3 SCC 327

6. Surinder Kumar Vs. U.T., Chandigarh, (1989) 2 SCC 217

(Delivered by Hon'ble Suresh Kumar Gupta J.)

1. Being aggrieved with the judgment and order dated 12.4.2018 passed by Additional Sessions Judge, Court No. 21, Shahjahanpur, this jail appeal has been preferred by appellant in S.T. No. 165 of 2014, Case Crime No. 395 of 2013, under sections 304, 504 & 506 I.P.C. in which appellant has been convicted under section 304 (II) I.P.C. for 5 years rigorous imprisonment alongwith fine of Rs. 10,000/- and in default of payment of fine six month further imprisonment. Appellant was acquitted under sections 304/34, 504 &

506 I.P.C. After depositing the aforesaid fine ¾ part of the same shall be given to the victim as compensation.

2. Brief facts of this case are as follows-:

That on 7.9.2013 at about 7-8 P.M. lot of altercation happened between husband of complainant namely Sher Pal (deceased) and her neighbour namely Mausam Ali and this altercation continued for a long time. Complainant alongwith her daughters and her Jeth's son namely Ramesh (appellant) had tried to sort out the matter but all in vain. Then Ramesh inflicted two - three blow of stick on the head of Sher Pal and pushed him on the floor. Accused Mausam Ali is also involved in this incident. Thereafter complainant tried to take her husband to the hospital for treatment but could not do the same due to non-availability of vehicle, resultant her husband-Sher Pal had died on the spot. This occurrence was witnessed by several neighbours of the complainant. Thereafter, complainant scribed a report by Irfan and on the basis of that written report Ex. Ka-1 an F.I.R. was lodged (Ex. Ka-8) on 8.9.2013 at 00.30 mid night at police station Rauja against appellant-Ramesh and co-accused-Mausam Ali. Distance between the police station and place of occurrence is about 12 hours in North-East.

3. This case is entered in G.D. at serial no. 2 dated 8.9.2013 at 00.30 hours (Ex. Ka-2) and inquest report (Ex. Ka-4) as well as papers relating to autopsy is also prepared by SI Janki Prasad Sharma on direction of S.H.O. Afterward autopsy of deceased was done in district hospital by PW-5-Dr. R.S. Prasad. According to PW-5 at the time of alleged incident deceased was 45 years old and duration of death of deceased about one day. In medical examination following ante-mortem injuries were found on the body of deceased:-

i. Lacerated wound 2.5 cm X 1 cm into bone deep on the right eye-brow.

ii. Abraided contusion 4 cm X 2 cm on tip of nose

iii. Contusion 6 cm X 3 cm on the left side of back 12 cm below the right tip of shoulder.

iv. Contusion of 8 cm X 4 cm on left side back 10 cm below.

v. Contusion 12 cm X 3 cm on left side of lower part of back just above left side of buttock.

vi. Abraided contusion 7 cm X 3 cm on right side of back of chest 4 cm below tip of shoulder.

vii. Contusion 8 cm X 2.5 cm on right side of back 9 cm below tip of shoulder.

4. On internal examination of body of deceased injuries no. 4 to 7 were rib fracture on the left side of back, lungs were raptured, heart was empty, stomach was empty, chyme and gases were present in small intestine, bladder was empty. As per result of ante-mortem injuries, doctor opined that death of deceased was done due to shock and hommerrage. Death report is proved as Ex. Ka-7.

5. That investigation of this case was conducted by IO Virendra Bahadur Singh / PW-3. IO prepared site plan (Ex. Ka-2) on instruction of complainant and after recording the statement of witnesses as

well as after completing formality of investigation submitted charge-sheet (Ex. Ka-3) against appellant-Ramesh and co-accused-Mausam Ali before C.J.M. concerned, where it is committed to the sessions court and by means of transfer this case is decided by A.D.J. Court No. 21. On 16.7.2014 charge was framed against the appellant as well as co-accused, Mausam Ali, under sections 304/34, 504 & 506 I.P.C. After conclusion of trial learned trial court acquitted co-accused, Mausam Ali, and convicted the appellant as aforesaid.

6. In order to substantiate the charge levelled against the appellant, prosecution examined Smt. Mahadevi (wife of deceased) as PW-1, she proved the written report (Ex. Ka-1). Sita, who is the daughter of deceased as PW-2, PW-1 and PW-2 are reported as eye-witnesses of the alleged incident, IO Virendra Bahadur Singh as PW-3, who proved site plan as Ex. Ka-2 and charge sheet as Ex. Ka-3, Dr. Janki Prasad Verma as PW-4, who proved inquest report as Ex. Ka-7, C.M.O. Letter, R.I. Letter and challan nash Ex. Ka-4 to Ex. Ka-6, Dr. Aditya Prakash Arya as PW-5, who proved post mortem report as Ex. Ka-7 and Ct. Clerk Jitendra Singh as PW-6, who proved the chik F.I.R. as Ex. Ka-8 and relevant G.D. No. 2 as Ex. Ka-9.

7. After examination of these witnesses, on 9.3.2018 statement of accused-appellant was recorded under section 313 Cr.P.C. Accused/ appellant denied all the charges levelled against him and stated that he was falsely implicated in this case by complainant due to personal vengeance. Co-accused Mausam Ali clearly denied the prosecution version and stated that he is innocent and deceased and his wife committed marpeet to one woman of his village namely Sushila Devi and co-accused was the witness of that incident, due to that enmity wife of deceased has falsely implicated him in this case. After hearing of both the parties, learned trial court acquitted the accused and convicted the appellant as aforesaid being aggrieved against the order dated 2.4.2018, this appeal has been filed by the appellant.

8. I have heard learned counsel for the appellant and the learned A.G.A. and perused the material available on record.

9. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case. The occurrence has taken place at about 8 P.M. and F.I.R. was lodged at about 12.30 midnight having delay of 4.30 hours and there is no explanation regarding the same. That no independent eye-witness was examined by the prosecution and both the prosecution witnesses i.e. PW-1 (wife of deceased) and PW-2 (daughter of deceased) are relatives of deceased and they are interested witnesses, therefore no reliance can be placed on the statement of interested and related witnesses. As independent witness was available on the spot as no independent witness examined by the prosecution so conviction of appellant could not be sustained Learned counsel further submitted that death of deceased was died due to falling on the pave road it cannot be established from the evidence that the act was committed by the appellant with intention to kill the deceased. Rather than due to certain altercation between Mausam Ali and deceased this incident unintentionally happened. Learned counsel next submitted that co-accused-Mausam Ali was acquitted by the trial court so appellant is also liable to be acquitted. Learned counsel further submitted that appellant is an old age person and if court

found appellant's guilt then considering the poor condition, and there was no pre-mediation or pre-arrange plan and entire circumstances that death of deceased occurred due to non-availability of any vehicle at the time of alleged incident so complainant could not take her husband to the hospital for treatement and he succumbed due to excessive bleeding.

10. Per contra, learned A.G.A. submitted that appellant had intentionally committed culpable homicide and given several fatal blow by stick, which resultant to death of deceased. He further submitted that although there are several eye-witnesses were present at the spot at the time of alleged incident but due to enmity and partibandi in village independent person always refuse to give deposition so it could not be presume that absence of independent eye-witness belied prosecution case. Learned A.G.A. further contended that prosecution is able to prove its case beyond shadow of doubt. The alleged incident has taken place in the village of deceased. Hence, neither date time and place of occurrence nor the identity of accused could be disputed by learned counsel for appellant. Role of appellant to inflict injury to deceased with lathi and unintentionally pushed the deceased on pave road was proved. There is no material on record to disbelieve the prosecution charge against appellant. It is also submitted that learned trial court does not seem to have fallen an error while convicting and sentencing the appellant under section 304 part II I.P.C. Appellant deserves no leniency. So appeal is liable to be dismissed.

11. In order to prove this case prosecution examined six witnesses and out of these only two witness of fact, examined by prosecution. PW-1, Mahadevi, is the wife of deceased as well as an eye-witness of this case. PW-1 deposed in her statement that before three year at 7-8 P.M. there was some altercation between her husband and neighbour, Mausam Ali. Meanwhile, brother-in-law of PW-1, Dharmpal, and her daughter tried to pacify the altercation but they could not succeed. Son of her brother-in-law (jeth) Ramesh and Mausam Ali both assailant grabbed her husband and pushed him on the pave ground. Due to this Sher Pal sudden sustained serious injuries and PW-1 could not take her husband for treatment because she failed to make arrangement of any vehicle and her husband Sher Pal died after half an hour on the spot. At the time of incident a bulb was lightening on the pole and PW-1 clearly identified the accused in the light of bulb. PW-1 in his cross-examination stated by making an improvement that Mausam Ali was armed with banka and inflicted on head of Sher Pal and Ramesh inflicted lathi on the base of nose and both of them pushed Sher Pal on pave road resultant, Sher Pal died.

12. PW-2 is the daughter of deceased who herself examined as an eye-witness and she clearly stated in her statement that Ramesh armed with lathi and Mausam Ali armed with farsa, inflicted injuries to her father so statement of PW-1 also in support of PW-2.

13. Learned trial court acquitted co-accused, Mausam Ali, only on the grounds that although both the witnesses (PW-1 & PW-2) in their statements clearly stated that co-accused, Mausam Ali, was also involved in this incident and taken active participation but in the F.I.R.(Ex. Ka-1) no said allegation is imputed against Mausam Ali. On the opinion of learned trial court

that evidence adduced against co-accused, Mausam Ali, was not in consonance with F.I.R. so learned trial court acquitted Mausam Ali against charge levelled upon him and no appeal against acquittal of Mausam Ali is filed by prosecution till date. Only appellant, Ramesh, was convicted and presently he is languishing in jail.

14. One of the argument of learned counsel for appellant is that occurrence has taken place on 7.9.2013 at about 7 to 8 P.M. That distance between place of occurrence and police station is about 3 kms and F.I.R. was lodged against the appellant at 12.13 midnight. Thus there are about 5 hours delay in lodging the F.I.R. which is not at all explained by the prosecution and delay in lodging F.I.R. gives rise to the fact that appellant has been falsely implicated in this case. In case of prompt F.I.R., chance of false implication of accused is very remote. While learned A.G.A. submitted that delay is clearly explained in this matter that first informant is an illiterate, rustic household lady and nobody from the village came forward for arranging conveyance for deceased after alleged incident. Complainant could not manage conveyance in time so in these circumstances, delay occurred in lodging F.I.R. There are many factors which have to be taken into consideration while looking into factum of delay in criminal cases. It is true that court has duty to take notice of delay and examined the same in a back draft of a factual score whether there is any expectable explanation offered by the prosecution but when delay is satisfactorily explained no adverse inference is to be drawn. It is to be seen whether there has been possibility of embellishment in the prosecution version on account of such delay.

15. In this connection it will be useful to take note of the following observation made by Apex Court in ***Tara Singh & Ors. v. State of Punjab, AIR 1991 SC 63 :***

"The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go the police station for giving the report. Of course, in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the Courts should be cautious to scrutinize the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the Court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case."

16. Thus delay in lodging F.I.R. has been very satisfactorily and reasonably explained which has also been discussed by

trial court and in this case delay is not at all fatal for prosecution case.

17. So far as the second argument is concerned that only interested and related witnesses i.e. PW-1, Mahadevi w/o deceased and PW-2 Sita, daughter of deceased, were examined by the prosecution. No other independent witness is produced so no reliance can be placed in the statement of interested and related witnesses. That the prosecution has produced only interested and related witnesses i.e. PW-1 & PW-2. Both are relatives of deceased except this no independent eye-witness produced by the prosecution. While PW-1 has clearly stated in her statement that at the time of alleged incident her daughter as well as villagers were present at her door and Ramvir was also sit on his shop but neither anyone come forward nor prevented the appellant from being killing.

18. In ***Nagappan v. State (by Inspector of Police, Tamil Nadu) reported in (2014) 3 SCC (Cri) 660*** Hon'ble the Apex Court in paragraph no. 10 has observed as under :-

"10. As regards the first contention about the admissibility of the evidence of PW 1 and PW 2 being closely related to each other and the deceased, first of all, there is no bar in considering the evidence of relatives. It is true that in the case on hand, other witnesses turned hostile and have not supported the case of the prosecution. The prosecution heavily relied on the evidence of PW 1 & PW 2. The trial court and the High Court, in view of their relationship, closely analysed their statements and ultimately found that their evidence is clear, cogent and without considerable contradiction as claimed by their counsel. This Court, in a series of decisions, has held that where the evidence of "interested witnesses" is consistent and duly corroborated by medical evidence, it is not possible to discard the same merely on the ground that they were interested witnesses. In other words, relationship is not a factor to affect the credibility of a witness. " (emphasis added)

19. In ***Vikram Singh and others V. State of Punjab reported in (2010) 3 SCC 56*** Hon'ble the Supreme Court has cited paragraph 3 of its earlier pronouncement in the case of ***Rana Pratap and Others V. State of Haryana reported in 1983 (3) SCC 327*** which reads as under:-

"There were three eye witnesses. One was the brother of the deceased and the other two were a milk vendor of a neighbouring village, who was carrying milk to the dairy and a vegetable and fruit hawker, who was pushing his laden cart along the road. The learned Sessions Judge and the learned Counsel described both the independent witnesses as chance witnesses implying thereby that their evidence was suspicious and their presence at the scene doubtful. We do not understand the expression 'chance witnesses'. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that that they are mere chance witnesses'. The expression 'chance

witnesses' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are 'chance witnesses' even where murder is committed in a street is to abandon good sense and take too shallow a view of the evidence."(Emphasis added)

20. In ***Sheesh Ram and others v. State of Rajasthan reported in (2014) 3 SCC 689*** Hon'ble the Apex Court in paragraph no. 10 has observed as under:-

"10. It is submitted that all these witnesses are related and therefore their evidence cannot be relied upon. Assuming they are related to each other and, hence, interested witnesses, it is well settled that the evidence of interested witnesses is not always suspect. It has to be scrutinized with caution and can be accepted if it is found reliable."

21. Hence, statement of a relative or interested witness could not be thrown out only on the ground that the witness is relative or interested witness, rather, such statement is to be scrutinized with caution.

22. Hon'ble the Apex Court in ***Gopal Singh Vs. State of U.P. reported in (1978) 3 SCC 327*** has observed in paragraph no. 11 as under:-

"11. True, they were interested witnesses, related to the deceased. Far from undermining the circumstances of the case, it guaranteed the truth of their testimony. Being relations, they would be the least disposed to falsely implicate the appellant, or substitute him in place of the real culprit. In short, the murder charges had been proved to the hilt against the appellant."

23. As the law propounded by apex court statement of relatives and interested witnesses could not be thrown out only on the ground that witnesses are relatives. Rather such statement of the witnesses is to be scrutinized with caution. It is made clear that related or interested witnesses will never like to save the real culprit and falsely implicate some other innocent person. In this case alleged occurrence has taken place near the house of the deceased and presence of these witnesses are quite natural. Hence, no adverse inference can be drawn that witnesses are related and interested witnesses. In the backdrop of the legal situation now it is to be seen as to whether the prosecution has been succeed to prove the charges against the accused.

24. It was argued that the incident in question took place on a sudden fight without any premeditation and the act of the appellant hitting the deceased was committed in the heat of passion upon a sudden quarrel without the appellant having taken undue advantage or acting in a cruel or unusual manner. Firstly, there is not even a suggestion that the appellant had any enmity or motive to commit any offence against the deceased. Secondly, because the weapon used was not lethal nor was the deceased given a second blow once he had collapsed to the ground. The prosecution case is that no sooner the deceased fell to the ground on account of the blow on the head, the appellant and his companions took to their heels - a circumstance that shows that the appellant had not acted in an unusual or cruel manner

in the prevailing situation so as to deprive him of the benefit of Exception-4. Thirdly, because during the exchange of hot words between the deceased and the appellant, intention of the appellant and his companion was at best to belabour him and not to kill him as such. The cumulative effect of all these circumstances, in our opinion, should entitle the appellant to the benefit of Exception-4 to section 300 of the I.P.C.

25. In ***Surinder Kumar Vs. Union Territory, Chandigarh (1989) 2 SCC 217***, Apex Court held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries out of which only one proves fatal, he would be entitled to the benefit of the Exception provided he has not acted cruelly. This Court held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section 300 I.P.C. this Court observed:-

".....To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a curel manner. The cause of the quarrel is not relevant not is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly."

26. Considering the entire facts and circumstances of the case as well as after perusing the record in this appeal prosecution has successfully proved the charges levelled against the appellant beyond reasonable doubt. Learned trial court has also rightly recorded the finding of guilt against the appellant. I do not find any illegality in the impugned judgment and order of the trial court. So in these circumstances, the conviction is upheld against the appellant. So far as regard sentence is concerned appellant is the nephew of the deceased. Appellant only tried to pacify the matter between Mausam Ali and deceased and there were no pre-mediation or pre-arranged plan to commit crime and incident has taken place all of sudden in spur of moment. Appellant has no intention to commit such fatal assault on the deceased. Appellant was incarceration few months during trial as well as after judgment he is in jail continuously since 12.4.2018. **In these circumstances, it would be appropriate for the end of justice, sentence of five years rigorous imprisonment is reduced to three years rigorous imprisonment alongwith fine of Rs. 10,000/- with default clause and compensation to the widow / complainant (wife of deceased) as awarded by trial court.**

27. **Appeal is partly allowed on the point of sentence only.**

28. Appellant is in jail. The period spent by the appellant in jail shall be set off from the imprisonment awarded by this court. Learned trial court shall ensure compliance of this order.

29. Office is hereby directed to certify this order to the learned trial court immediately. The lower court record should also be transmitted forthwith.

(2020)03-05ILR A240
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.05.2020

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAVA, J.

Criminal Appeal No. 577 of 2009
&
Criminal Appeal No. 371 of 2009
&
Criminal Appeal No. 655 of 2009

Ram Pal ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Ashok Verma, Anil Kumar Pandey (Amicus) Pramod Kumar Shukla, Sanandan Kumar Misra, Soniya Mishra

Counsel for the Respondent:
G.A., M.L. Syal, Shashi Kiran Arya

A. Evidence law- Indian Evidence Act, Section 154 - Hostile witness- The common law principle, "falsus in uno falsus in omnibus' does not apply in Indian Law of Evidence- - The evidence of a Hostile Witness cannot be altogether rejected and the part of the evidence, which finds corroboration from other evidence, is admissible.

B. Evidence law- Indian Evidence Act- Section 3- Related or Interested Witnesses- Fact that the witnesses are related to each other is no ground for disbelieving their evidence- Relative should have no interest to falsely implicate the accused or protect the real culprit - There is no reason for related witnesses to falsely implicate the accused and let the real culprits go scot free. However, The Court has to treat the said evidence with caution.

C. Evidence law- Indian Evidence Act- Section 45- Opinion of Expert -The evidence of doctor is merely an opinion of expert under Section 45 of the Indian Evidence Act- The expert is a valuable witness when it becomes utmost necessary for the court to record his evidence to form an accurate opinion to determine that the offence was committed by the accused-The other evidences corroborated with the expert's witness' deposition fixes the guilt on the accused-The testimony of eye witness should be paramount unless medical evidence is so conclusive as to rule out even the possibility of eye witness's version to be true- If the opinion of the Doctor corroborates the ocular evidence then the accused can be safely convicted however the ocular version shall be granted primacy over the medical evidence unless the medical evidence overwhelmingly contradicts the ocular version.

D. Criminal Law- Code of Criminal Procedure- Section 313.- Opportunity to enable accused to explain incriminating circumstances emerging out from the evidence against them - All accused have availed the opportunity and commonly blamed the incriminating which came out from prosecution evidence to be "false implication by reason of enmity'-- Failure of the accused to provide explanation to the incriminating material against him would lead the Court to derive an adverse inference against him.

E. Criminal law- Indian Penal Code-Section 34 - Concept of joint liability- The proved facts circumstances and materials available on record attract the constructive liability enshrined in the provision of Section 34 of the IPC.- Section 34 Provides for joint liability of the accused where the common intention and participation of the accused in the commission of the offence is proved.
(Para 53,58,59,60,72,77,80,89,109,110)

Criminal Appeal dismissed.(E-3)

List of case cited:-

1. Dahari & ors. Vs. St. of U.P. (2012) 10 SCC 256

2. Vijendra Singh & ors. Vs. St. of U.P. (2017) 11 SCC 129

3. Darya Singh Vs. St. of Punj. AIR 1965 SC 328 (331)

4. Mahendra Singh Vs. St. of U.P. (2017) 11 SCC 129

5. Raghubeer Singh Vs. St. of U.P. (1972) 3 SCC 79

6. Maqsoodan Vs. St. of U.P. (1983) 1 SCC 218

7. Veer Singh Vs. St. of U.P. (2014) 2 SCC 455

8. Shyam Babu Vs. St. of U.P. (2012) 8 SCC 651

9. Brahma Swaroop Vs. St. of U.P. (2011) 6 SCC 288

10. Guru Singh Vs. St. of Raj. (2011) 2 SCC 205

11.Attar Singh Vs. St. of Maha. (2013) 11 SCC 719

12. Mrinal Das Vs. St. of Trip. (2011) 9 SCC 479

13. Anil Rai Vs. St of Bih. (2001) 7 SCC 318

14. St. of U.P. Vs. Harban Sahai & Ors. (1998) 6 SCC 50

15. Thaman Kumar Vs. St. of U.T of Chandi. (2003) 6 SCC 380

16. Reena Hazarika Vs. St. of Assam (2019) 13 SCC 289

17. Sheikh Sattar Vs. St. of Maha. (2010) 8 SCC 430

18. Jitendra Kumar Vs. St. of Har. (2012) 6 SCC 204

19. 'Barendra Kumar Ghosh Vs. King Emperor' (AIR 1925 P.C. 1)

20. Mohan Singh Vs. St. of Punj. AIR 1963 SC 174

21. Virendra Vs. St. of Har. (Manu/SC/1751/2019)

(Delivered by Hon'ble Vikas Kunvar Srivastava, J.)

These three criminal appeals have arisen out from the judgment of Trial Judge, the Additional Sessions Judge (Fast Track Court), No.7 in Sessions Trial No.431 of 1985, dated 03.02.2009, whereby the accused-appellants, namely Ram Pal, Lala Ram and Babu Ram are convicted of the offence punishable under Section 302 IPC read with Section 34 of the IPC and awarded with sentence to undergo life imprisonment with fine to the tune of Rs.5,000/- each. In case of failure to pay the fine, they are further sentenced to undergo imprisonment of six months.

1. The Criminal Appeal no.371 of 2009 is preferred by appellant, "Babu Ram', represented by Sri Kapil Mishra, Advocate assisting learned Senior designate Sri Jyotindra Mishra, Advocate. The criminal Appeal No.577 of 2009 is preferred by "Ram Pal', who is represented by learned counsel Sri Anil Kumar Pandey in the capacity of *Amicus Curiae*. The Criminal Appeal No.655 of 2009 is preferred by "Lala Ram' who is represented by learned counsel Sri U.P. Singh.

2. Initially, a Case Crime No.48 of 1985 was registered on 4.4.1985 at 7:30 p.m. in Police Station 'Behta Gokul', District 'Hardoi' under Section 302 read with Section 34 of the I.P.C. upon the information of Chhotey Lal, who is further examined by the Trial Court as prosecution witness no.1. The written complaint was directed against: (1) Raj Pal (2) Ram Pal, both sons of Bihari R/o Police Station Behta Gokul, District Hardoi (3) Lal Ram

(4) Babu Ram, both sons of Digga R/o village Paitapur, Police Station Pali, District Hardoi.

3. When the first chargesheet was submitted excluding the name of two named accused Lala Ram and Babu Ram by the Police before the Chief Judicial Magistrate, Hardoi, he committed the case, as the same was triable by the Sessions Judge on 17.07.1985. It comes out from the judgment of learned Trial Judge dated 02.01.1987 that Lala Ram and Babu Ram were summoned for trial along with the chargesheeted accused when the first informant chhotelal, during his examination in chief recorded during trial, reiterated the name of aforesaid accused along with other two accused named in the FIR, in exercise of power under the provision of Section 319 Cr.P.C. It also comes out from the judgment that during the sessions trial, accused Raj Pal died, therefore, the trial as against the deceased-Raj Pal was abated vide order dated 19.09.2000. Accordingly, the trial proceeded with three accused, namely, Babu Ram, Ram Pal and Lala Ram. All the three accused after having been convicted and sentenced by the impugned judgment and order of sentence dated 03.02.2009 by the Trial Judge, have preferred their appeal separately which are described hereinabove.

4. All the appellants are accused of the same criminal incident and were tried in the same sessions trial, therefore, evidences adduced against them are common. We heard the learned counsels on behalf of their respective accused-appellants. In our opinion, it would be proper to decide all the three appeals through a consolidated judgment so as to avoid anomaly and contrary finding on the same evidence.

5. The accused-appellants in the three appeals shall be addressed hereinafter as A1 (Babu Ram) in Criminal Appeal No.371 of 2009, A2 (Rampal) in Criminal Appeal No.577 of 2009 and A3 (Lala Ram) in Criminal Appeal No.655 of 2009.

6. The case in brief, as comes out from the written complaint submitted by Chhoteylal, the First Information Report founded thereupon and the evidences, is that on 04.04.1985 at about 7:30 p.m., Chottey Lal S/o Raggha Raidas R/o Village and Police Station 'Behta Gokul', District 'Hardoi' along with Saheb Lal, (injured) approached to the police station with a report written in his hand writing and signature informing thereby that his brother Ganga Ram was killed by the accused person, namely (1) Raj Pal, (2) Rampal both sons of Behari, R/o village and Police Station Behta Gokul, District Hardoi, (3) Lala Ram and (4) Babu Ram both sons of "Digga' residents of village Paitapur, Police Station Pali, District Hardoi. The report disclosed that on 04.04.1985 at about 6:00 p.m. when the deceased Ganga Ram, his brothers Chottelal (informant) and Saheb Lal, after sowing sugarcanes in their field were on their way to home and reached near the bridge over Sharda Canal, the accused persons namely Raj Pal, Lala Ram (A3), Babu Ram (A1) and Ram Pal (A2), suddenly plunged over the bridge from their hide, intercepted and asked Ganga Ram to halt. Raj Pal (dead) was armed with country-made pistol, A3 with gun, A2 with Lathi (Stick) and A1 was armed with a Gandasa (Chopper). The two accused persons carrying fire arms named above fired on "Ganga Ram' with their respective weapon due to which he got injuries and collapsed on the ground. Thereafter A1 and A2 inflicted on the body of Ganga Ram blows of Gandasa and lathi respectively. Saheblal in order to save Gangaram received lathi blows from A2 to ward him

off and was injured. When Chhotey Lal, the informant made hue and cry, "Vijay Pal' son of Laxman and "Kadhiley' son of Sukkha residents of same village Behta Gokul, who were coming on bullock-cart, ran towards the scene of crime. "Ganga Ram' who was severely injured due to profused bleeding succumbed to death on spot. On seeing the witnesses rushing up to the spot of incident, the accused persons fled away. The informant has also disclosed the motive behind the commission of crime by the accused-appellant, that a criminal prosecution was continuing against the deceased (Ganga Ram), along with the other co-accused, with regard to murder of "Digga', (father of both A1 and A3), wherein though Sessions Court recorded conviction against all the accused, but in appeal preferred by deceased in the High Court he was released on bail during the pendency of appeal. He further disclosed that father of Raj Pal, namely, Bihari had also lodged a criminal case under Section 307 I.P.C. against deceased Ganga Ram wherein he was acquitted. Because of these reasons, the accused hatched enmity with deceased Gangaram and in vengeance, they attacked Ganga Ram and done him to death on spot. He approached to the police station after the arrival of other family members, leaving dead body in their supervision.

7. It would be important and relevant to take notice of the fact that on receiving the written report from Chhotey Lal, (the informant), the officer in charge of the Police Station registered FIR and the special report was sent to the concerned Magistrate about the commission of the offence. Site map was prepared. Inquest proceeding was done on the spot where the dead body of "Ganga Ram' was lying since after the incident and ultimately the dead body was sent for post-mortem to the mortuary. From the stage of receiving the written report of the incident upto sending off the dead body for post-mortem, the investigation was done by Sub Inspector 'Ram Ruchi Arya' and thereafter further investigation upto the stage of submission of chargesheet before the concerned Magistrate was done by S.I., Jitendra Nath Singh S.H.O. posted in the Police Station with the first named I.O. The subsequent Investigating Officer, named herein-above, submitted three chargesheets. Out of the four named accused persons in the FIR viz Raj Pal, Lala Ram, Ram Pal and Babu Ram, the first chargesheet was submitted only against Raj Pal and Ram Pal under Section 302 IPC read with Section 34 IPC. Second chargesheet thereafter was submitted against two strangers namely Pramod Kumar and Rameshwar under Section 302 IPC read with Section 34 of the IPC. Lastly, a third chargesheet was submitted by the said Investigating Officer against one more stranger to the FIR, "Devi Dayal' in the same incident under Section 302 IPC read with Section 34 IPC. In all the three chargesheets the named accused Lala Ram and Babu Ram were not included. Accordingly, the Trial Judge in the matter of murder of Ganga Ram as reported in FIR dated 04.04.1985 by Chhotey Lal, on 19.11.1985 tried along with Raj Pal, Ram Pal the additional chargesheeted accused also Pramod and Rameshwar charging them under Section 302 IPC read with Section 34 IPC. Thereafter once again the charge was framed against Devi Dayal also on 28.07.1986. On 28.07.1986, when trial began, on the denial from charges by the aforesaid accused persons, the informant, Chhotey Lal was produced as PW-1 by the prosecution for examination on oath before the court. He firmly said about the involvement of Raj Pal, Ram Pal alongwith

Babu Ram and Lala Ram who were named by him in the FIR. He firmly denied the involvement of Pramod, Rameshwar and Devi Dayal and even stated not to know them. Therefore, the trial Judge exercising its power under Section 319 Cr.P.C. summoned the accused Lala Ram and Babu Ram, who were dropped out from the chargesheet by the Investigating Officer, for trial alongwith the chargesheeted accused persons. Consequent thereupon, the charge of committing offence under Section 302 IPC read with Section 34 IPC with regard to the murder of Ganga Ram with the other two named accused was framed against Babu Ram and Lala Ram on 11.03.1987.

8. The record reveals that during trial accused Pramod Kumar was throughout absconding from last 15 years, therefore his case was separated subjected to the proceedings under Section 299 of the Cr.P.C. Further on the report submitted by the concerned police station about the death of Devi Dayal, his case was abated. Likewise, receiving report about the death of Rameshwar and Raj Pal respectively the proceedings against them were also abated. Thereafter three surviving accused namely Lala Ram (A3), Babu Ram (A1) and Ram Pal (A2) were proceeded with and subjected to further trial.

9. The prosecution to prove its case against the accused-appellants produced eight witnesses and documents prepared during the process of investigation which were proved by their respective witnesses in the court during their examination. For easy reference, the respective witnesses and documents proved by them marked as Exhibits in the course of trial are given hereunder in the appended chart.

PW-1, Chhotey Lal, the informant	Proved his written report submitted in the Police Station Behta Gokul.	Exhibit Ka-1
Pw-2, Dr. Surendra Singh	Proved the post-mortem report, submitted after autopsy of dead body of deceased Ganga Ram	Exhibit Ka-2
PW-3, Vijay Pal, witness of fact		
PW-4, Dr. P.K. Gangwar	Who examined on the reference of Investigating Officer, the injury sustained by Saheb Lal	Exhibit Ka-3
PW-5, Sunder Lal, the Head Muharrar, posted in PS Behta Gokul when the incident was reported	He proved the First Information Report and entry of the same in G.D. the Nakal report Letter for medical examination of injured Saheb Lal to District Hospital Lucknow and injury report of Saheb Lal	Exhibit Ka-4 and Ka-5 Exhibit Ka-6 respectively
PW-6, Saheb Lal	The injured witness of fact	
PW-7, Rameshwar Shukla, Constable posted in P.S. Behta Gokul on 04.04.1985	To whom the dead body of deceased Ganga Ram after having been sealed was handed over for carrying the same to Post-mortem House. He submitted his personal affidavit to prove the said fact not cross examined.	
Lastely, PW-8, Ram Ruchi Arya, Sub Inspector, posted in PS Behta Gokul at the time of incident.	He did the investigation from the stage of registering the FIR upto the stage of sending the body for post-mortem and also prove the inquest report	Exhibit Ka-7 Exhibit Ka-8 to Ka-12 Exhibit Ka-13 Exhibit Ka-14 Exhibit Ka-15

	Challaned Lash along with letter to CMO along with Photos
	The empty cartridge recovered from the spot of incident prepared the memo thereof on the spot proved in the trial court
	The plain soil and blood stained soil collected from the spot, sealed, prepared memo thereof and proved in the court.
	Prepared site map and proved in the court
	After stage of sending the body of deceased for post-mortem of sending the body of deceased for Post-mortem, the subsequent Investigating Officer, Jitendra Nath Singh who has submitted three chargesheets, referred hereinabove, was also proved by PW-8, being acquainted with the handwriting and signature of the aforesaid Investigating Officer as PW-8 was working with him during trial at PS Behta Gokul. The chargesheets were proved by him

10. The trial Judge after recording evidence of the aforesaid prosecution witnesses nos.1 to 8 called the accused-appellants to submit their explanation, if any, against the incriminating facts and circumstances proved on evidences against them under Section 313 of the Code of Criminal Procedure 1973. All the three accused-appellants stated the said evidences false and concocted to implicate them due to enmity. They proposed to produce witnesses in their defence. Consequent thereupon, two witnesses were examined namely, Sushil Bajpayee (DW-1) and Gaya Prasad (DW-2). Sushil Bajpayee supported the plea of alibi of A1 (Babu Ram) deposing that on the date, time and place of incident as reported by PW-1 in his written report and FIR dated 04.04.1985, Babu Ram was not at the spot of incident but was on duty. DW-2 Gaya Prasad stated on oath that he identified three unknown assailants in the District Jail Hardoi who committed the crime with Raj Pal. The Trial Judge evaluated the evidence of aforesaid defence witnesses but did not find the same credible, reliable and trustworthy therefore, discarded. The learned Trial Judge dealing with issues as to the trustworthiness and credibility of the prosecution witnesses held them reliable for recording conviction of the accused-appellants. Learned Trial Judge in his judgment has elaborately discussed both factual and legal aspects of the prosecution case and that of the defence case and held that the prosecution has been successful in proving its case with all certainty beyond all reasonable doubts. The learned Trial Judge thus reached at conclusion that the murder of Ganga Ram was committed by the accused persons named in the First Information Report and none else, therefore, recorded conviction against them for the offence punishable under Section 302 IPC with the aid of Section 34 IPC. Accordingly, awarded the punishment.

11. The learned counsel made submissions on behalf of their respective accused appellants separately. We heard their submissions anxiously devoting several days. We heard the learned

Additional Government Advocate for the State and thereafter awarded opportunity of second round of submission in reply to the respective counsels of the appellants. We think it proper and necessary to give a short account of the arguments preferred before us by the learned counsels for the appellants and the respondent State. We perused the voluminous record so as to move ahead for decision on the moot issues involved in all the abovesaid three criminal appeals through a consolidated judgment.

12. Considering the facts and evidences led before the learned Trial Judge and argued before this court also the prosecution case involves four accused, named in the First Information Report dated 04.04.1985, Exhibit Ka-4. The named accused, four in number; are respectively Raj Pal (names), out of whom Raj Pal died during trial. The proceeding abated against him but so far as the role of Raj Pal alongwith other accused as participant in commission of the crime is concerned, it is necessary to be considered in context that accused-appellants are convicted under Section 302 IPC read with section 34 IPC. In other word they are held to have committed the homicide of Ganga Ram in furtherance of their common intention. We are of the opinion to examine and re-appreciate the evidence in view of the above so as to find out whether the prosecution has been successful in proving its case beyond all reasonable doubts. We have to consider also the effect of induction of three other persons as accused by the second Investigating officer J.N Singh namely Pramod Kumar, Rameshwar and Devi Dayal in the context that neither in the First Information Report they were named by the informant nor any of the prosecution witness named them as participant in commission of crime during trial.

Arguments submitted by learned Senior designated Sri Jyotindra Mishra, Advocate assisted by Sri Kapil Mishra , Advocate for and on behalf of the accused-appellant A-1, namely, Babu Ram

Contention as to Ingenuinity of the FIR

13. Learned counsel opened his arguments with condemnation of the First Information Report alleging the same ante-timed and ante-dated as the information received from PW-1 (the informant) Chhotey Lal was got reduced into writing after consultation with the Investigating Officer. The purpose behind this was illustrated by contending the fact that only Raj Pal and Ram Pal were charge-sheeted after investigation alongwith two others, namely, Pramod Kumar and Rameshawar in the chargesheet submitted by the Investigating Officer before the Magistrate concerned. The name of Babu Ram and Lala Ram was added on the consultation with informant and accordingly the First Information Report was styled and registered naming them in the written report and FIR which is ante-timed and ante-dated. He further contended that the statements of prosecution witnesses are suffering from serious discrepancies as to the fact, the weapon, namely, Gandasa (Chopper) allegedly held and used by A-1 in the course of commission of offence. PW-1 and PW-6 assigned to A1 the role in inflicting blows of Gandasa, whereas the PW-3 assigned the role to A-1 of having Lathi in his hand while committing the offence in question. Therefore, the witnesses loose their credibility by virtue of such kind of serious discrepancy in their narration as to the commission of offence by the accused-appellant, A-1.

Discrepancies in the testimony of eye witnesses and the reasons not to believe them.

14. Learned counsel further assailed the credibility and trustworthiness as well as the truthfulness of the witnesses on the ground that their oral statement as a witness of incident is not corroborated with the medical evidence. He pointed out towards the Post-mortem report of deceased Ganga Ram which referrers the injuries no.1 to 7 on his body, as lacerated injuries. A lacerated wound which in the opinion of doctors PW-2 who did autopsy on the dead body of Ganga Ram, would have been caused from an article having blunt edge. In the post-mortem report, Exhibit Ka-2, no incise wounds are reported on the body of deceased Ganga Ram, therefore, probability of using "Gandasa' by accused-appellant A-1 is ruled out. As such the witnesses PW-1 and PW-6 are falsely implicating the accused-appellant A-1, they are not reliable witnesses.

15. He has further submitted that PW-3, Vijay Pal has been declared hostile witness by the prosecution as he did not support the prosecution case against the accused-appellant A-1 of his having used "Gandasa' in the course of occurrence of killing Ganga Ram. He further drew attention towards the statement of PW-3 in cross examination by prosecution in Para-4 to the effect that he could not see anyone inflicting the blow of Gandasa because he was crying for rescue at that time. Further in his cross examination done on behalf of accused-appellant A-1, in Para 7 he again asserted that he could not see anyone inflicting the blow of Gandasa. He further assigned the role to the accused-appellant A-1 of having Lathi and using the same during the incident by inflicting blow of Lathi upon the body of Ganga Ram, (deceased).

Doubt as to the presence of PW-1 and PW-6 on the spot of incident

16. Learned counsel doubted upon the presence of PW-1 and PW-6 at the time of incident on 04.04.1985. He argued the said two witnesses were not present at the spot of incident and did not see anything and have only told a lie to poise their vengeance against the accused-appellant A-1 due to prolonged enmity.

Doubt as to PW-6 being injured witnesses and alleging him to be a planted witnesses

17. Learned defence counsel further argued that witness Saheb Lal (PW-6) is a planted witness. Neither he is an eye witness nor a witness injured in the occurrence. His injuries were self inflicted by him so as to masquerade him an eye witness present during the incident to falsely implicate the accused-appellant A-1. To fortify his argument, he emphasized on the fact that the medical examination of his alleged injuries were not made promptly but the same was procured in consultation with Investigating Officer on 05.04.1985 in District Hardoi. On the basis of above contention, learned counsel assailed the judgment and order of sentence impugned in this appeal that despite the fact that prosecution failed to prove its case by reliable witnesses, the learned Trial Judge committed serious error in appreciating the evidence.

Plea of alibi taken in defence of ''A1'

18. To prove his allegation against the truthness of prosecution case and particularly against the prosecution witnesses, learned defence counsel relied on the statement of DW-1, Sushil Bajpayee. The DW-1 has deposed that 'Babu Ram Verma' was on duty in the Board Examination during second inning

on 04.04.1985, as such he gave evidence in support of plea of alibi so as to show the prosecution witnesses implicating falsely the accused-appellant A-1 who actually was not present on the spot of incident on 04.04.1985 at the relevant time of occurrence.

Arguments of learned counsel Sri Anil Kumar Pandey, *Amicus Curiae* for and on behalf of the accused-appellant A-2, namely, Ram Pal.

False implications

19. Learned *Amicus Curiae* assailed the judgment of conviction and sentence against Ram Pal on the ground that he is arraigned in the incident for his being brother of the co-accused Raj Pal (died during the trial). He emphatically relied on statement on oath of PW-1, Chottey Lal to argue that he himself admitted in the statement as to his running away to save his life from the spot. As such the learned *Amicus Curiae* argued that how one can claim himself an eye witness when he left the spot of incident under the fear of his life, when the occurrence just began to occur.

No evidence against A-2

20. He argued that nothing incriminating circumstance against A2 was stated to him when he was called under Section 313 Cr.P.C. to explain. He further emphasized that prosecution has not proposed and adduced evidence against the accused-appellant A-2 to prove his presence on the spot of crime with "lathi'. On bare perusal of question asked to him no weapon is assigned to the accused-appellant A-2 which he was alleged to hold and used in the course of commission of crime. He argued that A2 in his explanation to the question no.13 during examination under Section 313 Cr.P.C. has submitted that the informant, PW-1 and his family members were having enmity with him for the reason, he (accused-appellant A-2) has been a witness in prosecution against Ganga Ram with regard to murder of Digga, the father of accused-appellant A-1 (Babu Ram). The learned trial Judge has not appreciated the evidence correctly and on false implication though the prosecution has not been successful in proving it's case beyond all reasonable doubt, has convicted and sentenced the A2 in the matter of killing of Ganga Ram.

Arguments submitted by learned counsel Sri U.P. Singh, Advocate in Criminal Appeal No.655 of 2009, Lala Ram Vs. State of U.P. for and on behalf of accused-appellant A-3.

Objection as to reliability of prosecution witness of fact

21. Most of the arguments done by learned counsel are as to the falsity of the prosecution case and the prosecution witnesses being untrustworthy and not worthy of reliance for recording a conviction for the offence of murder of "Ganga Ram' are quite similar to that submitted in putting the case of accused-appellant A-1.

22. Learned Advocate Sri U.P. Singh further raised the issue of trustworthiness of the witness of the prosecution witnesses of fact, namely, PW-1, Chhotey Lal, PW-6, Saheb Lal on the ground of their being "Related' and "interested' as they are real brothers of deceased-Ganga Ram, whereas the prosecution witness no.3 is also related with the deceased-Ganga Ram being his cousin brother. On the basis of this contention, he submitted that in no way the

said witnesses may be termed as independent witnesses or disinterested witnesses, rather they stand on the footings of interested witnesses having inimical relation with the accused-appellant, therefore, their evidence before the court required thorough care and caution while considered for reliance so as to record conviction against the accused but the learned Trial Judge failed to do so.

Absence of P.W-3 on spot

23. Learned counsel further argued that the informant, PW-1, Chottey Lal was not on the spot of incidence and the written report filed by him i.e. Exhibit Ka-1 was prepared and submitted in the police station with prior consultation and pre-plan to falsely implicate the accused-appellant A-3.

False implication

24. Learned counsel further drew attention of the court towards the fact which we ourselves have noticed in one of the preceding paras, that the investigating officer submitted the first chargesheet excluding Lala Ram and Babu Ram and a final report of no evidence was submitted with regard to them. Chargesheet was submitted dropping their names against rest of the named accused in the FIR namely Raj Pal and Ram Pal. He further submitted that during the investigation, name of two other persons came into light, namely, Pramod and Rameshwar, thereafter one Devi Dayal also came into picture. The case of Pramod could not proceed further in the trial as he was absconding from last 15 years, whereas Devi Dayal and Rameshwar died during trial, therefore, prosecution continued against three surviving accused persons. One of the named accused is Lala Ram (A-3). The conviction recorded not only the role of the accused-appellant but also his presence accompanied with other co-accused was necessary to have been proved, which the prosecution failed to do.

Eye witness's evidence is not in consonance with medical evidence

25. Learned counsel further argued that none of the prosecution witnesses are credible and genuine. The oral account given by the witnesses as to the manner and mode allegedly adopted by A-3 in committing the offence of killing the deceased "Ganga Ram' is not in consonance with the medical evidence. The weapon assigned to the accused-appellant A-3 is a gun whereas a country-made pistol in the hand of Raj Pal (died during trial). The oral account given by the prosecution witnesses as to the distance from the victim Ganga Ram of the accused having firearm his direction from the victim and relatively location of firearm wound on the body of the deceased are not in consonance with each other. The nature of wound does not support the eye witnesses' account of incident and, as such, the witnesses proved themselves not present on the spot of incidence and, therefore, they cannot be said to have seen anything on the spot. Like the learned counsel for the appellant A-1, learned counsel for the appellant A-3 also emphasized on the discrepancies that occurred in the statements of PW-1 and PW-2 as to the manner of attack and weapons said to be used by them. The declaration of hostility of PW-3 is also taken into consideration by learned counsel for the appellant A-3 illustrating inconsistencies between the prosecution witnesses with regard to the use of weapon. In doing so, learned counsel stepped into the capacity as counsel for A-1 with regard to use of Gandasa by him, otherwise the

case of accused-appellant A-3 for whom the learned counsel appeared and argued is with regard to the use of gun in the couse of incident of killing Ganga Ram making firearm injury. He further stressed on the point of enmity which induced the informant PW-1 and other prosecution witnesses to falsely implicated the accused -applicant.

Ingenuinity of FIR

26. Learned counsel lastly argued that FIR is ingenuine. The incident is said to have happened on 6:00 p.m. on 04.04.1985. The police station was only two kilometers away from the place of incidence even then PW-1 and PW-6 reached the police station at 7:30 p.m. The delay is not explained. It is, therefore, the FIR is post-dated and ante timed, registered after consultation with the police officer. He summed up his arguments with the fact that there is a proved enmity between the informant, his family members and the accused-appellants. In view of the proved enmity, the witness who are not only relatives of the deceased Ganga Ram but also stands on the footings of interested witnesses, their evidence without proper scrutiny, care and caution and appreciation, could not be taken into reliance for recording conviction against the accused-appellants.

Defence witness not considered

27. In supporting his contentions as to the legal requirement of considering the testimony of defence witnesses and evidentiary value thereof. Learned counsel Sri U.P. Singh, Advocate referred the judgment of the Hon'ble Supreme Court in ***State of Haryana Vs. Ram Singh*** with ***Rai Saheb and Anr. Vs. State of Haryana*** reported in ***(2002) 2 SCC 426***. When it is held elaborately in para 19, the evidence tendered by defence witnesses cannot always be termed to be a tainted one. The defence witness are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and trustworthiness ought to be attributed with the defence witnesses at par with that of the prosecution witnesses.

Argument by Sri Chandra Shekhar Pandey, the learned Additional Government Advocate for and on behalf of the State:-

28. Learned A.G.A countered the objection and upon objurgation done by the respective counsels as to the weakness of the prosecution case, witnesses and evidences of the three appellants, he submitted categorically on each and every point. First of all, he clarified that the incident happened in course of the day, when there was sufficient day light at 6:00 p.m. in the evening of 04.04.1985, as the witnesses could have faced no difficulty in properly seeing the incident taking place and identify the accused. They did so, with all certainty. The informant named the accused in the FIR as they were well known to him as well as to other witnesses of fact. He further submitted that the First Information Report was lodged promptly by the police on receiving written complaint from the informant, Chhotey Lal (PW-1) on 7:30 p.m. He read over the relevant paras extracted from the statement recorded by the Trial Judge of PW-1 and other witnesses like Investigating Officer and Head Moharrir (respectively PW-8 and PW-5) as well as another witness of the fact, who was injured in the course of incident, (PW-6, Saheb Lal), to explain the gap of time between time of occurrence (6:00 p.m.) and lodging of the FIR in the

Police Station (7:30 p.m.) while the distance of police station from the spot of incident was two kilometers. He submitted that the time spent by PW-1, the informant is well explained from the evidence as firstly he waited his family members and the village Chaukidar thereafter handing over the dead body of Ganga Ram, he proceeded along with his brother, PW-6 Saheb Lal towards the police station and reached there within a reasonable time. He bought plain paper from a nearby shop, wrote the report in his handwriting and then handed over the same to the officer on duty in the police station.

29. Learned A.G.A vehemently denied the argument as to the FIR being ante-timed and ante-dated, quoting the statement of Head Moharrir Sunder Lal (PW-5) that immediately after registering the First Information Report at 7:30 p.m., the special report was sent at 8:40 p.m. on the same day to the concerned Magistrate. He further quoted from the statement of PW-5 that after registering the First Information Report, the police party moved to the spot where the dead body of the deceased-Ganga Ram was lying near the bridge over Sharda Canal in village Karuna Kheda. At the spot necessary inquiry was done. The inquest proceeding before 'Panchas' of dead body was performed and prepared the inquest report. Quoting from Exhibit Ka-7 (the inquest report) he argued that the inquest proceeding started at 2130 hours (9:30 p.m. in the evening) and continued upto 2230 hours (10:30 p.m.) on the same day i.e. 04.04.1985, after the completion of inquest proceeding the dead body was sent for post-mortem. He further added that the Exhibit Ka-7 itself bears the Case Crime No.48 of 1985, under Section 302 IPC registered in Police Station Behta Gokul on 7:30 p.m. and even the memo along with the dead body, sending for the same to post-mortem, bears the said case crime number. All these documents are duly proved by PW-5 and PW-8 in the course of their examination before the Trial Judge and no cross-examination in this regard was done by the counsels for the defence, therefore, the statements with regard to registration of FIR, it's time and date stand un-controverted and even sufficiently corroborated by the proof of documents like Exhibit Ka-1, Exhibit Ka-4 etc. The aforesaid Exhibit Ka-1, Exhibit Ka-4, First Information report and Exhibit Ka-5, FIR and copy of the FIR had been furnished to the informant on the same day. Learned A.G.A. submitted that the arguments advanced by learned counsels for the appellants as to the FIR being ante-dated and ante-timed is baseless.

30. Learned Additional Government Advocate further submitted that the First Information Report was lodged promptly and quickly by the informant, Chhotey Lal (PW-1) clearly naming the accused persons who were four in number, namely, Raj Pal, Lala Ram, Ram Pal and Babu Ram and no one else in their aid in the commission of offence. The first Investigating Officer, PW-8, SI, Ram Ruchi Arya had promptly registered the FIR on the basis of written report then there was no room for any consultation or dictation on the part of the investigating officer on duty from the stage of lodging of the FIR up to the stage of sending the dead body of deceased-Ganga Ram for postmortem. All the proceedings under investigation were done by Ram Ruchi Arya and thereafter when the investigation was taken over by the S.H.O. himself namely J.N. Singh. He on his own when submitted chargesheet arraigned Ram Pal and Raj Pal only and excluded the named accused persons Babu Ram and

Lala Ram. Furthermore by way of second charge sheet, he added the names of Pramod and Rameshwar while they were never named by the informant or any other witness of fact during the investigation. He further added the name of Devi Dayal whose name was also not given in the first information report nor disclosed by any witnesses of fact during the investigation. The actual culprits named by the informant could only be arraigned after the examination of PW-1, the informant, Chhotelal before the Trial Judge, when the witness during his examination in chief gave the whole account of the incident took the name of Lala Ram and Babu Ram involved in the incident as reported by him on 04.04.1985 at 7:30 p.m. upon which the FIR was registered, the learned Trial Judge summoned both aforesaid persons for trial along with other accused already chargesheeted by the second investigating officer. Charges were framed afresh against the summoned accused Lala Ram and Babu Ram and evidence were recorded de novo by the Trial Judge.

31. Learned A.G.A submitted that when the prosecution case was clearly confined with the role of four accused, named in the written report, (Exhibit Ka-1) and in the FIR registered thereupon as (Exhibit Ka-4), then induction of Pramod Kumar, Rameshwar and Devi Dayal was done with the malafide on the part of second Investigating Officer with ulterior motive, however, second Investigating Officer could not be traced out for examination before the court and the chargesheet submitted by him was proved in the court by the investigating officer, Ruchi Ram Arya, PW-8.

32. Learned A.G.A. further submitted that the presence, the role assigned to the respective accused, the weapons used by them, the time of occurrence and the presence of ocular witnesses, all are proved by the witness of facts, PW-1, PW-3 and PW-6 without any contradiction, inconsistency and doubt. Further, the narration of the factual aspect of the incident is stated by the witnesses PW-1, PW-3 and PW-6, finds support with the independent corroborative evidence like post-mortem report (Exhibit Ka-2), injury report of PW -6 (Exhibit ka-3), site plan (Exhibit Ka-15) and other formal witnesses.

33. Countering the arguments of learned counsel for the appellant A-1 (Baburam) learned A.G.A submitted that the doubt raised as to the weapon (Gandasa) used by the accused Babu Ram in the course of the commission of the incident is proved by the witness of fact, namely, PW-1 and PW-6. Moreover, the inquest report, Exhibit Ka-7 also supports as during the enquiry of the dead body by the police officer and other witnesses of inquest there were incised wounds on the body of deceased-Ganga Ram.

34. Learned A.G.A. further submitted that so far as the presence of the A-1 on spot in the course of the occurrence is concerned, even the witness PW-3, Vijay Pal, who was declared hostile by the prosecution, has stated about his presence and involvement in the commission of offence, though the weapon used by him is differently stated as "Lathi'.

35. Learned A.G.A further submitted on the objection as to the non-examination of one of the named witness "Kadhiley' by the prosecution. He argued that it is the wisdom and discretion of the prosecution to propose by what witness and evidence it

has to prove the case. He further drew attention towards the provision of the Indian Evidence Act, 1872 Section 134 of the Act emphasizes on quality of the witness and not upon the quantity of witnesses. If the prosecution has no trust upon the bonafide of witnesses then it is not binding upon it to produce such witness for examination before the court. It is proved by evidence of PW-1 that the said "Kadhiley' was in the company of accused-appellants, therefore, he was not supposed to give a true and real account of incident, if proposed to be examined before the court in trial. As such, the argument of non examination of "Kadhiley' as witness of prosecution is of no avail.

36. Learned A.G.A. concluded his argument saying that prosecution has been successful in proving its case on the basis of statement of witnesses, the materials produced and proved before the court beyond all reasonable doubts, therefore, there was sufficient evidence and corroborating materials before the Trial Judge for recording conviction of the named accused in the first information report, lodged by the informant, PW-1, for the offence of murder of Ganga Ram punishable under Section 302 IPC with the aid of Section 34 IPC. Accordingly sentence of life imprisonment and fine vide judgment dated 03.02.2009 is just and proper. As such there is no error of fact or law in the judgment and the same deserves to be confirmed.

37. With the conclusion of his argument, the learned A.G.A. cited case laws, he relies, in supporting his contentions. Learned A.G.A. gave reference of judgement of Hon'ble Apex Court in ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat (1983) 3 SCC 217***. Though facts of the case were with regard to sexual harassment by the accused-appellants of two minor girls, but the learned A.G.A. cited the case carving out the general principle laid down by their Lordships of the Supreme Court on minor inconsistencies in and between the statements of witnesses of fact. The relevant reasons as enumerated contained in Para-5 of the judgment. It is held as under:-

"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprised. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-

sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him -- Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

38. Learned A.G.A further posed reliance in this regard on ***Shivaji Sahab Rao Bobade Vs. State of Maharashtra (1973) 2 SCC 793 (801)*** para 8, which reads as under:-

"8. Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. The learned Sessions Judge has at some length dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the post-mortem certificate. Certainly, the court which has seen the witnesses depose, has a great advantage over the appellate Judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial Judge of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naivete and clever equivocation, manipulated conformity and ingenious unveracity of persons who swear to the facts before him. Nevertheless, where a Judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence, the court of appeal is in as good a position to assess or arrive at legitimate conclusions as the Court of first instance. Nor can we make a fetish of the trial Judge's psychic insight."

He also relied on ***Mahendra Vs. State of Tamil Nadu (2019) 8 SCC 359.*** He further cited para 12.4 from the judgment of Apex Court in ***State of Karnataka Vs. Savarnamma (2015) 1 SCC 323*** arguing the rule of benefit of doubt, thus reads as under:-

"12.4. State of Haryana v. Bhagirath [(1999) 5 SCC 96 : 1999 SCC (Cri) 658] : (SCC pp. 100-01, paras 8-11)

"8. It is nearly impossible in any criminal trial to prove all the elements

with a scientific precision. A criminal court could be convinced of the guilt only beyond the range of a reasonable doubt. Of course, the expression ''reasonable doubt' is incapable of definition. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge.

9. Francis Wharton, a celebrated writer on criminal law in the United States has quoted from judicial pronouncements in his book Wharton's Criminal Evidence (at p. 31, Vol. 1 of the 12th Edn.) as follows:

''It is difficult to define the phrase "reasonable doubt". However, in all criminal cases a careful explanation of the term ought to be given. A definition often quoted or followed is that given by Chief Justice Shaw in the Webster case [Commonwealth v. Webster, 5 Cush 295 : 59 Mass 295 (1850)] . He says: "It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that consideration that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."'

10. In the treatise The Law of Criminal Evidence authored by H.C. Underhill it is stated (at p. 34, Vol. 1 of the 5th Edn.) thus:

''The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in the minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt.'

11. In Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : (1974) 1 SCR 489] this Court adopted the same approach to the principle of benefit of doubt and struck a note of caution that the dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence demand special emphasis in the contemporary context of escalating crime and escape. This Court further said: (SCC p. 799, para 6)

''6. ... The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt.'"

39. On point of defective investigation that for certain defect in investigation the accused cannot be acquitted, learned A.G.A. relied on para 10, 11 and 12 of ***Hema Vs. State through Inspector General of Police AIR 2013 SC 1000 (1004):-***

"10. It is settled law that not only fair trial, but fair investigation is also part of the constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Accordingly, investigation must be fair, transparent and judicious and it is the immediate

requirement of the rule of law. As observed by this Court in Babubhai v. State of Gujarat [(2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336] the investigating officer cannot be permitted to conduct an investigation in a tainted and biased manner. It was further observed that where non-interference of the court would ultimately result in failure of justice, the court must interfere. Though reliance was placed on the above decision in Babubhai case [(2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336] by the appellant, it is not in dispute that in that case, the High Court has concluded by giving detailed reasons that the investigation was totally one-sided based on mala fides. Further, in that case, the charge-sheets filed by the investigating agency in both the cases were against the same set of accused. This was not the situation in the case on hand. Though the State Crime Branch initiated investigation, subsequently, the same was taken over by CBI considering the volume and importance of the offence.

This extract is taken from Hema v. State, (2013) 10 SCC 192 : (2013) 4 SCC (Cri) 755 : 2013 SCC OnLine SC 20 at page 199

11. In this regard, Mr Raval, learned ASG by drawing our attention to the relevant provisions of the Delhi Special Police Establishment Act, 1946 submitted that the course adopted by CBI is, undoubtedly, within the ambit of the said Act and legally sustainable.

This extract is taken from Hema v. State, (2013) 10 SCC 192 : (2013) 4 SCC (Cri) 755 : 2013 SCC OnLine SC 20 at page 199

12. Section 5 of the said Act speaks about extension of powers and jurisdiction of special police establishment to other areas. Section 5 of the Act is relevant for our purpose which reads as under:

"5.Extension of powers and jurisdiction of special police establishment to other areas.--(1) The Central Government may by order extend to any area (including Railway areas), in a State, not being a Union Territory the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under Section 3.

(2) When by an order under sub-section (1) the powers and jurisdiction of members of the said police establishment are extended to any such area, a member thereof may, subject to any orders which the Central Government may make in this behalf, discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of a police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police station.

(3) Where any such order under sub-section (1) is made in relation to any area, then, without prejudice to the provisions of sub-section (2) any member of the Delhi Special Police Establishment of or above the rank of Sub-Inspector may subject to any orders which the Central Government may make in this behalf, exercise the powers of the officer in charge of a police station in that area and when so exercising such powers, shall be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station."

To counter the argument of defence with regard to injury wounds and

weapon, learned A.G.A. relied on ***Sukhdeep Singh Vs. State of Uttar Pradesh & Anr. (2010) 9 SCC 177*** wherein Honorable Supreme Court has held that it would be impossible for any witness to give a categorized statement as to the posture that deceased or assailants were holding at the time when firing incident happened. He further relied on ***Mallikarjun Vs. State of Karnataka (2019) 8 SCC 359*** to stress the contention that medical evidence when may cast doubt on the ocular testimony would prevail unless medical evidence rules out such possibility of injury being caused by in the manner stated by the prosecution. He relied on ***Dinesh Yadav vs State of Jharkhand (2017) 174 ADC 76*** as the defence did not examine the investigating officer with regard to lacerated wounds.

40. After hearing the learned counsels for the respective appellants, learned Additional Government Advocate for the State and even the arguments advanced in reply to the arguments of learned A.G.A., we in course of the hearing the arguments traversed through the evidences, both oral and documentary brought before the court with regard to the material facts as to the involvement and role of the accused-appellants have formulated the following two points of determination as to reach at conclusion for decision in the appeal, which are as follows:

(i) Whether the prosecution has been successful in proving its case against the accused, named in the FIR dated 04.04.1985 beyond all reasonable doubts?

(ii) Whether the accused-appellants are equally liable jointly for the conviction under section 302 IPC with regard to the killing of Ganga Ram in the incident occurred on 04.04.1985, as reported in the FIR dated 04.04.1985 irrespective of their specific role manner of involvement and weapons assigned to them by prosecution.

Date, time and place of the incident

41. The written report submitted by the informant (PW-1) and proved before the Trial Judge as Exhibit Ka-1 itself mentions the date of incident on 04.04.1985 in the evening at 6:00 p.m. when the deceased "Ganga Ram' along with his younger brother namely Chhotelal (is found the PW-1) and Saheblal (PW-6) after sowing in their field seeds of sugarcane and just reached the bridge over Sharda Canal on the way to their home. Further during examination on oath on 20.12.1986 PW-1 stated that the said bridge over Sharda Canal is situated from their house in Behta Gokul in west at about one and a half kilometers. He further stated the bridge is in the village Karauna Kheda near the village "Behta Gokul' PW-1 further clarified in his statement that their field from where after sowing the sugarcane seeds they were returning back home, is known as "Jhabra' and is far from the said bridge about one and half "furlong' in north west direction (generally furlong is used for measuring distance, especially on a horse racing track; one eighth of a mile; 220 yards or 201 meter). The site map prepared and proved in the court (Exhibit Ka-15) by the investigating officer (PW-8) is relevant to exactly understand the location. In the said map the way leading to the home village of deceased Ganga Ram and his brothers (PW-1 and PW-6) passing through the bridge over Sharda Canal in a direction from east-west. The bridge is shown lying over the canal running from north to south direction. As such the "Bridge' has two side

boundary one at north and another at south. The place of incident is shown about to the North boundary wall of the bridge at it's western end marked as A-1.

42. On reversion to the statement of PW-1, again, we found him stating in para-14 during his cross examination on 29.7.1987 the sides of the bridge over the canal, in north and south both are bounded with wall of about 4-5 feets in height. We were coming to the bridge from west direction through the road. When we reached at the western end of the bridge, the accused were on the north of the said boundary wall of the bridge, and there was no water in the canal. The place where the accused sat hidden, the boundary wall on the road side foot path over the bridge on the canal was about 4-5 feet in height. That place was not visible from the road through which we were coming. This portion of statement extracted out from the cross examination is fully corroborated with the independent corroborative evidence on record, the Exhibit Ka-15, duly proved by the investigating officer, PW-8.

43. The statement of PW-1 is further supported from the statement of another eye witness PW-6 Saheb Lal who is injured also in the course of same incident. Undoubtedly PW-6 is the brother of the deceased victim of incident, "Ganga Ram' and the informant Chhotelal (PW-1), therefore, at this juncture of discussion we would not go into the evidentiary value of his deposition before the court, and will confine ourselves to the fact proved by him. He stated in his examination-in-chief before the Trial Judge on 6.1.1988. At the time of recording his statement he was 20 years of age. On the date of incident which occurred about 2 years and 8 months ago the witness was approximately 17 years of age. Without any inconsistency he stated, on the day of incident, I was coming back to home from our field known as "Jhabra' after sowing the sugarcane seeds therein. I was accompanied with my brothers "Ganga Ram' (deceased) and Chhotelal (PW-1). At about 6:00 p.m., when we reached at the Bridge over canal near the village "Karauna Kheda', the accused Lala Ram, Babu Ram, Raj Pal and Ram Pal, popped out from their hiding behind the boundary wall of the bridge and intercepted us armed with their respective weapons. As such PW-6 had also proved the date, time and place as stated by PW-1 and reported by him in the written report Exhibit Ka-1 on 04.04.1985 submitted in Police Station - Behta Gokul.

44. Another witness of fact examined as PW-3 in the trial is cousin brother of the deceased Ganga Ram and the witnesses PW-1 and PW-6, PW-3, Vijay Pal, though declared hostile by the prosecution itself, but what he has stated about the date, time and place of incident is important. We shall discuss further the evidentiary value of the deposition made before the trial Judge during his examination PW-3 in his statement recorded on 02.12.1987 stated in para-2, "When I was coming on my bullock cart towards the bridge and was 15-20 steps away from the western end of the bridge, "Ganga Ram' (deceased), Chhotelal and Saheblal were also ahead of me, proceeding towards the bridge. The accused persons Lala Ram, Raj Pal, Babu Ram and Ram Pal popped out from behind the northern boundary wall of the bridge and attacked over Ganga Ram with their respective weapons. During his cross-examination by defence counsel PW-3 affirms his above referred statement in para-7. He stated the canal was devoid of water. I did not see the accused sitting hidden behind the wall, rather saw them popping out therefrom. No

doubt this witness also proved the date, time and place of occurrence in full consistency with the earlier witness PW-1 and PW-6.

45. Lastly on this point the reference of inquest report proved in the court by the Investigating Officer (Exhibit Ka-7). In the inquest report, under the head "the name of village in which the body was found' it is filled in before the witnesses and signed by them, "in the territorial limit of village Behta Gokul" about 2 k.m. away from Police Station Behta Gokul. The dead body was then mentioned to have been lifted from bridge over the canal within the limit of village Behta Gokul to be sent for post-mortem. As per the discussions made above, from the statements of the witnesses it comes out that the incident of killing by the accused persons of Ganga Ram occurred on 04.04.1985 at about 6:00 p.m. at the western end of the bridge over Sharda Canal near village Karauna Kheda lying within the territorial limit of village Behta Gokul and 2 k.m. away from the Police Station of Behta Gokul. The incident took place near the northern boundary wall of the bridge abutting to the road side path of the bridge at it's western end.

Sufficiency of light

46. It was evening when at about 6:00 p.m. the incident took place. The witness PW-3 and PW-6 both were questioned about the sufficiency of light at that time to see the things. Both the witnesses firmly stated that there was sufficient light and it is wrong to say that it was dark when the incident occurred. They boldly denied that at the time of incident it was dark due to sunset. We do not find any improbability in the aforesaid statement as to the sufficiency of light at 6:00 p.m. on 04.04.1985 when the incident took place. April is the beginning of summer season when the days are comparatively longer than in it's preceding months. Generally the time of sun set in April is after 6:30 p.m. It does not mean that immediately after sun set darkness falls as technically it takes around 70-100 minutes in accordance with location proceeding to north to get complete darkness. Sunset is a period when only a part of the Sun and not all the sun is below the horizon. By reason of this astronomical phenomenon, up to sunset time and even after that for a considerable long period there is twilight wherein things are visible. We are therefore fully convinced with the statement of all the three witnesses viz. PW-1, PW-3 and PW-6 that at about 6:00 p.m. in evening of 04.04.1985 when the incident occurred there was sufficient light to make things visible to the witnesses.

Moreover, the witnesses were very well aware with the accused persons, the reasons being that two of them namely Ram Pal and Raj Pal were native villagers, whereas two others namely Babu Ram and Lala Ram were not only their relative but also inimical to the deceased and well known to them.

The manner and mode adopted and weapon used in committing the offence by the accused-appellant

47. It would be unnecessary reiteration of the narration of the incident as informed to the police through the written report Exhibit Ka-1, therefore, we think it proper to discuss the relevant portions of statement of PW-1, PW-2 and PW-3 stating the manner and mode wherein the accused attacked over "Ganga Ram' with their respective weapon as assigned to them by the informant. Earlier we have considered and discussed the

statement of witness as to the date, time and place of occurrence and found settled that Ganga Ram (deceased) alongwith his brother PW-1 and PW-6 (Chhotelal and Saheblal) after sowing their field with seeds of sugarcane was on the way to his home in village Behta Gokul, when he reached at the western end of bridge on their way over Sharda Canal, the accused persons who were hiding behind the northern boundary wall abutting the road side path of the canal, popped out therefrom along with their arms, intercepted him and attacked fatally. Now upon going through the statements of the witnesses and to scrutinizing whether the witnesses have consistently and convincingly deposed before the court about manner and mode wherein the accused with their respective weapon assigned to them by the informant PW-1 has attacked Ganga Ram because of which he succumbed to death.

48. In Exhibit Ka-1 and FIR (Exhibit Ka-4) the weapon assigned to the accused Raj Pal (died during trial) is a country made pistol (Tamancha), the accused-appellant A-3 (Lala Ram) with gun, the accused-appellant A2 (Babu Ram) with "Gandasa' (Chopper) and the accused appellant A-1 (Rampal) with a lathi (stick). PW-1 in his statement during examination-in-chief dated 20.8.1986 and against his examination-in-chief recorded afresh after the trial court summoned the accused appellant A-2 and A-3 for trial under Section 319 of the Criminal Procedure Code 1973, stated firmly that Raj Pal was armed with country made pistol A-3 with gun, A-2 with Gandasa and A-1 with a lathi when they popped out from behind the wall for intercepting the victim (deceased). In para 7 of the statement in chief dated 20.12.1986 PW-1, stated that coming out from where they were hiding, accused shouted and asked to stop and A-3 (Lala Ram) fired on "Ganga Ram' from his gun and Raj Pal fired from his country made pistol over Ganga Ram. Ganga Ram when fell down on the ground unconscious then A-2 and A-1 (Babu Ram and Ram Pal) began to inflict blows over the body of Ganga Ram with their respective weapons namely Gandasa and Lathi. PW-6, Saheblal when swoop in to save Ganga Ram towards accused person he was also beaten by A-1 (Ram Pal) with Lathi due to which he was severely injured. On the hue and cry made by PW-1 and PW-6 for their rescue other witnesses namely Vijay Pal (PW-3) who was coming on his bullock-cart along with "Kadhiley' also saw the incident and raised alarm, on this, the accused "Raj Pal' fled away towards east and rest of them towards west along with their respective weapons. When the witnesses reached upto the place where Ganga Ram was lying on ground, injured who died because of excessive bleeding. The statement accounting the incident in question is further subjected to cross-examination on 29.3.1987. In para-20, PW-1, stated, when intercepted by accused persons (as described earlier in preceding paras) I had seen the weapons held by them in their hands. Ganga Ram did not tried to run away but I ran away from the spot and Saheblal stayed there, first fire on Ganga Ram was done just after intercepting him within one minute. In quick succession thereto, Raj Pal made second fire upon Ganga Ram. Ganga Ram on sustaining two firearm injuries and fell down on the ground soon.. Thereafter, Lala Ram (A-3) fired shot from his gun upon Ganga Ram. Ganga Ram was injured with three shots of firearms. First shot from fire arm injured Ganga Ram below the mandible on left side of neck. Second shot made by Raj Pal caused injury on chest,

third fire made by A-3 (Lala Ram) caused injury on the back of head of Ganga Ram while he was lying collapsed on ground A-3 made the fire from a distance of 3 to 4 steps in north from the head of Ganga Ram lying collapsed on the ground. Ganga Ram when A-3 made first fire upon him was standing facing east and the nozel of the gun held by A-3 pointed towards him was 3 to 4 steps away Raj Pal fired on Ganga Ram standing in north direction from him he stood facing east and nozzle of Raj Pal's pistol for 3 to 4 steps away from his chest.

49. About the roles of A-2 (Babu Ram) and A-1 (Ram Pal) PW-1 stated in his cross examination done by the learned defence counsel that when Ganga Ram fell on ground sustaining fire arm injuries, A-2 and A-1 began to inflict blows on Ganga Ram with lathi over his body. He stated that since at that time he (PW-1) was crying and weeping he could not seen on which part of Ganga Ram's body the blow of Gandasa and lathi were made by these two accused, but he saw the accused A-2 blowing Gandasa standing towards head of Ganga Ram which A-1 was blowing lathi over him standing at a distance of about two feet from his legs. For himself, PW-1 stated, "I was standing 4-5 steps away in west direction from Ganga Ram-PW-6 (Saheblal) during his examination-in-chief recorded by the Trial Judge on 6.1.1988 stated about the manner, mode and weapon used in the crime that, when the accused popped out from their place of hiding and intercepted Ganga Ram along with him and PW-1, A-3 was armed with a gun, Rajpal was with country made pistol, A-2 was with a "Gandasa' and A-1 was with a lathi. A-3 asked Ganga Ram to halt and simultaneously both of them fired at him from their respective fire arms. A-2 and A-1 attacked from their respective weapons when the injured Ganga Ram fell on the ground. The PW-6 further stated when he swooped in to save Ganga Ram. A-1 he also sustained lathi blows and upon listening the hue and cry for rescue, witnesses Vijay Pal and Kadhiley also came on spot who saw the incident. After committing the crime accused Raj Pal fled away from the spot towards east while rest of them towards west, Ganga Ram was lying dead on the spot. In para-7 of his statement PW-6 stated while cross-examined, Ganga Ram was just 1 or 2 steps ahead of me when the accused intercepted him at the spot of incident. In para 8 this witness firmly stated again that A-1 hit him with lathi. Whereas A-2 inflicted 6 to 7 blow of Gandasa on the head of Ganga Ram. In para 8 when again cross-examined about his injury sustained during the incident he replied I got contusion with bluish mark which persisted for about 15 days approximately.

50. PW-6 was also cross-examined about the direction of and distance between accused and Ganga Ram (deceased) during the incident. He stated when A-3 made first fire Ganga Ram was facing east and A-3 himself was near Ganga Ram in his north side. When fire was made by Raj Pal at that time also Ganga Ram was facing east. Both the fires made by Raj Pal over Ganga Ram was from north of Ganga Ram.

51. PW-3 Vijaypal is also the witness of fact for whom PW-1 Chhotelal has stated in his examination that he along with another villager "Kadhiley', was coming on his bullock cart and when they heard the cries made for rescue and blast of fire they ran towards the spot. He stated both PW-3 and Kadhiley saw the incident. In para-20 PW-3 stated in his cross-examination about his position at the spot of incident from

where both of them were watching the incident. He stated, when Ram Pal (A-1) was inflicting blows of lathi over Ganga Ram, Babu Ram (A-2) was standing towards the head of Ganga Ram, I was about four steps away towards west from Ganga Ram, "Kadhiley' was standing about 50 steps away towards south and Vijay Pal was standing about 15 steps away from me towards west. In the context of this position of the witness PW-3, we considered the oral account of the incident deposed before the trial Judge recorded on 21.12.1987. PW-3 in his examination-in-chief reiterated the weapons assigned to the accused A-2 and A-3 as well as to Raj Pal but for the weapon (Gandasa) assigned to A-1, he deviates from the statement of PW-1, and PW-6. He stated, A-1 (Babu Ram) was holding Lathi. He firmly stood with the FIR version that A-3 and Raj Pal fired on Ganga Ram while A-2 (Rampal) and A-1 hit him with lathi when he fell down on the ground on sustaining fire arm injuries. The witness PW-3 further confirmed the witness of the incident in addition to him to "Kadhiley' only by saying that no one else saw the commission of incident. PW-3 firmly stood with the statement of PW-1 and PW-6 as to the fact that after commission of crime accused Raj Pal fled away towards east whereas rest of them towards west and when they reached near Ganga Ram he was lying dead on the spot. The prosecution declared PW-3, it's hostile witness and opted to cross-examine him. During cross-examination PW-3 firmly stood with the statements of PW-1 and PW-6 with regard to role and weapon of crime assigned to A-3 and Raj Pal by saying that first fire of Ganga Ram was made by A-3 (Lalaram) at that time Ganga Ram was standing, he could not see if the bullet struck to Ganga Ram, but after that fire Ganga Ram fell on the ground at the spot. Just thereafter second fire was made by Raj Pal when Ganga Ram was lying on the ground. Total three fires were made. With regard to the role and weapon assigned to the rest of the two accused A-1 and A-2 (respectively Gandasa and lathi) when he was cross-examined he replied to the prosecution that he did not see any one inflicting blow of gandasa because at that time he was crying for rescue. He further stated about his statement recorded by the Investigating Officer that A-1 was holding Gandasa in his hand, he replied with quite absurdity, if it is written in my statement then I might have spoken this to him (I.O) I do not remember, Babu Ram whether hit Ganga Ram with lathi and Gandasa. However, PW-3 when cross-examined by learned counsel for defence, on the same point he replied in para-7 of his statement, "I did not see any one beating Ganga Ram with "Gandasa'. He stood firmly with the statement as to the role of Raj Pal and A-3, and number of fires made by them on Ganga Ram. He further supported the statement of Saheb Lal (PW-6) that he (PW-3) was 2-3 steps behind the PW-1 and PW-6. He was at 15-20 steps away towards east from the accused-assailants.

52. We are now summing up the statements of the three witnesses PW-1, PW-3 and PW-6 discussed hereinabove as to the mode, manner, weapon held and used by the accused appellants in the commission of incident and their specific roles while acting in consortium during the occurrence. We reached at the finding, (i) the witnesses with all certainty without any inconsistency or anomaly have established that all the accused Lala Ram (A-3) Babu Ram (A-1) Ram Pal (A-2) and Rajpal sat hidden behind the north side of boundary wall of road side patri of Bridge over Sharda Canal lying on the way, heading

from west to east, toward the native village of deceased-Ganga Ram namely village Behta Gokul, the deceased Ganga Ram who was coming along with his brothers PW-1 & PW-6 from his field after sowing sugarcanes in their field known as "Jhabra' situated in west. (ii) All the accused popped out from their place of hiding as and when Ganga Ram reached along with his brothers (PW-1 and PW-6) near the western end of the Bridge towards patri abutting to the northern boundary of the bridge, and asked him to halt. (iii) Simultaneously Lala Ram made first fire from his gun over Ganga Ram Rajpal made second fire which respectively hit him below the mandible on the neck and on chest of the Ganga Ram. Ganga Ram on sustaining firearm injuries collapsed on spot. When attacked by the aforesaid two accused Ganga Ram stood facing east while the accused duo were towards north of him about 3-4 steps away. (iv) When Ganga Ram collapsed on the ground Raj Pal made another shot which injured him behind his head. (v) Ram Pal hit PW-6 Saheb Lal with lathi when he swooped in to save Ganga Ram and thus PW-6 got contusion and blow mark over his arm and elbow. (vi) According to PW-1 and PW-6 Babu Ram inflicted the blow of Gandasa after Ganga Ram collapsed on ground sustaining fire arm injury. Babu Ram was blowing Gandasa over Ganga Ram standing towards his head, while Rampal was inflicting blow of lathi standing towards his legs. (vii) According to PW-3, Rampal hit Ganga Ram from lathi when he collapsed on sustaining fire arm injuries. He stated Babu Ram also gave several blows over the body of Ganga Ram after he collapsed on ground.

53. The prosecution has declared PW-3, it's hostile witness because he did not support the role assigned by it to the A-1 of having "Gandasa' from which he inflicted blows upon the body of Ganga Ram when he collapsed on ground. When we go through the statement of PW-3 we found it versatile in nature and intent only to the extent of weapon assigned to A-2 only. For rest of the prosecution version as to the date, time, place of incident, participation of accused persons in the commission of crime the role and weapon used in the commission of crime by the accused, the witness PW-3 is in full consistency with other witness PW-1 and PW-6. Since, the common law principle, "falsus in uno falsus in omnibus' do not apply in Indian Law of Evidence, therefore, the statement of PW-3 is not liable to be discarded as a whole, moreover the statement of PW-3 has not confidently and firmly denied the fact of holding "Gandasa' by A-1 but states that he could not see him or anyone else armed with Gandasa because at the time of incident he was crying for help. As such his denial of the fact of Babu Ram armed with Gandasa and beating Ganga Ram when he collapsed on ground is not firm, confident and full hearted. Leaving the fact of "Gandasa' allegedto have been used by A-1 in the course of commission of crime to be settled on the basis of other independent corroborative evidence, we, reach at finding with all certainty that undoubtedly A-1 was present througout the incident with rest of the named accused person, moreover, the defence has also not taken a firm stand of his absence on the spot and have argued as to his role and participation in crime with lathi and not with Gandasa, as such the presence of accused at the spot of crime in the course of commission of offence along with other accused is a proven fact on evidence led by prosecution beyond all reasonable doubt. We will discuss further it's effect over his liability in the commission of crime.

The reason why PW-1, PW-3 and PW-6 are believed as a witness of fact

54. PW-1 (informant-Chhotelal), PW-6 (injured witness-Saheb Lal) are real brother of Ganga Ram deceased-victim of the incident dated 04.04.1985 for the commission of which the accused appellants and Raj Pal (died during trial) are arraigned for prosecution. The said trio of witness claimed themselves to be eye witnesses of the incident.

55. The P. Ramnatha Aiyar's Law Lexican (third edition, reprint in 2011 by Lexis Nexis Butterworths Wadhwa) Page-431, defines "Eye Witness', one who saw the act, fact or transaction to which he testifies. Hon'ble the Supreme Court in ***Vishnu Narayan Moger Vs. State of Karnataka 1996 Cr.L.J. 1121*** held, *"An eye witness is one, who saw the act, fact of transaction to which he testifies. A witness is able to provide graphic account of attack on the deceased can be accepted as eye witness"* Needless to signify the witness PW-1, PW-3 and PW-6 eye witnesses who in the case before us giving the graphic account of the attack by the named accused person over the deceased in the incident dated 04.04.1985, therefore, they are the best evidence subject to their cross examination which is essential in testing the veracity and trustworthiness of the witnesses.

56. It is the established law of evidence that the evidence of a witness is assessed by it's worth. In Sir John woodsoff and Syed Amir Ali's "Law of Evidence" Page 461 (S.V. Joga Rao/17th Edition Butterworth, Vol.1, reprint 2001), The appreciation of evidence of eye witness depends upon -

(a) The accuracy of the witness's original observation of the events which he described, and

(b) The correctness and extent of that he remember and his veracity.

57. The credibility of a witness has to be decided by referring to his evidence, finding out how he has fared in cross-examination and what impression is created by his evidence, taken in other context of the case and not by entering into the realm of the conjecture and surmises. We have discussed a lot in preceding paras with the statements recorded in evidence by the Trial Judge, under different heads. We find out on their appreciation firstly that the presence of witnesses PW-1 and PW-6 with Ganga Ram was naturally probable, for the reason

(i) they are real brother of the deceased and their family being agriculturist were ploughing and sowing sugarcane seeds in their field known as "Jhabra' measuring about 11 acrs. for the whole day starting from 7:00 a.m. in the morning of 04.04.1985.

(ii) though the entire field could not been sown that day, therefore, the brothers trio, before the dusk leaving the rest of the unsown field for the next day, departed for their home in village Behta Gokul situated towards west of the "Jhabra' field. On their way to home there was a bridge over Sharda Canal (The place of incident).

(iii) PW-3 villager of the same village Behta Gokul to which deceased and PW-1, PW-6 belonged, was also coming behind them from his field after finishing his agricultural work for the day, as the time was running towards dusk, on his bullock cart along with his native villager "Kadhiley'.

(iv) in agricultural calendar month of April is usually of harvesting of wheat and sowing of sugarcane etc.

58. In the light of above proven fact by evidence of witnesses PW-1, PW-3 and PW-6 which remained constant consistent and uncontradicted even in cross examination emanate our finding as to the aforesaid witnesses that they were naturally present on the spot of incidence. Further they have given graphical account of the incident without any contradiction shaking the case of the prosecution. Therefore, they proved themselves a cogent and reliable eye witness.

59. It has been vehemently argued by learned counsel for defence to discredit witness PW-1 referring his statement that in the course of incident he did nothing to save the deceased Ganga Ram, rather he ran back some steps away when the assailants A-3 and Raj Pal fired on Ganga Ram and A-1 and A-2 were inflicting blows from their respective weapon over the body of Ganga Ram and he collapsed on ground sustaining fire arm injuries. This argument has no weight in the light of proved fact that none of the brother trio namely deceased, Ganga Ram, PW-1 Chhotelal and PW-6 Saheblal or even PW-3 Vijaypal were armed at that time, whereas the accused assailants were armed with their respective weapons. In a similar set of facts before Hon'ble the Apex Court in the case of ***Sucha Singh Vs. State of Punjab AIR 2003 SC 3617: 2003 (7) SCC 643*** it is held, where both the eye witnesses were unarmed and bare handed, while the accused were armed with deadly weapons then how a person would react in a situation like this, could not be encompassed by any rigid formula. It would depend on many factors, such as, where witnesses were unarmed but the assailants were armed with deadly weapons, in a given case instinct of self preservation would be the dominant instinct. The court held that in the case, their inaction in not coming to the rescue of the deceased, could not be a ground for discarding their evidence. So in present case also, the argument of learned defence counsel to discard the evidence of PW-1 (Chhotelal) treating his presence doubtful on the spot of incident at the relevant time of occurrence, on the ground of his statement that he ran back when the assailants fired on Ganga Ram and he did not physically tried to rescue his brother Ganga Ram is not tenable. It is proved that this witness was unarmed at the time of occurrence and was crying for rescue, in response whereof other witnesses rushed to the spot.

60. Another ground raised for discrediting the evidences of PW-1, PW-3 and PW-6, argued by the defence counsel is their being relatives of the deceased. We considered the argument in the context of the present case. The deceased Ganga Ram was killed on a place lying in rural area road running through villages, where general activities of people comes to a retardation with the falling of evening. The brothers trio Ganga Ram (deceased), PW-1 and PW-6 were also after finishing the agricultural work throughout the whole day from 7:00 a.m. and onward going back to their home. At about 6:00 p.m. they reached at the spot where the accused persons sat hidden armed with their respective weapon, waiting for them. PW-6 the cousin brother of deceased was also coming behind them on his bullock cart after finishing agricultural work, from his field along with "Kadhiley' his native villager. All of them were native of the

same village and the way leading to their home village "Behta Gokul' from their fields was the only one and common. These are the proved and undisputed facts. As such, they are naturally probable witnesses of the incident happened at the western end of bridge over Sharda Canal lying on their way to home. Law of Evidence does not bar any such person from being a witness of an incident which he had seen being committed before them, even if he is a relative of the victim. In a catena of cases dealt by Hon'ble Apex Court ***Bhagwan Swaroop Vs State of U.P. AIR 1971 SC 429, State of U.P. Vs. Paras Nath Singh AIR 1973 SC 1093 and Swarn Singh Vs. State of Punjab 1976 Cr.L.J. 1757*** it is held, the fact that the witnesses are related to each other is no ground for disbelieving their evidence. Relative should have no interest to falsely implicate the accused or protect the real culprit. In the present case, since as eye witnesses PW's statement neither in itself nor inter se found by us, inconsistent or self contradictory, therefore, the same cannot be discarded on the ground of their being related with the deceased as well as with each other. More over they cannot be said interested in implicating falsely to the accused. In ***Dahari & Ors. Vs. State of U.P. (2012) 10 SCC 256*** Hon'ble Apex Court in para-11, 12 and 24 has held as under:-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. [Vide Himanshu v. State (NCT of Delhi) [(2011) 2 SCC 36 : (2011) 1 SCC (Cri) 593] , Ranjit Singh v. State of M.P. [(2011) 4 SCC 336 : (2011) 2 SCC (Cri) 227 : AIR 2011 SC 255] and Onkar v. State of U.P. [(2012) 2 SCC 273 : (2012) 1 SCC (Cri) 646]]

12. Man Bahadur (PW 1) and Raj Bahadur (PW 2) undoubtedly, are the real brothers of the deceased. They, at the time of the incident, were following the deceased on their "moped". They have supported the case of the prosecution to the fullest extent, and even though they were thoroughly questioned by the defence in the course of cross-examination, they did not elicit anything which could shake their testimony. Thus, we do not see any reason to discard their testimonies.

24. It is a broad daylight murder at 9.00 a.m. on the main road. The eyewitnesses had been following the deceased on the "moped" as they had to attend the court's proceedings at Azamgarh. The enmity between the parties stood fully established as criminal cases were pending between them. The case of the prosecution stood fully corroborated by the medical evidence and the ocular evidence. It is not probable that the real brothers of the deceased who had been the eyewitnesses would implicate the appellants falsely sparing the real assailants, though false implication of some of the persons may not be ruled out. Thus, the High Court was justified in acquitting some of the convicts as they did not belong to the family of the appellants/assailants."

61. Hon'ble Apex Court in para -26 of the case of ***Vijendra Singh & Ors. Vs. State of U.P. (2017) 11 SCC 129*** has held as under:-

"26. In Lallan Rai v. State of Bihar [Lallan Rai v. State of Bihar, (2003)

1 SCC 268 : 2003 SCC (Cri) 301] the Court relying upon the principle laid down in Barendra Kumar Ghosh [Barendra Kumar Ghosh v. King Emperor, 1924 SCC OnLine PC 49 : (1924-25) 52 IA 40 : AIR 1925 PC 1] has ruled that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result."

62. The witnesses PW-1, PW-3 and PW-6 were vehemently termed, in the argument by learned counsel for the defence, not only "interested' being relatives of the victim but also interested in false implication, due to enmity with accused. Considering the said argument we carefully examined and scrutinized the statement of the said witnesses to find out the hostility, if any, of the victim (deceased-Ganga Ram) against the accused. We also tried to find out whether and also that the witnesses or any one of them shared any such hostility with the deceased against the accused. We have gone through the statement of PW-1 (the informant Chhotelal) who seems to have been grilled in the cross-examination for a long on the point of enmity. PW-1 has himself in his written complaint (Exhibit Ka-1) and the FIR (Exhibit Ka-4) disclosed that the victim Ganga Ram (deceased) was accused of the murder of one "Digga' the father of A-3 (Lala Ram) and A-1 (Babu Ram). The deceased Ganga Ram was also prosecuted by father of another accused Rajpal under Section 307 IPC wherein he was acquitted. In para 6 of the examination in chief recorded on 20.12.1986, he clarified the position by saying that Ganga Ram was one of the accused in the trial with regard to the murder of Digga and was convicted and sentenced by the Sessions Court. In appeal to the High Court he was released on bail during the pendency of the appeal. At the time of incidence Ganga Ram was continuing on bail. Likewise in the criminal prosecution under Section 307 IPC, on the complaint of Bihari (accused Raj Pal and Ram Pal's father) Ganga Ram was convicted and sentenced by the Sessions Court but acquitted from the High Court in appeal. In Examination in chief recorded on 20.7.1987 PW-1 stated, he knowns the accused Raj Pal and Ram Pal sons of Bihari who are natives of his village Behta Gokul while the accused Lala Ram and Babu Ram are sons of Digga resident of nearby village Partapur. In cross examination dated 20.7.1983 para-17 PW-1 stated that father of PW-3 Lakshman was also accused with Ganga Ram in the criminal prosecution under Section 307 IPC launched by Bihari. The defence has set forth these two criminal prosecution against Ganga Ram as enmity on the part of witnesses PW-1, PW-3 and PW-6 against accused a cause for false implication. In the cross-examination the learned counsels for the defence could not extract any criminal prosecution by or against the said witnesses or civil litigation by or against them pending with the accused, moreover, in the criminal prosecution against Ganga Ram none of the witnesses were co-accused with him. The said prosecution were in a period of more than 12 years ago from the incident of killing of Ganga Ram. Even as we have discussed earlier it was Ganga Ram only, to whom the assailants intercepted and shot down. This is also note worthy here that even on the part of Ganga Ram who was arraigned in trial for murder case of Digga and in prosecution under Section 307 I.P.C. by 'Behari', no criminal prosecution by him against any of the accused was ever launched. There is nothing coming out from the evidence on record as to the witnesses shared any hostility along with

Ganga Ram against the accused which may induce them to falsely implicate them for the murder of Ganga Ram.

63. It would be relevant to refer the decision of Hon'ble Apex Court in ***Darya Singh Vs. State of Punjab AIR 1965 SC 328 (331)*** which speaks about related witness who is closely related to the victim that he is not necessary an interested witness. Hon'ble the Apex Court in ***Mahendra Singh Vs. State of U.P. (2017) 11 SCC 129*** has held in para-31 as under:-

"31. In this regard reference to a passage from Hari Obula Reddy v. State of A.P. [Hari Obula Reddy v. State of A.P., (1981) 3 SCC 675 : 1981 SCC (Cri) 795] would be fruitful. In the said case, a three-Judge Bench has ruled that: (SCC pp. 683-84, para 13)

"[it cannot] be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

It is worthy to note that there is a distinction between a witness who is related and an interested witness. A relative is a natural witness. The Court in Kartik Malhar v. State of Bihar [Kartik Malhar v. State of Bihar, (1996) 1 SCC 614 : 1996 SCC (Cri) 188] has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason".

64. Arguing on the non-examination of material witnesses, the learned counsel referred "Kadhiley' who was with PW-3 Vijay Pal on his bullcart few steps behind the victim Ganga Ram and his brothers PW-1 and PW-6 when Ganga Ram was intercepted and attacked by the accused assailants, he had seen the entire incident. It is discussed by us in preceding paragraphs that the prosecution has examined three material witness on the fact of killing Ganga Ram by the accused namely PW-1, PW-3 and PW-6. On the same fact prosecution was at liberty to examine or not any more witness. In the evidence of PW-1, he has already stated that "Kadhiley' has been won over by the accused and would not be able expected to tell the truth in the court. In a similar set of facts before Hon'ble Apex Court in ***Vijendra Singh Vs. State of U.P. (2017) 11 SCC 129*** in para 35, 36, 37 has held as under:-

"35. The next plank of argument of Mr Giri is that since Nepal Singh who had been stated to have accompanied PW 2 and PW 3 has not been examined and similarly, Ram Kala and Bansa who had been stated to have arrived at the tubewell as per the testimony of PW 2, have not been examined, the prosecution's version has to be discarded, for it has deliberately not cited the independent material witnesses. It is noticeable from the decision of the trial court and the High Court, that reliance has been placed on the testimony of PWs 1 to 3 and their version has been accepted. They have treated PW 2 and PW 3 as natural witnesses who have testified that the

accused persons were leaving the place after commission of the offence and they had seen them quite closely. The contention that they were interested witnesses and their implication is due to inimical disposition towards accused persons has not been accepted and we have concurred with the said finding. It has come out in evidence that witnesses and the accused persons belong to the same village. The submission of Mr Giri is that non-examination of Nepal Singh, Ramlal and Kalsa is quite critical for the case of the prosecution and as put forth by him, their non-examination crucially affects the prosecution version and creates a sense of doubt. According to Mr Giri, Nepal Singh is a material witness. In this regard we may refer to the authority in State of H.P. v. Gian Chand [State of H.P. v. Gian Chand, (2001) 6 SCC 71 : 2001 SCC (Cri) 980] wherein it has been held that: (SCC p. 81, para 14)

"14. Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses were available for being examined in the court and were yet withheld by the prosecution."

The Court after so holding further ruled that it is the duty of the court to first assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on and deserves acceptance, then non-examination of any other witnesses available who could also have been examined but were not examined, does not affect the case of the prosecution.

36. In Takhaji Hiraji v. Thakore Kubersing Chamansing [Takhaji Hiraji v. Thakore Kubersing Chamansing, (2001) 6 SCC 145 : 2001 SCC (Cri) 1070] , it has been held that: (SCC p. 155, para 19)

"19. ... if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand, if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. ... If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable, the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."

37. In Dahari v. State of U.P. [Dahari v. State of U.P., (2012) 10 SCC 256 : (2013) 1 SCC (Cri) 22] , while discussing about the non-examination of material witness, the Court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the

medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution. Similar view has been expressed in Manjit Singh v. State of Punjab [Manjit Singh v. State of Punjab, (2013) 12 SCC 746 : (2014) 4 SCC (Cri) 531] and Joginder Singh v. State of Haryana [Joginder Singh v. State of Haryana, (2014) 11 SCC 335 : (2014) 3 SCC (Cri) 366] ."

65. Tested on the aforesaid parameters we are unable to accept the submission of learned counsels for the defence that due to non examination of "Kadhiley' who had been referred to by PW-3 (Vijay Pal) and PW-1 (Chhotelal) would affect the prosecution version or would create any doubt in the mind of the court. Thus in our considered opinion the witnesses examined by the prosecution are trustworthy and the court could safely rely on their testimony. In the facts of present case no adverse inference can be drawn against the prosecution.

66. Non examination of independent witnesses is argued by learned counsels for defence so as to shake the testimonies of prosecution witness. It would be relevant to refer in this regard the case before Hon'ble Apex Court ***Raghubeer Singh Vs. State of U.P. (1972) 3 SCC 79***. It is held in para-10:-

"10. As against the argument that some witnesses mentioned in the first information report were not examined, it is enough to repeat, what has often been ruled that the prosecution is not bound to produce all the witnesses said to have seen the occurrence. Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need be produced without unnecessary and redundant multiplication of witnesses. The appellant's counsel has nut shown how the prosecution story is rendered less trustworthy as a result of the non-production of the witnesses mentioned by him. No material and important witness was deliberately kept back by the prosecution. Incidentally we may point out that the accused too have not considered it proper to produce those persons as witnesses for controverting the prosecution version. In this connection general reluctance of an average villager to appear as a witness and get himself involved in cases of rival village factions when spirits on both sides are running high has to be borne in mind."

Injured witness

67. PW-6 Saheblal is an eye witness who himself got injury caused by blows of lathi in the course of incident, as A-2 (Ram Pal) warded him off when he swooped in to rescue Ganga Ram from the assailants. The 16/17 years old boy, after the incident was medically examined under the memo of police by Dr.P.K. Gangwar the incharge medical officer posted in District Hospital Hardoi on 5.4.1985. The said doctor is produced as witness for examination before the Trial Judge. Who proved before the court the report prepared by him under his signature and handwriting pursuant to the letter of investigating officer handed to him by Chowkidar. The report is Exhibit Ka-3 wherein the PW-4 (doctor) has entered complaint of pain at left elbow joint but no external mark of injury seen. PW-1 in his statement and even PW-6 when examined has stated about the injury suffered by him in the course of incident. PW-5 the Head moharrir posted at Police Station Behta Gokul on the relevant date of incident on

04.04.1985 who registered the FIR, when examined before the Court, has also confirmed in para-3 of statement that Saheblal (PW-6) who accompanied PW-1, when arrived at the Police Station, was injured. He further stated that entry to the above effect was made by him in the general diary at report no.29. He stated that a written letter for medical examination was sent by him with the injured Saheblal to District Hospital, Hardoi through Chowkidar. As such Saheb Lal is an injured witness and was present at the spot of incident in the course of commission of crime is undoubted.

68. Hon'ble the Apex Court in ***Maqsoodan Vs. State of U.P. (1983) 1 SCC 218*** (three Judges Bench) has held in para-8 as under:-

"8. The High Court has found that the testimony of the eyewitnesses, namely, PWs 1, 2, 3 and CW 1 "suffer from numerous infirmities". It, therefore, sought support to their testimony from the two earlier statements, erroneously called dying declarations, Exts. Ka-22 and Ka-23 made by PW 3 Vijay Kumar and PW 2 Jagdish respectively. The infirmities referred to by the High Court consisted in, according to the High Court, improvements made by the witnesses and variations in their earlier and latter statements. In our opinion, on that ground alone, the testimony of PWs 1, 2, 3 and CW 1 cannot be Held to be infirm. It is the duty of the court to remove the grain from the chaff. These four witnesses are the injured witnesses having received the injuries during the course of the incident. Their presence at the time and place of the occurrence cannot be doubted; in fact it has not been challenged by the defence. As both the parties were inimical for a long time, it will be prudent to convict only those persons whose presence and participation in the occurrence have been proved by the prosecution beyond reasonable doubt. We agree with the finding of the High Court that the presence and participation of the appellants Maqsoodan, Madan Mohan, Prayagnath and Nando, who are appellants in Criminal Appeal No. 175 of 1974 has been proved beyond reasonable doubt, despite the improvements and variations in their evidence.

69. Hon'ble the Apex Court in para-22 of ***Veer Singh Vs. State of U.P. (2014) 2 SCC 455*** has held as under:-

"22. In the present case we are left with the sole testimony of the injured eyewitness PW 4 Harbans Kaur. She has lost all the members of her family in the attack during the occurrence. There is no reason for her to falsely implicate any of the accused in the case. On the contrary she would only point out the correct assailants who are responsible for killing her family members. We are of the considered view that the testimony of PW 4 Harbans Kaur is cogent, credible and trustworthy and has a ring of truth and deserves acceptance. All the twelve victims of the occurrence died of homicidal violence is established by the oral testimony of the doctors who conducted autopsies on their bodies and the certificates issued by them to that effect."

70. Hon'ble the Apex Court in para 21 and 22 of ***Shyam Babu Vs. State of U.P. (2012) 8 SCC 651*** has held as under:-

"Evidentiary value of related witnesses

21. Mr V.K. Shukla, learned counsel for the appellant submitted that since most of the prosecution witnesses are related to the deceased persons, the

same cannot be relied on. We are unable to accept the said contention.

22. This Court has repeatedly held that the version of an eyewitness cannot be discarded by the court merely on the ground that such eyewitness happened to be a relative or friend of the deceased. It is also stated that where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the court to discard the statement of such related or friendly witnesses. To put it clear, there is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend, etc. These principles have been reiterated in Mano Dutt v. State of U.P. [(2012) 4 SCC 79 : (2012) 2 SCC (Cri) 226] and Dayal Singh v. State of Uttaranchal [(2012) 8 SCC 263] ."

71. Hon'ble the Apex Court in para-28 of ***Brahma Swaroop Vs. State of U.P. (2011) 6 SCC 288*** has held as under:-

"28. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with an in-built guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." (Vide State of U.P. v. Kishan Chand [(2004) 7 SCC 629 : 2004 SCC (Cri) 2021] , Krishan v. State of Haryana [(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214] , Dinesh Kumar v. State of Rajasthan [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472] , Jarnail Singh v. State of Punjab [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] , Vishnu v. State of Rajasthan [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] , Annareddy Sambasiva Reddy v. State of A.P. [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630 : AIR 2009 SC 2661] and Balraje v. State of Maharashtra [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] .)"

Evidentiary value and reliability of the witness PW-3 (Vijay Pal)

72. Much have been discussed over the statement of Vijay Pal (PW-3) earlier in preceding paras. He is declared hostile only to the extent that he did not support the prosecution case that A1 was wielding Gandasa over the body of Ganga Ram when he collapsed on ground sustaining fire arm injuries. Since we have discussed earlier that for rest of the prosecution case PW-3 has been supporting witness and proved a material fact as to the presence and participation of accused in committing crime in question along with the other accused from the very inception through his statement recorded in the Court. The deviation from the statements of other two prosecution witnesses PW-1 and PW-6 is in assigning the weapon whether a "lathi' or a "Gandasa'. His statement to this regard is in contradiction with his pretrial statement given to the Investigating Officer, which he

accepted before the Court. He could not explain the contradiction of pretrial statement confidently. Rather he stated during his examination that if the investigating officer has reduced it in to writing his statement that A-1 (Babu Ram) was armed with "Gandasa' and inflicted it's blows over Ganga Ram, then he would have said it to the investigating officer. He further stated on oath that he could not see whether A1 was having a lathi or a Gandasa as he at the time of incident was crying for rescue. Certainly this much of his statement regarding Babu Ram having a "Gandasa', shakes the prosecution version but rest of his tetimony which support the prosecution case as to the presence of A1 at the spot of incident and participation in crime with rest of the accused cannot be discarded for the reason he has been declared hostile by the prosecution itself. In the above context we proceed to ascertain the evidentiary value of and reliability over the statement of this witness in the light of the law laid down by Hon'ble the Apex Court in various cases.

73. It would be relevant to refer the case of ***Guru Singh Vs. State of Rajasthan (2011) 2 SCC 205*** where it is held in para-11 and 12:-

"11. There appears to be a misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389 : 1976 SCC (Cri) 7 : AIR 1976 SC 202] held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base the conviction upon the testimony of such witness. In Rabindra Kumar Dey v. State of Orissa [(1976) 4 SCC 233 : 1976 SCC (Cri) 566 : AIR 1977 SC 170] it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.

12. The terms "hostile", "adverse" or "unfavourable" witnesses are alien to the Indian Evidence Act. The terms "hostile witness", "adverse witness", "unfavourable witness", "unwilling witness" are all terms of English law. The rule of not permitting a party calling the witness to cross-examine are relaxed under the common law by evolving the terms "hostile witness and unfavourable witness". Under the common law a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him and an unfavourable witness is one called by a party to prove a particular fact

in issue or relevant to the issue who fails to prove such fact, or proves the opposite test. In India the right to cross-examine the witnesses by the party calling him is governed by the provisions of the Indian Evidence Act, 1872. Section 142 requires that leading question cannot be put to the witness in examination-in-chief or in re-examination except with the permission of the court. The court can, however, permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. Section 154 authorises the court in its discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness. Extensively dealing with the terms "hostile, adverse and unfavourable witnesses" and the object of the provisions of the Evidence Act this Court in Sat Paul v. Delhi Admn. [(1976) 1 SCC 727 : 1976 SCC (Cri) 160 : AIR 1976 SC 294] held: (SCC pp. 741-43 & 745-46, paras 38-40 & 52)

"38. To steer clear of the controversy over the meaning of the terms ''hostile' witness, ''adverse' witness, ''unfavourable' witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared ''adverse' or ''hostile'. Whether it be the grant of permission under Section 142 to put leading questions, or the leave under Section 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of Sir Lawrence Jenkins in Baikuntha Nath Chattorji v. Prasannamoyi Debya [AIR 1922 PC 409 : 27 CWN 797] . The discretion conferred by Section 154 on the court is unqualified and untrammelled, and is apart from any question of ''hostility'. It is to be liberally exercised whenever the court from the witnesses' demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as ''declared hostile', ''declared unfavourable', the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English courts.

39. It is important to note that the English statute differs materially from the law contained in the Indian Evidence Act in regard to cross-examination and contradiction of his own witness by a party. Under the English law, a party is not permitted to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or

previous conviction. In India, this can be done with the consent of the court under Section 155. Under the English Act of 1865, a party calling the witness can ''cross-examine' and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be ''adverse'. As already noticed, no such condition has been laid down in Sections 154 or 155 of the Indian Act and the grant of such leave has been left completely to the discretion of the court, the exercise of which is not fettered by or dependent upon the ''hostility' or ''adverseness' of the witness. In this respect, the Indian Evidence Act is in advance of the English law. The Criminal Law Revision Committee of England in its Eleventh Report, made recently, has recommended the adoption of a modernised version of Section 3 of the Criminal Procedure Act, 1865, allowing contradiction of both unfavourable and hostile witnesses by other evidence without leave of the court. The Report is, however, still in favour of retention of the prohibition on a party's impeaching his own witness by evidence of bad character.

40. The danger of importing, without due discernment, the principles enunciated in ancient English decisions, for interpreting and applying the Indian Evidence Act, has been pointed out in several authoritative pronouncements. In Praphullakumar Sarkar v. Emperor [ILR (1931) 58 Cal 1404 : AIR 1931 Cal 401 (FB)] an eminent Chief Justice, Sir George Rankin cautioned, that

''when we are invited to hark back to dicta delivered by English Judges, however eminent, in the first half of the nineteenth century, it is necessary to be careful lest principles be introduced which the Indian Legislature did not see fit to enact'.

It was emphasised that these departures from English law ''were taken either to be improvements in themselves or calculated to work better under Indian conditions'.

52. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stand thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto."

74. In ***Attar Singh Vs. State of Maharashtra (2013) 11 SCC 719*** Hon'ble the Apex Court has held that if the statement of a witness declared hostile is corroborated with other evidence and inspires confidence it can be relied. Paras-14, 15, 16 and 17, read as under:-

"14. We have meticulously considered the arguments advanced on this vital aspect of the matter on which the conviction and sentence imposed on the appellant is based. This compels us to consider as to whether the conviction and sentence recorded on the basis of the

testimony of the witness who has been declared hostile could be relied upon for recording conviction of the appellant-accused. But it was difficult to overlook the relevance and value of the evidence of even a hostile witness while considering as to what extent their evidence could be allowed to be relied upon and used by the prosecution. It could not be ignored that when a witness is declared hostile and when his testimony is not shaken on material points in the cross-examination, there is no ground to reject his testimony in toto as it is well settled by a catena of decisions that the court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard the same in toto and can be relied upon partly. If some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He cannot be thrown out as wholly unreliable. This was the view expressed by this Court in Syad Akbar v. State of Karnataka [(1980) 1 SCC 30 : 1980 SCC (Cri) 59] whereby the learned Judges of the Supreme Court reversed the judgment of the Karnataka High Court which had discarded the evidence of a hostile witness in its entirety.

15. Similarly, other High Courts in Gulshan Kumar v. State [1993 Cri LJ 1525 (Del)] as also Kunwar v. State of U.P. [1993 Cri LJ 3421 (All)] as also Haneefa v. State [1993 Cri LJ 2125 (Ker)] have held that it is not necessary to discard the evidence of the hostile witness in toto and can be relied upon partly. So also, in State of U.P. v. Chet Ram [(1989) 2 SCC 425 : 1989 SCC (Cri) 388 : AIR 1989 SC 1543 : 1989 Cri LJ 1785] , it was held that if some portion of the statement of the hostile witness inspires confidence it can be relied upon and the witness cannot be termed as wholly unreliable. It was further categorically held in Shatrughan v. State of M.P. [1993 Cri LJ 120 (MP)] that hostile witness is not necessarily a false witness. Granting of a permission by the court to cross-examine his own witness does not amount to adjudication by the court as to the veracity of a witness. It only means a declaration that the witness is adverse or unfriendly to the party calling him and not that the witness is untruthful. This was the view expressed by this Court in Sat Paul v. Delhi Admn. [(1976) 1 SCC 727 : 1976 SCC (Cri) 160 : AIR 1976 SC 294]

16. Thus, merely because a witness becomes hostile it would not result in throwing out the prosecution case, but the court must see the relative effect of his testimony. If the evidence of a hostile witness is corroborated by other evidence, there is no legal bar to convict the accused. Thus testimony of a hostile witness is acceptable to the extent it is corroborated by that of a reliable witness. It is, therefore, open to the court to consider the evidence and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused.

17. While examining the instant matter on the anvil of the aforesaid legal position laid down by this Court in several pronouncements, we have noticed that the support rendered by the daughter Mangibai approving the incident should be accepted as reliable part of evidence in spite of she being a hostile witness. The witness Mangibai's evidence pushes the accused with his bag to the wall and the accused is obliged to explain because her evidence shows that the accused was the only person in the company of the deceased soon before the death. The defence of the accused that Nagibai's injury was a result of fall is ruled out by

medical evidence and the details available of the location in the panchnama of offence. The courts below thus have rightly drawn some support from the reports of the chemical analysis since all the articles of the victims and clothes of the accused are found having bloodstains of human Blood Group A. This was in view of the fact that the results of the analysis for determination of the blood group of the victim and accused were conclusive when blood sent in phial was analysed. Thus, the evidence of the daughter of the deceased coupled with other material as also evidence of other witnesses i.e. Ramesh, Khandu, Bhatu and Makhan, provided a complete chain and the prosecution successfully proved that the incident occurred in the manner and the place which was alleged."

75. In ***Mrinal Das Vs. State of Tripura (2011) 9 SCC 479*** Hon'ble the Apex Court it is settled that corroborated part of evidence of hostile witnesses regarding commission of offence is admissible. His statement cannot be discarded enblock only for the reason he has been declared hostile. Relevant para-67 of the judgment thus reads as under:-

"67. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution."

76. In somehow similar situation of a case before Hon'ble Supreme Court in ***Anil Rai Vs. State of Bihar (2001) 7 SCC 318,*** where merely because a witness has been declared hostile because of not mentioning the name of one of the accused it is held that his entire evidence cannot be wiped out. Para-26 thus reads as under:-

"26. I also do not find any substance in the submission of the learned counsel for the appellant Subhash Chand Rai (A-2) that as Mukati Singh (PW 12) was declared hostile in not naming his client, the prosecution case could not succeed. The mere fact that the Court gave the permission to the Public Prosecutor to cross-examine his own witness by declaring him hostile does not completely efface the evidence of such witness. The evidence remains admissible in the trial and there is no legal bar to base conviction upon his testimony if corroborated by other reliable evidence. The said witness in his statement recorded in the Court stated that after the meeting

in the Panchayat Bhawan he along with Lal Muni Rai and others were coming back to the village and when they reached near puwal heap of Baij Nath Ram he saw accused Avinash Chand Rai (A-1), Anil Rai and Awadh Bihari Rai with others, equipped with rifles and guns. They caught hold of Lal Muni Rai. The witness cried and raised alarm that Lal Muni Rai was held by the aforesaid persons after which a number of people from the village rushed to the place including Chand Muni Rai (deceased). He, however, did not mention the presence of Subhash Chand Rai (A-2) for which he was declared hostile. In his cross-examination he admitted that bloodstained earth was recovered from the spot where Lal Muni Rai and Chand Muni Rai had fallen down. Regarding presence of the eyewitnesses he stated, "I do not remember that I stated before Darogaji that by that time the wife and son of Chand Muni Rai came to secure Chand Muni Rai." The occurrence having taken place and the two persons having died on the date of occurrence have been admitted even by PW 12. There is, therefore, no reason to hold that as Mukati Singh (PW 12) has not named appellant Subhash Chand Rai (A-2), he is entitled to acquittal."

77. In the discussion made above we reached at this conclusion that statement of PW-3 declared hostile is admissible and reliable to the extent it is in corroboration with the other evidences including statements of PW-1 and PW-6 with regard to presence at spot of incident and participation with all the accused in commission of crime since the very inception till the completion of the criminal act of killing "Ganga Ram' (deceased). All the three witnesses of fact are natural eye witnesses, truthful and credible and trustworthy.

Corroboration from medical evidence.

78. After the commission of crime the accused fled away from the spot and when the prosecution witnesses PW-1, PW-3 and PW-6 reached near the body of victim Ganga Ram lying collapsed on the ground in a pool of blood, they found him dead on spot with bleeding wounds, all these stand proved by the evidence of aforesaid witnesses, as we have discussed earlier in preceding paras. It is also found proved that after registration of offence against the assailants, in the course of investigation on spot inspection with examination of dead body was done and inquest report (Exhibit Ka-7) was prepared. The inquest report (Exhibit Ka-7) discloses the wounds stained with profused blood on the right side of chest, on the neck below the right ear, marks of pillets' injury caused by fire arm along with several incised lacerated wounds and contusions and abraded injuries on the body of deceased Ganga Ram. In their examination on oath the eye witnesses have consistently and without any anomaly have given a graphical account of the incident in question in detail, how the accused assailants armed with their respective weapons attacked over Ganga Ram and that A-3 with Rajpal fired upon him with their gun and country made pistol thus injured him. The rest of the accused also hit Ganga Ram with their weapon (lathi and Gandasa) when he collapsed. At this stage the wounds and other injuries found on the body of Ganga Ram is a fact relevant to the issue of killing of Ganga Ram by the accused. Though the evidence of PW-1, PW-3 and PW-6 prove sufficiently and reliably as to who caused

the injuries to the victim Ganga Ram. Further the nature and effect of the injuries whether sufficient to cause death in the ordinary course of nature, is proved by producing the doctor who did the autopsy of deceased body and prepared post mortem report. PW-2 Dr. Surendra Singh, the then Medical Officer, posted on 5.4.1985 in District Hospital, Hardoi, has proved the post mortem (Exhibit Ka-2), for easy reference the relevant extract from Exhibit Ka-2 is reproduced hereunder:-

Antemortem Injuries

(i) Lacerated wound 4 c.m. x 1.5 c.m. x scalp deep on middle of head 12 c.m. above the bridge of nose.

(ii) Lacerated wound 4 c.m.x 1.5 c.m. x scalp deep on the right side of the middle of the head 10 c.m. above right eye brow.

(iii) Lacerateed wound 2 c.m.x1 c.m. x bone deep on the left eye brow.

(iv) Lacerated wound 1 c.m. x 1.5 c.m. bone deep on the bridle of the nose.

(v) Lacerated wound 3 c.m. x 1.5 c.m. x bone deep on the right eye brow.

(vi) Abraded contusion 5 c.m. x 3 c.m. on the right side of the face.

(vii) Abraded contusion 4 c.m. x 3 c.m. on the left side of the face.

(viii) Firearm wound of entry 3 c.m. x 2.5 c.m. x bone deep on right angle of mandible margins are inverted and lacerated 3 c.m. below from right ear lower end. Blacking present around the wound direction upward and right to left.

(ix) Firearm wound of entry 2 c.m. x 1.5 c.m. X skin deep through and through on right side of upper part of chest including some part of right shoulder joint 8 c.m. above right nipple at 11 O'clock. Blackening present margins inverted and lacerated.

(x) Firearm wound of Exit 3 c.m. x 2.5 c.m. just below the injury no.9 communicated with injury no.9 c.m. above right nipple at 10 O'clock. Margins everted and lacerated.

(xi) Multiple abrasions in the area of 10 c.m. x 5 c.m. on the right side of the chest 1.5. c.m. above and left to the right Nipple measuring .25 c.m. x .25 c.m. to .5 c.m. x .5 c.m.

(xii) Abrasion 2 c.m. x 1 c.m. on right knee joint.

(xiii) Abrasion 1 c.m. x 1 c.m. on left knee joint.

Cause of Death:- In my opinion death occurred due to shock and hemorrhage as result of Antimortem injury."

79. Surendra Singh (PW-2) confirmed his opinion as to the cause of death of victim of the incident dated 4.4.1985 before the trial Judge also. He stated that in his opinion death of the deceased caused due to shock and excessive hemorrhage on account of the ante mortem injuries caused to him. He further stated that two wading pieces of bullet and 10 big size pillets were found on his body. The injuries reported by him, in the ordinary course of nature, were sufficient to cause death. PW-2 further opined about the time of death on the basis of post mortem staining and rigour mortis of the victim Ganga Ram that it might have occurred on 4.4.1985 at about 6:00 p.m. in evening. He also confirmed that injuries No.8,9 and 10 would have been caused by fire arm like gun and country made pistol (tamancha) and injuries reported at serial No.1 to 7 being lacerated wounds, would have been caused by any blunt end object like lathi also. He did not ruled out the use of "Gandasa' which has one side sharp edge while other side being bat or handle, a blunt end, if the same is wielded on the body of

deceased from blunt end. In totality the post mortem report Exhibit Ka-2 and the evidence of Doctor (PW-2) are in consonance with the graphical account of the incident as given by the defence through cross examination of the Doctor (PW-2) but seems to have put much vehemence in asking about the distance and direction of the accused from deceased when made shot at him, so as to falsitfy the statement of accused as to the location of assailants while they are said by them to have fired at Ganga Ram in the course of incident. They argued a lot on the basis of their hypothetical questions and their answer by doctor (PW-2) so as to shake the credibility of the eye witnesses referring the statement of eye witnesses as to the possible direction and distance from the deceased of the accused in the course of incident, keeping in view the fire arm injury wounds on the body of deceased having their margin inverted, lacerated everted or their specific location on the body. However, PW-2 opined that the assailant who caused injury no.8 would have been standing in the right side of the deceased at a distance about one and a half to two feets whereas injury no.9 would have been caused when the victim was lying supine on the ground.

80. The evidence of PW-2 (doctor) is merely an opinion of expert under Section 45 of the Indian Evidence Act. In the case before us the weapons stated to have been used by the accused in the course of commission of incident are proved and the effect caused through them are also found corelated wounds by virtue of the report as to ante mortem injuries found on the body of deceased Exhibit Ka-2 also commensurate with the nature of weapon. We have held that the witnesses PW-1, PW-3 and PW-6 are wholly reliable therefore, the expert evidence of (PW-2) is of not much importance as corroborative evidence. However, it is not in repugnancy with the evidence of the aforesaid eye witnesses of fact. The expert is a valuable witness when it becomes utmost necessary for the court to record his evidence to form an accurate opinion to determine that the offence was committed by the accused. The other evidences corroborated with the expert's witness' deposition fixes the guilt on the accused. In the present case before us the victim of the incident is proved not only by the witnesses of fact PW-1, PW-3 and PW-6 to have on spot died because of the injuries sustained by him from the weapon used by accused. They saw him lying in pool of blood and died on spot. The inquest report also confirms the ante mortem injuries on the dead body and post mortem report also mentions the said ante mortem injuries which in the opinion of PW-2 were fatal to cause death of Ganga Ram. Minor deviation, if any, as to the location of wound on the dead body, the distance between the assailants and the deceased in the deposition of the witness is not material to disbelieve the eye witness's account of the incident. In most of the details given by the witnesses as to the direction and distance they are more or less near the standard condition under forensic science. Ballistic parameters are not strictly the same as the same depend on the kind and strength of the firearms on their bore and the gun powder used in the bullets.

81. It is established law that the testimony of eye witness should be paramount unless medical evidence is so conclusive as to rule out even the possibility of eye witness's version to be true. A three Judges Bench of Hon'ble Supreme Court [Hon'ble M.M. Punchi, (C.J.), Hon'ble K.T. Thomas and Hon'ble S.

Rajendra Baboo, J.J] in ***State of U.P. Vs. Harban Sahai & Ors. (1998) 6 SCC 50*** has held in para-9:-

"9. The second reason put forth by the High Court for disbelieving the version of the eyewitnesses is this: PW 1 (Shashi Bhushan) and PW 2 (Shiv Sagar Lal) said that two accused had fired the gun simultaneously, but the deceased sustained only one gunshot injury which is described in the post-mortem certificate as Injury 2. The Public Prosecutor in the trial court endeavoured to show that Injury 7 would possibly have been the result of a gunshot. Dr R.S. Pandey (PW 7) answered to the said query saying that there is a possibility of that injury being caused in a gunshot if pellets have touched that part of the face and deflected therefrom. Injury 7 is described as "multiple abrasions in an area of 7 cm × 6 cm on the right side of the face 2.5 cm below the right eye". But the High Court ruled out the possibility of the said injury having been caused in gunshot on the following reasoning:

"But in the cross-examination the doctor has denied the possibility of such injury being caused while the deceased was being chased from behind and that is exactly what the prosecution case is, that while the deceased was running away the two appellants armed with guns, fired from behind. Consequently Injury 7, even if it is said to be a gunshot injury, would not go to corroborate the prosecution case in any manner."

The High Court has thus knocked out an eyewitness on the strength of an uncanny opinion expressed by a medical witness. Overdependence on such opinion evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe modus adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eyewitnesses only if it is so conclusive as to rule out even the possibility of the eyewitness's version to be true. A doctor who conducted post-mortem examination or examined an injured person is usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post-mortem features which he noticed in the medical report. But the answers given by the witness to such questions need not become the last word on such possibilities. After all he gives only his opinion regarding such questions. But to discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice. (Vide Piara Singh v. State of Punjab [(1977) 4 SCC 452 : 1977 SCC (Cri) 614 : AIR 1977 SC 2274] , Mange v. State of Haryana [(1979) 4 SCC 349 : 1979 SCC (Cri) 985 : AIR 1979 SC 1194] , Ram Dev v. State of U.P. [1995 Supp (1) SCC 547 : 1995 SCC (Cri) 402 (2)])"

82. Further in ***Thaman Kumar Vs. State of Union Territory of Chandigarh (2003) 6 SCC 380,*** Hon'ble Apex Court has held in para-16 as under:-

"16. The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the

size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

83. It would be relevant to refer the significance of distance between victim and the fire arm from which the fire of bullet is discharged. From ***Modi's Medical Jurisprudence and Toxicology 23rd Edition (reprint 2009)*** page No.721 following is extracted:-

"If a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches around the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt grains of gunpowder or smokeless propellant powder. The adjacent hairs are singed, and the clothes covering the part are burnt by the flame. If the powder is smokeless, there may be a grayish or white deposit on the skin around the wound. If the area is photographed by infrared light, a smoke halo round the wound may be clearly noticed. Blackening is found, if a firearm like a shotgun is discharged from a distance of not more than three feet and a revolver or no distinction can be made between on distant shot and another, as far as distance is concerned. Scorching in the case of the latter firearms is observed within a few inches, while some evidence of scorching in the case of shotguns may be found even at one to three ft. Moreover, these signs may be absent when the weapon is pressed tightly against the skin of the body, as the gases of the explosion and the flame smoke and particles of gunpowder will all follow the track of the bullet in the body. Wetting of the skin or clothes by rain reduces the scorching range. Blackening is not affected by wet surface although it can easily be removed by a wet cloth. Blackening with a high power rifle can occur up to about one ft. Usually, if there are unburnt powder grains, the indication is that the shot was fired from a revolver or a pistol and shorter the barrel of the weapon used the greater will be the tendency to the presence of unburnt of slightly burnt powder grains."

84. In the present case PW-1 have deposed before the court that assailants along with their fire arms were in north direction from the deceased at a distance of 3 to 4 steps. One feet is equal to 0.3048 meter. The distance covered by a single step assuming a stride length of 0.762 meters or 2.5 feet. Although stride length varies from person to person as per his/her activity. As such 2.5 feet would be a

maximum measurement of one step, otherwise normally, while walking it would be less than 2.5 feet. PW-3 has also stated about distance of fire arm (country made pistol) in the hand of Raj Pal about two steps from the deceased. All the witnesses have consistently deposed that accused persons fired three shots on Ganga Ram simultaneously. The dead body was found with three fire arm wounds measuring 3 c.m.x2.5 c.m. with inverted and lacerated margin and blackening around the wound (injury no.8). Secondly, entry wound measuring 2 c.m.x1.5 c.m. 5 c.m. deep and blackening around the wound with inverted and lacerated margin, thirdly wound of 3 c.m.x2.5 c.m. just below the injury no.9 with margin inverted and lacerated. The witnesses have also deposed the deceased was standing east facing towards the spot when the accused fired at him from north. The fire arm injuries are also on the right side of the body of deceased on mandible below the right ear on neck and right upper side of chest.

85. So far as the injuries inflicted by Gandasa by A1 is concerned the inquest report Exhibit Ka-7 shows presence of incised wound over the head and upper portion of body whereas in post mortem report (Exhibit Ka-2) no incised wound is reported on the body of deceased rather injuries no.1 to 7 are found to be lacerated wound PW-1 and PW-6 both have assigned "Gandasa' in the hand of A-1 and in their deposition before the court A-1 is stated to inflict blow of Gandasa over the head of Ganga Ram collapsed on the ground struck with firearms' shot made by A-3 and Rajpal. PW-3 in contradiction with his earlier statement given to Investigating Officer PW-8 under Section 161 Cr.P.C. has not supported while examined before the court. In his statement on oath, A-2 was stated by him to have been holding a lathi. However, in cross-examination by prosecution PW-3 stated he could not see whether A-1 was having Gandasa as he was crying for rescue at that time. He also asserted, if the investigating officer has written his statement regarding A-1 was armed with and used in the incident Gandasa then he would have been stated to him (I.O.). In view of the above the defence of A1 that he was not armed with Gandasa in the course of commission of offence is not corroborated with medical evidence. The expert opinion as to the lacerated wound depend before the court is that they might have been caused by some blunt end object like lathi. He further, added in case "Gandasa' is blown to inflict injury from it's reverse end which used to be blunt then it might have caused lacerated wound. The doctor's opinion firstly confirms in his report and statements apart of fire arm injuries on the body of deceased Ganga Ram, existence of lacerated wounds (at serial no.1 to 7) also on the body of the deceased Ganga Ram as ante mortem injuries. He opined further that such injuries might have been caused by using some blunt object. Further in cross-examination by the learned counsel for the defence that injuries No.1 and 2 could not be caused if the blows of lathi (stick) had been made from the side of legs of the deceased who lay fallen on the ground. Injuries no.1 and 2 are on the head of the deceased. It has come in statement on oath examination of PW-1 and PW-2 that A-2 was standing towards the head side of the Ganga Ram when he fell on ground and began to inflict blows of Gandasa. It is not asked by the learned counsel for the defence from aforesaid witness whether A-2 used the "Gandasa' for inflicting injuries from sharp edged and of the Gandasa or from reverse end which used to be blunt.

Corroboration from other materials proved in the Court.

86. The prosecution has produced for examination before the trial Judge the Head Moharrir (PW-5) who received the complaint (Exhibit Ka-1) from the informant PW-1 and registered the First Information Report which he proved when examined during trial as Exhibit Ka-4. He placed before the court the G.D. entry of the said FIR at serial no.29, in original and proved the FIR to have been registered in the P.S. Behta Gokul on 04.04.1985 at 7:30 p.m. He has also proved the fact that PW-1 and PW-6 both came together in Police Station to lodge FIR of the incident and that PW-6 was injured to whom he alongwith Chowkidar named "Subedar', sent for medical examination to District Hospital, Hardoi, along with his letter. Exhibit Ka-3. In cross examination this witness confirmed the special report pursuant to the lodging of FIR of the incident was sent to the concerned Magistrate at 8:40 p.m. on the same date 04.04.1985 through a constable named Abdul Samad. This witness as such proved one of the most vital fact, 'the prompt lodging of the FIR' of the incident on 04.04.1985 without any unreasonable delay. This overrules the argument of learned counsel for the defence as to the FIR being ante-timed and ante-dated. He further proved that PW-6 was injured at the time of his arrival at police station for filing FIR and proved this physical condition of PW-6 by showing entry to the same effect in the General Diary dated 04.04.1985 maintained in the Police Station.

87. Another police witness produced before the Trial Judge for examination is the Investigating Officer "Ram Ruchi Arya' as PW-8. He was posted in P.S. Behta Gokul as Additional Sub Inspector. He deposed before the Trial Judge that the FIR of the case concerned in the Police Station was lodged in his presence and that the investigation was handed over to him. He further proved the inquest report (Exhibit Ka-7) prepared in the presence of "Panch' witnesses on 04.04.1985, after enquiry of the dead body, in his own hand writing and signature. He stated that the then S.H.O. Jitendra Nath Singh, S.I. Vipin Singh and S.I. Shreepal Singh Constable Mohd. Yusuf and Ramasre Shukla (PW-7) were also present at the time of inquest. We thoroughly perused the Exhibit Ka-7 (Inquest report) it has properly mentioned crime no.48 registered under Section 302 IPC. None of the column in the prescribed format under Section 174 Cr.P.C is left unfilled. The time of occurrence date and place, the condition of the dead body, incised wounds and fire arm injuries present over the body of the deceased, the time when inquest proceeding started, the opinion of the witnesses as to cause of death all are duly filled. All the details furnished in the inquest report are in full consistency with those stated by the ocular witnesses in their deposition before the Court. The time of reporting as mentioned in Exhibit Ka-7 is 7:30 p.m. on 04.04.1985 and the initiation of proceeding at 9:30 p.m. whereas after completion of inquest proceeding the handing over of the dead body for post mortem at 10:30 p.m. on 04.04.1985 clearly overrules the argument as to the FIR being ante timed and ante dated. No discrepancy in inquest report is argued by learned counsel for defence but for the non mentioning of the name of accused therein. In this regard it would be relevant to give reference of the decision of Hon'ble Apex Court in ***Brahma Swaroop Vs. State of U.P. (2011) 6 SCC 288*** in para-9 has held as under:-

"9. The whole purpose of preparing an inquest report under Section 174 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating as in what manner, or by what weapon or instrument such wounds appear to have been inflicted. For the purpose of holding the inquest it is neither necessary nor obligatory on the part of the investigating officer to investigate into or ascertain who were the persons responsible for the death. The object of the proceedings under Section 174 CrPC is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. The question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings i.e. the inquest report is not the statement of any person wherein all the names of the persons accused must be mentioned."

88. Summing up our discussion over the first point of determination framed by us we reached at the conclusion that the prosecution has been successful in proving it's case against the accused-appellants A-1, A-2 and A-3 beyond all reasonable doubts through it's witnesses PW-1, PW-6 who are totally reliable for the reason their deposition before the Trial Judge has ever been free from any inconsistency anomaly, contradiction or improbability and as such in totality give a true, natural and trustworthy graphical account of incident wherein on 04.04.1985 at about 6:00 p.m. the accused appellants (and Rajpal died during trial) attacked Ganga Ram, deceased popping out from their place of hiding with their respective weapons at the western end of the bridge over the Sharda Canal on the way to village Behta Gokul for the reason of enmity with the deceased. We do not find any error in the judgment of the Trial Judge in this regard.

Defence witnesses of behalf of the accused appellants

89. We have earlier held that in the present case before us, which is based on direct and ocular witnesses of the incident, the prosecution has been successful in proving it's case with the help of it's reliable and trustworthy witnesses of fact namely PW-1, PW-3 and PW-6 as well as the formal witnesses and medical witnesses against the accused appellant with regard to their presence and participation in the killing of Ganga Ram (deceased). After closure of prosecution evidence the Trial Judge called the accused appellants personally under Section 313 of the Cr.P.C. so as to enable them to explain incriminating circumstances emerging out from the evidence against them. As such all the three accused appellants were personally given opportunity to explain his stand on the incriminating circumstances in addition to what their counsels would have already done by way of cross-examination. All of them have availed the opportunity and commonly blamed the incriminating which came out from prosecution evidence to be "false implication by reason of enmity'. Further they all wanted to adduce evidence in their defence. One of them (A-2) namely "Babu Ram' in addition to the common explanation of "false implication due to enmity' claimed himself to be on duty in Board Examination thus took plea of alibi. Two witnesses namely Sushil

Bajpayee (DW-1) and another "Gaya Prasad' (DW-2) were examined from the side of accused appellant.

90. We perused the judgment of learned Trial Judge to examine whether the defence offered by the accused has been duly considered or not. We found that in compliance of the mandatory duty cast upon the trial court under Section 313 (1)(b) Cr.P.C. the Trial Judge not only recorded the oral examination of the two defence witness DW-1 and DW-2 but also discussed in his judgment on the norms and parameter held by the decisions of our High Courts and the Apex Court for placing reliance on them. The Trial Judge found the plea of alibi not tenable on the ground of specifying the name and identification of the person in respect of whom the photo copy of a duty chart of Board Examination was placed before the Court, the want of mention of specific session of exam whether forenoon or afternoon and period of examination. Likewise the primary fact of appointment and posting of the accused (A-2) as teacher or in any other capacity in the institution at the relevant date was not shown. So far as the document (duty chart in Board Examination) is concerned the trial court observed, it was not admissible for the uncertainty as to the authority who prepared and issued the same. The Trial Judge considered DW-2 as a witness planned to save the accused appellants otherwise by his deposition he has admitted and proved the day, date, time and place of incident along with one of the accused appellant, Raj Pal. Before proceeding to scrutinize the evidence of the defense witnesses, we think it proper to give reference of some decisions of Hon'ble Apex Court relevant to the issue.

91. Hon'ble Apex Court in a recent judgment delivered in ***Reena Hazarika Vs. State of Assam (2019) 13 SCC 289*** has discussed the scope of Section 313 Cr.P.C. and nature of burden of proof of defence given by the accused. Hon'ble Apex Court in para 19, 20, 21 has held as under:-

"19. Section 313 CrPC cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) CrPC. The importance of this right has been considered time and again by this Court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) CrPC the Court is duty-bound under Section 313(4) CrPC to consider the same. The mere use of the word "may" cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available, is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 CrPC, in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 CrPC and to either accept or reject the same for reasons specified in writing.

20. Unfortunately neither the trial court nor the High Court considered

it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 CrPC to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of other evidence available as discussed hereinbefore. The complete non-consideration thereof has clearly caused prejudice to the appellant. Unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in Hate Singh Bhagat Singh v. State of Madhya Bharat [Hate Singh Bhagat Singh v. State of Madhya Bharat, AIR 1953 SC 468 : 1953 Cri LJ 1933] observing as follows: (AIR p. 471, para 26)

"26. We have examined the evidence at length in this case, not because it is our desire to depart from our usual practice of declining to re-assess the evidence in an appeal here, but because there has been in this case a departure from the rule that when an accused person puts forward a reasonable defence which is likely to be true.... then the burden on the other side becomes all the heavier because a reasonable and probable story likely to be true when pitted against a weak and vacillating case is bound to raise reasonable doubts of which the accused must get the benefit. ..."

21. A similar view is expressed in M. Abbas v. State of Kerala [M. Abbas v. State of Kerala, (2001) 10 SCC 103 : 2002 SCC (Cri) 1270] as follows: (SCC p. 108, para 10)

"10. ... On the other hand, the explanation given by the appellant both during the cross-examination of prosecution witnesses and in his own statement recorded under Section 313 CrPC is quite plausible. Where an accused sets up a defence or offers an explanation, it is well settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities. ..."

92. Here the question before us, is that whether, against the proved case of prosecution as to the presence and participation of accused in crime, the accused persons have put forward a reasonable defence which is likely to be true and can raise a reasonable doubt against the prosecution case. We think it proper to consider the defence case one by one.

(a) Plea of Alibi by accused appellant A-2 (Babu Ram)

93. To examine the plea of alibi set as defence by accused Baboo Ram we have gone through the evidences of PW-1, PW-3 and PW-6. The presence of the said accused on spot of crime his participation along with other accused in commission of crime is proved consistently by all the witnesses of fact named above. The nature of injury found on the body of deceased also corroborated the deposition of eye witnesses. We carefully scrutinized the chief examination and thereafter the cross examination of all the three witnesses of fact whether fact of Baboo Ram's having his employment on the relevant period of incident in an educational institution in any capacity teaching or non-teaching staff. Even assuming him on duty the distance of institution from the spot of incident is not asked from any of the said witness. Moreover, in statement recorded under Section 313 (1)(b) Cr.P.C., this accused has not stated his status as teaching or non-

teaching staff in a particular institution. He simply stated, I was on duty in board exam. Further DW-1 Sushil Bajpayee was produced, he too had not disclosed the capacity in which he was in board examination duty on 04.04.1985 in the Inter College "Pali', District Hardoi. He stated about one Baboo Ram Verma working with him on that day in examination duty. He filed a photo state copy of document purported to be duty chart of examination duty of the 04.04.1985 is second session but failed to state who prepared the same and who was the authority to issue that. In totality of facts and circumstances available on record as proved by the evidences, where the issue is whether the accused Baboo Ram was present anywhere else other than the spot of incident, there is nothing on record even to make it possible at least by preponderance of probability.

94. Hon'ble the Apex Court in the judgment delivered in ***Sheikh Sattar Vs. State of Maharashtra (2010) 8 SCC 430*** has held, the burden to establish the plea of alibi is on the accused. Para 34 and 35 are thus reads as under:-

"34. Except for making a bald assertion about his absence from his rented premises, the appellant miserably failed to give any particulars about any individual in whose presence, he may have read the namaz in the morning. He examined no witness from Chikalthana before whom he may have read the Koran in the evening prior to the incident. He examined nobody, who could have seen him in the masjid during the night of the incident. Therefore, the trial court as also the High Court concluded that this plea of being away from the rented premises at the relevant time was concocted.

35. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case. We may also notice here at this stage the proposition of law laid down in Gurpreet Singh v. State of Haryana [(2002) 8 SCC 18 : 2003 SCC (Cri) 186] as follows: (SCC p. 27, para 20)

"20. ... This plea of alibi stands disbelieved by both the courts and since the plea of alibi is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the abovenoted concurrent finding of fact."

95. This view was further reiterated by the Apex Court in para-64 and 71 of ***Jitendra Kumar Vs. State of Haryana (2012) 6 SCC 204*** which reads as under:-

"64. The mere fact that the accused were residents of a village at some distance would be inconsequential. As per the statement of the witnesses, both these accused were seen by them in the house of Ratti Ram where the deceased was murdered. We are also unable to accept the contention that presence of PW 10 and PW 11 at the place of occurrence was doubtful and the statements of these witnesses are not trustworthy.

71. Once PW 10 and PW 11 are believed and their statements are found to be trustworthy, as rightly dealt with by the courts below, then the plea of abili raised by the accused loses its significance. The burden of establishing the plea of alibi lay upon the appellants and the appellants have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of alibi. The plea of alibi in fact is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the place of occurrence and in the house which was the home of their relatives. (Ref. Sk. Sattar v. State of Maharashtra [(2010) 8 SCC 430 : (2010) 3 SCC (Cri) 906] .)"

96. Thus we uphold the finding of learned Trial Judge that accused appellant Baboo Ram failed to establish his plea of alibi even on the preponderance of probabilities in the totality of proven facts and circumstances as on record.

(b) false implication due enmity

97. In one of the preceding paras under the head "enmity' we have discussed the evidence on record by cross examination of PW-1 and PW-6 the real brothers of deceased Ganga Ram. We have found it proved that whatever enmity might have been is amongst Ganga Ram and the accused brother Lala Ram, Baboo Ram. The proved reason of enmity was the murder of "Digga' father of accused brothers Lala Ram and Baboo Ram, for which they were prosecuting Ganga Ram and two others namely Vishram and Ram Kumar. The trial ended at the level of Sessions Judge with conviction of the accused but in appeal by Ganga Ram he was released on bail by the High Court. Admittedly none of the witness was accused in that trial nor any civil or criminal litigation was pending between the witnesses and the accused. Therefore, by cross examination whatever material came on record, it is not proved that the witnesses aforesaid shared any enmity against accused with Ganga Ram (deceased).

98. The witness DW-2 "Gaya Prasad' claims himself an eye witness of the incident. He stated to have seen the murder of "Ganga Ram' by Raj Pal (died duing trial) and three other unknown assailants to whom he identified in District Jail Hardoi. He stated that the family members of Ganga Ram and the I.O. were told by him about the assailants. In cross examination he stated that he don't know why he is not made a witness in the case by prosecution. The Trial Judge has evaluated his deposition and found him an unreliable witness coming forward to save the accused by false story.

99. We scrutinized the evidence of DW-2 Gaya Prasad along with other facts proved on evidence of prosecution witnesses. PW-1 in his statement on oath dated 20.12.1986 in para-4 have stated about the aforesaid "Gaya Prasad' that he knows him as he is resident of the same village Behta Gokul to which he belongs. He further told the court that Gaya Prasad is the companion of Deo Narayan and Ram Murari, his enemies. He ruled out the involvement of any stranger than the named accused as stated by the witnesses DW-2. DW-2 stated that he told the I.O. the fact of unknown assailants, but this seems to be false because on 04.04.1985 just after the time of occurrence at 6:00 p.m. in Police Station Behta Gokul FIR of the incident was lodged at 7:30 p.m. against the

named accused namely Raj Pal, Lala Ram, Baboo Ram and Ram Pal. Even the special report to concerned Magistrate was sent and thereafter inquest proceeding was initiated on spot of incident at 9:30 p.m. and completed by 10:30 p.m. Till then the "Gaya Prasad' did not appear as eye witness. It may be seen in the inquest report itself (Exhibit Ka-7) wherein name of the Panch witnesses present on spot is written which does not include name of Gaya Prasad. Even the hostile witness PW-3 in his cross-examination by defence counsel firmly denied the presence of any other witness on spot than him, Kadhiley and PW's 1 and 3. All these prove the DW-2 an inimical witness to the PW-1 and PW-6 the real brother of Ganga Ram. He seems to be a fictitious witness planned to save the accused. The Trial Judge is not in error to hold this witness unreliable, because the witness whether of prosecution or of defence has to fulfill the same criterion as to be treated trustworthy and reliable.

100. On the basis of above discussion we reached at the conclusion that the accused appellant could not establish defence set up by them even on preponderance of probabilities so as to raise any doubt as to the prosecution case.

Liability under Section 34 IPC

101. Our second point of determination in these three criminal appeals of accused appellants is as to their liability consequent upon their joint participation in the commission of crime. Before we proceed to discuss this issue it would be relevant to refer hereunder the provision of Section 34 of the Indian Penal Code, 1860 which reads as under:-

"34. Acts done by several persons in furtherance of common intention.--When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

102. Simply stating Section 34 of the Indian Penal Code, provides that all those persons who have committed a crime with a common intention and they have acted while keeping in mind their common institution, then every one should be liable for the act of another done in common intention as if the act is done by the person alone. This is the concept of joint liability enshrined in the Section 34 IPC. The essential ingredients for the application of the joint liability under Section 34 of the IPC obvious from it's language are-

(i) a criminal act is done by several persons.

(ii) the criminal act must be to further the common intention of all,

(iii) there must be participation of all the persons in furthering the common intention.

103. The learned Trial Judge took into consideration the proved facts and materials on record in the light of the three essential ingredients referred hereinabove and held the accused in furtherance of their common intention to take revenge of the murder of accused appellants' (A-2 and A-3) father "Digga' sat hidden with their weapons on the way leading to Ganga Ram's home and when he reached near they suddenly jumped out and intercepted him. A-3 and Rajpal (died during trial) fired on Ganga Ram with their respective fire arms injured thereby when he collapsed on the ground A-2 and A-1 inflicted on his body the blows of their respective weapon namely Gandasa and lathi. Seeing the people rushing to the spot on the hue and cry made by PW's 1, 3 and 6 all the accused

fled away from the spot. The Trial Judge on the basis of the said proved facts held all the accused to have participation and role in murder of "Ganga Ram' committed in furtherance of their common intention. Accordingly, he convicted all of them being jointly liable for the offence punishable under Section 302 read with aid of Section 34 IPC.

104. Out of the four accused persons Raj Pal (died during trial) and his case stood abated before the final decision in the trial. The rest of the three convicted accused A-1 (Baboo Ram) A-2 (Ram Pal) and A-3 (Lala Ram) have preferred separate appeals. The vehemence of argument done by their learned counsel is upon the effect caused from specific weapon assigned to them by prosecution and the nature of injury caused to the deceased through their weapon, whether fatal in consequence and sufficient to cause his death. However, with regard to A1 one fact proved on the evidence by deposition of PW-1, PW-6 and PW-3. Consequently, is the presence of all the four accused from the very inception throughout the occurrence of incident. The medical expert's opinion (PW-2, Dr. Surendra Singh) is also corroborative of the evidence of eye witnesses that the cause of death of Ganga Ram is the shock and excessive hemorrhage due to ante mortem injuries. The ante mortem injuries mentioned in the inquest report Exhibit Ka-7 and post mortem report (Exhibit Ka-2) are not only the fire arm wounds but also large and deep lacerated wound on head and other part of the body.

105. In the context of above proved facts it would be relevant to refer one of the earliest case on the concept of joint liability under Section 34 IPC decided by the *Privy Council, 'Barendra Kumar Ghosh Vs. King Emperor' (AIR 1925 P.C. 1)* where the court convicted one person for the act of another done in furtherance of common intention. The fact of the case are that several armed persons entered into a post office to extort money from the post master who was counting there the cash. They fired on him from pistol due to which he died on the spot. All the assailants fled away without taking money. The police caught one of the assailants Barendra Kumar Ghosh who was standing outside the post office for watching the police and alarm the other members of the group. Calcutta High Court rejected his plea that he was only a watchman and convicted him under Section 302 IPC with the aid of Section 34 IPC. Privi council also rejected the appeal.

106. A perusal of the evidence of PWs no.1, 3 and 6 the presence over spot of incident and participation in crime of all the accused is proved. Therefore, to gather from the evidences inference as to a common intention and that the accused persons were acting in furtherance thereto so as to fasten their joint liability, irrespective of the weapon assigned to them and their use by them it would be relevant to refer the judgment of the Constitution Bench of the Supreme Court in ***Mohan Singh Vs. State of Punjab AIR 1963 SC 174***, relevant para nos. 14 and 15 are thus reads as under:-

"14. What then are the facts and circumstances proved in the present case? It is proved that the appellants shared with Dalip Singh the motive which impelled Dalip Singh to inflict the fatal blow on Gurdip Singh. The close relationship between the appellants and Dalip Singh leaves no room for doubt that they shared

the same motive with Dalip Singh to the same extent. It is also proved that Dalip Singh and the two appellants were lying in wait for Gurdip Singh. We have also seen that when the party accompanying Gurdip Singh told the appellant Mohan Singh that the Patwari and the Qanungo had come on the spot to deliver possession of the land to Gurdip Singh, Mohan Singh pretended that he was hungry and went away. Then he seems to have contacted Dalip Singh and Jagir Singh and all the three were lying in wait for Gurdip Singh, who, they knew, would pass that way. Thus, the two appellants and Dalip Singh deliberately concealed themselves behind a grove of Khajoor trees and were armed with lathis. This conduct on the part of the three assailants clearly shows that they had the common intention of fatally assaulting Gurdip Singh. That alone can explain why they were armed with lathis and why they hid themselves behind the Khajoor trees. Besides, as soon as Gurdip Singh and Harnam Singh came near the place where the appellants lay concealed, all of them rushed on Gurdip Singh and chased him when he and Harnam Singh began to run away. This conduct also clearly indicates the presence of the common intention. After chasing the victims, three of them surrounded them and Dalip Singh gave the fatal blow on Gurdip Singh. In the act of surrounding Gurdip Singh, the two appellants undoubtedly played their part and thus helped Dalip Singh. After Gurdip Singh was fatally assaulted, the three assailants apprehended that the villagers would rush on the scene because an alarm had then been raised and so, they ran away together. On these facts, the conclusion appears to be inescapable that the appellants and Dalip Singh were actuated by the common intention to kill Gurdip Singh and the attack made by Dalip Singh on Gurdip Singh was in furtherance of the said common intention. Therefore, in our opinion, there is no difficulty whatever in coming to the conclusion that the appellants are guilty under Section 302/34 of the Indian Penal Code. We have no doubt that if the appellants had raised before the High Court the contention that Section 149 was inapplicable to their case, the High Penal Code. This modification in the order of the conviction does not require any change in the order of sentence at all. For the offence under Section 302, read with Section 34 of which we are convicting them, they would be sentenced to imprisonment for life. The conviction and sentence for the offence under Section 147 is, however, set aside and they are ordered to be acquitted in respect of that offence." Court would have without any hesitation altered their conviction from under Section 302/149 into one under Section 302, read with Section 34.

15. The result is, the conviction of the appellants is accordingly altered into one under Section 302, read with Section 34 of the Indian Penal Code. This modification in the order of the conviction does not require any change in the order of sentence at all. For the offence under Section 302, read with Section 34 of which we are convicting them, they would be sentenced to imprisonment for life. The conviction and sentence for the offence under Section 147 is, however, set aside and they are ordered to be acquitted in respect of that offence."

107. In a latest case before Hon'ble Supreme Court ***Virendra Vs. State of Haryana*** decided on 16.12.2019 by **Hon'ble Mohan M. Shantanagendar and**

K.M. Joseph, J.J. (Manu/SC/1751/2019), it is held as under:-

"11. In order to invoke the principle of joint liability in the commission of a criminal act as laid down in Section 34, the prosecution should show that the criminal act in question was done by one of the accused persons in furtherance of the common intention of all. If this is shown, the liability for the offence may be imposed on any one of the persons in the same manner as if the act was done by him alone. It may be difficult to procure direct evidence to prove the intention of an individual, and in most cases it has to be inferred from the facts and relevant circumstances of the case. The common intention may be through a pre-arranged plan, or it may be generated just prior to the incident. Just as a combination of persons sharing the same common object is one of the features of an unlawful assembly, so is the existence of a combination of persons sharing the same common intention one of the features of Section 34."

108. Each case has to rest on its own facts. Whether the crime is committed in furtherance of common intention or not, well depend upon the material brought on record and the appreciation thereof in proper perspective. Hon'ble the Apex Court in ***Vijendra Singh & Ors. Vs. State of Uttar Pradesh AIR 2017 SC 860 : (2017) 11 SCC 129*** has given reference of some of it's earliest decision which are :-

"22. In this regard, we may usefully refer to a passage from the authority in Pandurang v. State of Hyderabad [Pandurang v. State of Hyderabad, AIR 1955 SC 216 : 1955 Cri LJ 572] . The three-Judge Bench in the said case adverted to the applicability and scope of Section 34 IPC and in that context ruled that: (AIR p. 222, paras 32-33)

"32. ... It requires a prearranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: Mahbub Shah v. King Emperor [Mahbub Shah v. King Emperor, 1945 SCC OnLine PC 5 : (1944-45) 72 IA 148 : AIR 1945 PC 118] . Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely, the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a prearranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar Ghosh v. King Emperor [Barendra Kumar Ghosh v. King Emperor, 1924 SCC OnLine PC 49 : (1924-25) 52 IA 40 : AIR 1925 PC 1] and Mahbub Shah v. King Emperor [Mahbub Shah v. King Emperor, 1945 SCC OnLine PC 5 : (1944-45) 72 IA 148 : AIR 1945 PC 118] . As their Lordships say in the latter case, ''the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and

if overlooked will result in miscarriage of justice'.

33. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a prearranged plan however hastily formed and rudely conceived. But prearrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose."

23. And, again: (Pandurang case [Pandurang v. State of Hyderabad, AIR 1955 SC 216 : 1955 Cri LJ 572] , AIR p. 222, para 34)

"34. ... But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, ''the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis'. (Sarkar's Evidence, 8th Edn., p. 30.)"

24. In this context, we may refer with profit to the statement of law as expounded by the Constitution Bench in Mohan Singh [Mohan Singh v. State of Punjab, AIR 1963 SC 174 : (1963) 1 Cri LJ 100] . In the said case, the Constitution Bench has held that Section 34 that deals with cases of constructive criminal liability provides that if a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for the act in the same manner as if it were done by him alone. It has been further observed that the essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. The common intention in question animates the accused persons and if the said common intention leads to commission of the criminal offence charged, each of the person sharing the common intention is constructively liable for the criminal act done by one of them. The larger Bench dealing with the concept of constructive criminal liability under Sections 149 and 34 IPC, expressed that just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34. In some ways the two sections are similar and in some cases they may overlap. The common intention which is the basis of Section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a prearranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which Section 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their

character, but they are all actuated by the same common intention. Thereafter, the Court held: (Mohan Singh case [Mohan Singh v. State of Punjab, AIR 1963 SC 174 : (1963) 1 Cri LJ 100] , AIR p. 181, para 13)

"13. ... It is now well settled that the common intention required by Section 34 is different from the same intention or similar intention. As has been observed by the Privy Council in Mahbub Shah v. King Emperor [Mahbub Shah v. King Emperor, 1945 SCC OnLine PC 5 : (1944-45) 72 IA 148 : AIR 1945 PC 118] common intention within the meaning of Section 34 implies a prearranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the prearranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case."

25. In Harshadsingh Pahelvansingh Thakore [Harshadsingh Pahelvansingh Thakore v. State of Gujarat, (1976) 4 SCC 640 : 1977 SCC (Cri) 26] , a three-Judge Bench, while dealing with constructive liability under Section 34 IPC has ruled thus: (AIR p. 643, para 7)

"7. ... Section 34 IPC fixing constructive liability conclusively silences such a refined plea of extrication. (See Amir Hussain v. State of U.P. [Amir Hussain v. State of U.P., (1975) 4 SCC 247 : 1975 SCC (Cri) 505] ; Maina Singh v. State of Rajasthan [Maina Singh v. State of Rajasthan, (1976) 2 SCC 827 : 1976 SCC (Cri) 332] .) Lord Sumner's classic legal shorthand for constructive criminal liability, expressed in the Miltonic verse "They also serve who only stand and wait" a fortiori embraces cases of common intent instantly formed, triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile heads, some spilling drops of blood. Guilt goes with community of intent coupled with participatory presence or operation. No finer juristic niceties can be pressed into service to nullify or jettison the plain punitive purpose of the Penal Code."

This extract is taken from Vijendra Singh v. State of U.P., (2017) 11 SCC 129 : (2017) 3 SCC (Cri) 881 : 2017 SCC OnLine SC 21 at page 144

26. In Lallan Rai v. State of Bihar [Lallan Rai v. State of Bihar, (2003) 1 SCC 268 : 2003 SCC (Cri) 301] the Court relying upon the principle laid down in Barendra Kumar Ghosh [Barendra Kumar Ghosh v. King Emperor, 1924 SCC OnLine PC 49 : (1924-25) 52 IA 40 : AIR 1925 PC 1] has ruled that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result.

This extract is taken from Vijendra Singh v. State of U.P., (2017) 11 SCC 129 : (2017) 3 SCC (Cri) 881 : 2017 SCC OnLine SC 21 at page 144

27. In Goudappa v. State of Karnataka [Goudappa v. State of Karnataka, (2013) 3 SCC 675 : (2013) 2 SCC (Cri) 8] the Court has reiterated the principle by opining that Section 34 IPC lays down a principle of joint liability in doing a criminal act and the essence of that liability is to be found in the existence of common intention. The Court posed the question how to gather the common intention and answering the same held that the common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the

occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature of the injury caused by one or some of them and for arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of circumstances must be taken into consideration.

This extract is taken from Vijendra Singh v. State of U.P., (2017) 11 SCC 129 : (2017) 3 SCC (Cri) 881 : 2017 SCC OnLine SC 21 at page 144

28. The aforesaid authorities make it absolutely clear that each case has to rest on its own facts. Whether the crime is committed in furtherance of common intention or not, will depend upon the material brought on record and the appreciation thereof in proper perspective. Facts of two cases cannot be regarded as similar. Common intention can be gathered from the circumstances that are brought on record by the prosecution. Common intention can be conceived immediately or at the time of offence. Thus, the applicability of Section 34 IPC is a question of fact and is to be ascertained from the evidence brought on record. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the fact of the case and circumstances of the situation. Whether in a proved situation all the individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts. (See Kripal v. State of U.P. [Kripal v. State of U.P., AIR 1954 SC 706 : 1954 Cri LJ 1757] .) In Bharwad Mepa Dana v. State of Bombay [Bharwad Mepa Dana v. State of Bombay, AIR 1960 SC 289 : 1960 Cri LJ 424] , it has been held that Section 34 IPC is intended to meet a case in which it may be difficult to distinguish the acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. The principle which the section embodies is participation in some action with the common intention of committing a crime; once such participation is established, Section 34 is at once attracted.

This extract is taken from Vijendra Singh v. State of U.P., (2017) 11 SCC 129 : (2017) 3 SCC (Cri) 881 : 2017 SCC OnLine SC 21 at page 145

29. In the case at hand, it is contended that there is no injury caused by lathi or ballam. Absence of any injury caused by a lathi cannot be the governing factor to rule out Section 34 IPC. It is manifest from the evidence that the appellant-accused had accompanied the other accused persons who were armed with gun and they themselves carried lathi and ballam respectively. The carrying of weapons, arrival at a particular place and at the same time, entering into the shed and murder of the deceased definitely attract the constructive liability as engrafted under Section 34 IPC."

109. Similarly in the case before us the argument raised by the learned counsel for A-1 (Baboo Ram) and A-2 (Ram Pal) that there is no injury sufficient to cause death of Ganga Ram by lathi and Gandasa, absence of any such injury cannot be the governing factor to rule out application of Section 34 IPC. It is manifest from the evidence that the said appellant accused

armed with their respective weapon (lathi and Gandasa) had accompanied the two other accused armed with Gun and country made pistol. The carrying of weapon, sitting collectively at the place of hiding adjacent to the spot of incident waiting for the Ganga Ram (deceased) who was on the way back to home along with his brothers PW-1 and PW-6 intercepting Ganga Ram, hurling fire from the gun and pistol by two accused and when Ganga Ram fell collapsed on the ground beating him by other two accused from their lathi and Gandasa. As such they assured his death and then fled away from the spot seeing the people rushing to the spot on cries to rescue raised by the witnesses. All these proved facts circumstances and materials available on record attract the constructive liability enshrined in the provision of Section 34 of the IPC.

110. Therefore, the act of accused appellants collectively amounts culpable homicide amounting to murder under Section 300 IPC punishable under Section 302 IPC brings all of them under joint liability of the offence irrespective of their weapons and injury caused thereby to the deceased, Ganga Ram. We do not find error in finding of the learned Trial Judge in this regard. It is evincible from the evidences that all the accused were in prior concert and preplanned to kill Ganga Ram and to further this common intention they sat armed together in their place of hiding and in continuance of the same common intention they intercepted Ganga Ram when he reached near to them and ultimately after killing him fled away. We reached thus at the conclusion that accused appellants are jointly liable for the offence of murder of Ganga Ram punishable under Section 302 IPC with the aid of Section 34 IPC.

111. In view of the aforesaid analysis, we do not find any merit in all the three criminal appeal Nos. 371 of 2009 (Baboo Ram Vs. State of U.P.), 577 of 2009 (Ram Pal Vs. State of U.P.) and 655 of 2009 (Lala Ram Vs. State of U.P.) and the same is accordingly liable to be **dismissed.**

Order

(i) The criminal appeal nos. 371/2009 preferred by accused-appellant Babu Ram, 377/2009 preferred by accused-appellant Ram Pal and 655/2009 preferred by Lala Ram are arising out of judgment and order of sentence passed in Sessions Trial No.431 of 1985, Crime No.48/1985, Police Station Behta Gokul, District Hardoi under Section 302/34 IPC are dismissed. The judgment and order of sentence of life imprisonment along with sentence of fine imposed on each one and consequent upon the failure to deposit the same further imprisonment of six months are confirmed.

(ii) The accused appellant Babu Ram, Ram Pal and Lala Ram are on bail. Their bail bonds and surety bonds are hereby cancelled, the sureties are therefore discharged.

(iii) The accused appellants Ram Pal, Babu Ram and Lala Ram are ordered to surrender before the court of Chief Judicial Magistrate, District Judgeship of Hardoi within 15 days from the date of order. In case of their failure to surrender within aforesaid period, the Chief Judicial Magistrate, Hardoi in order to ensure the compliance shall adopt all coercive measures in accordance with law and send them to jail for undergoing sentence of life imprisonment.

(iv) In case of failure to comply with the sentence of fine the Chief Judicial Magistrate is to ensure the recovery in accordance with law.

(v) Copy of the judgment be sent to Sessions Judge, Hardoi to ensure compliance under intimation to this Court.

(vi) The Office is directed to provide the copy of the judgment separately to all the three appellant promptly.

(vii) The office is further directed to enter the judgment in compliance register maintained for the purpose on the Court.

(2020)03-05ILR A298
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.05.2020

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 612 of 1996

Jagat Pal & Ors. ...Appellants(In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Sri R.K. Saxena, Sri Sukhveer[*A.C.*]

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

Delay of 9 hours in lodging the FIR and convincing and reasonable explanation has not been furnished- Testimony of fact witnesses not in consonance with the FIR version- Where the witness has changed his version and has narrated a new set of facts which neither finds mention in FIR nor in his statement recorded by I.O under section 161 CrPC and which changes the nature and character of his evidence, the evidence becomes significantly contradictory and such improvement shatters his credibility as witness- It amounts to material contradiction and improvement and such evidence is not acceptable and should be discarded – Contradiction between the medical with the ocular evidence- The prosecution has not been able to show and prove the source of light at the time of incident in which the two fact witnesses saw the accused persons, nor has been able to discover any incriminatory article- No reason or motive has been alleged nor there was any enmity between the deceased and accused persons leading to such criminal act.

Held- Delay in lodging FIR- Where the witnesses are unreliable, the delay in lodging the FIR without any explanation becomes fatal for the case of the prosecution.

Evidence Law- Indian Evidence Act, 1872- Section 155- Credibility of witness- Material contradictions and improvements in the testimony of a witness renders his evidence untrustworthy and unreliable and should be discarded.

Absence of corroborative evidence- Where the medical evidence contradicts the ocular version and there is absence of corroboration of the ocular evidence, the presence of the prosecution witnesses becomes doubtful.

Evidence law-Indian Evidence Act, 1872 – Section 9- Identification of the accused- Early hours of winter morning and no recovery of source of light (torches) makes the identification of the accused doubtful.

Evidence Law -Indian Evidence Act, 1872- Section 8 - Absence of motive- The prosecution has failed to bring out any motive and on the contrary there was pre-existing bitterness which caused the false implication of the appellants**.**

The learned trial court has ignored the infirmities and shortcomings in the evidence and prosecution case. The impugned judgement is perverse, illegal and not sustainable under law and is liable to be set aside.
(Para 28, 29,31, 35)

Criminal Appeal allowed (E-3)

List of case cited:-

1. St. of Raj. Vs. Smt Kalki, AIR 1981 SC 1390

2. Alamgir Vs. St. of NCT, Delhi, (2003) 1 SCC 21

3. Rudrappa Ramappa Jainpur Vs. St. of Kar., (2004) 7 SCC 422

4. Bihari Nath Goswami Vs. Shiv Kumar Singh (2004) 9 SCC 186

5. Syed Ibrahim Vs. St. of A.P., AIR 2006 SC 2908;

6. Arumugam Vs. State, AIR 2009 SC 3

7. St. Rep. by Inspr. of Police, T.N, (2008) 15 SCC 440

8. St. of Raj. Vs. Rajendra Singh, (2009) 11 SCC 106

9. St. Rep. by Inspr. of Police Vs. Sarvanan, AIR 2009 SC 152

10. Mahendra Pratap Singh Vs. St. of UP, (2009) 11 SCC 334

11. Sunil Kumar Shambhu Dayal Gupta Vs. St. of Maha., 2011 (72) ACC 699 (SC)

12. Rohtash Vs. St. of Har., (2012) 6 SCC 589

13. Tomaso Bruno Vs. St. of U.P, (2015) 7 SCC 178

14. Rambraksh Vs. St. of Chhatisgarh, AIR 2016 SC 2381

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

1. Heard Sri Sukhveer Singh, Amicus Curiae, for the appellants and Ms. Meena, learned AGA for the State.

2. This criminal appeal has been filed against the impugned judgment dated 23.3.1996 passed by 3rd Additional Sessions Judge, Kanpur Nagar in ST No. 369 of 1992 arising out of Case Crime No. 16 of 1992 under Sections 302, 323, 506 IPC, Police Station Maharajpur, District Kanpur Nagar, by which the accused-appellants namely Jagat Pal, Jhabboo @ Somnath and Prithvi Pal have been convicted for the offence under Sections 302/34 and 323/34 IPC and have been sentenced to undergo life imprisonment for the offence under Section 302 IPC and three months imprisonment under Section 323 IPC with Rs. 500/- fine each and in default additional imprisonment of one month.

3. Vide order dated 22.11.2019 of this Court, criminal appeal has been **abated** in respect of appellant no.3 namely **Prithvi Pal** on account of his death report.

4. Brief facts of this case is that the informant Putti Lal gave a written report on 9.1.1992 at 13:15 PM in respect of criminal incident dated 9.1.1992 at about 4:00 AM in mid night. Ramdhani, nephew of informant, was sleeping on the tube-well at the time of incident and next day in the morning, for a long time when he did not return, his mother asked the informant to go and see why Ramdhani has not come till now from the tube-well. At about 10:00 AM in the morning when the informant was going to the tube-well, on the way he heard the sound of groaning and crying from the tube-well of Ramlal Kushwaha. He went there and found there Ramlal Kushwaha lying on his cot and was groaning. He had incurred bleeding injuries on his mouth. He asked about it then he told that in the mid night at about 4:00 AM Jagat Pal Singh son of Babu Singh Thakur, Jhabboo @ Somnath son of Ved Prakash and Prithvi Pal son of Munni Lal Pasi of the village were assaulting Ramdhani on his tube-well. Hearing his cry, he

challenged and cried out *'who is there'* and '*I am coming*'. Hearing his voice all the three accused persons after killing Ramdhani came to him and threatened him that if he told about it to anyone they would kill him. He said that they have committed a wrong thing by killing Ramdhani whereupon they started beating him by fist and hockey stick. The informant then went to the tube-well of Ramdhani and found that Ramdhani was lying dead below the cot. He told about it in the village and Bihari, Ramesh, Sanwari Lal, Rajkumar and other persons came on the tube-well and at the same time Ramlal s/o Murali, Ram Avatar and Brij Bihari also came and they said that they had also seen the incident. The informant Putti Lal (PW-1) along with Ramlal (PW-2) and Sanwari (PW-3) went to the police station and gave a written report. The offence was registered against the three accused persons namely Jagat Pal, Jhabboo @ Somnath and Prithvi Pal for the offence under Sections 302, 323 and 506 IPC and chik was prepared. The injured Ramlal was sent to hospital and he was medically examined on the injury letter of the police. The police went to the spot and the dead body was taken into possession and sealed. Inquest report was prepared, papers necessary for post-mortem were also prepared and the dead body was handed over to the police personnel to take the same to the District Hospital for post-mortem, where the post-mortem of the dead body was conducted.

5. The Investigating Officer went to the spot and recorded the statement of the witness, prepared spot map and after obtaining the post-mortem report and finding sufficient evidence against the accused persons, submitted charge sheet against them under the aforesaid sections. Charges were framed against the accused persons for the offence under Sections 302/34, 323/34 and 506 IPC. The accused persons denied the charge and claimed trial. Nine witnesses were examined by the prosecution in support of prosecution case. The statements of the accused persons were recorded under Section 313 CrPC. The accused persons stated that they were falsely implicated and false evidence was given against them out of enmity. Accused Somnath has stated that his mausi (sister of his mother) was killed in which an application was given against witness Sanwari on which direction was given to register the case. But, instead of registering a case against him, he was made a witness and the case was registered against Jagatpal and Prithwipal in which they were acquitted. Accused Prithvi Pal has stated that at the time of incident he was in Pali road and he had no idea about the incident and after attachment he appeared. The accused Jagat Pal Singh had stated that Ramlal and Sanwari Lal have enmity with him and Sanwari Lal had given evidence against him earlier also. They have enmity with him because of party rivalry. The nephew of Ramlal namely Rajendra Singh was killed in which Jagat Pal Singh was made an accused and he was acquitted, this is also a reason for enmity. At the time of incident, he was not in the village and on being informed that he has been involved in the case, he surrendered in the Court. The accused persons have, however, not given any evidence in defence. On the basis of evidence on record and after hearing both the sides, the learned trial court passed the impugned judgment convicting and sentencing the appellants for the offence under section 302/34 and 323/34 IPC.

6. Aggrieved by the impugned judgment, the appellants have filed this appeal challenging the impugned judgment

on the ground that the conviction and sentence is against weight of evidence on record and is bad in law. The sentence awarded is too severe and the judgment is liable to be set aside and they are entitled for acquittal.

7. Before proceeding to examine the legality of the impugned judgment, it is necessary to go through the prosecution evidence. PW-1 Putti Lal (informant) has stated that the deceased Ramdhani was his nephew, who used to sleep on the tube-well to look after the same. About 15-16 months ago Ramdhani as usual went to his tube-well in the evening and on the next day morning for a long time he did not come back. His mother asked him to go to the tube-well and to see why Ramdhani has not come back as yet. The informant at about 10:00 AM in the morning was going to tube-well and when he reached near the tube-well of Ramlal, he heard the voice of groaning and crying. He went there and saw that Ramlal was lying on his cot and was crying with pain. He had incurred bleeding injury on his mouth. On being asked by him, Ramlal said that in the mid night at about 4:00 AM accused Jagat Pal, Jhabboo @ Somnath and Prithvi Pal of the village were assaulting Ramdhani and hearing him crying Ramlal challenged that who is there and he is coming. The accused persons after killing Ramdhani came to him and threatened him that if he told about it to anyone he will be killed. Ramlal said that they had committed a wrong thing by killing Ramdhani, whereupon, all the three accused persons assaulted him by hockey stick and fist. Then, PW-1 went to tube-well of Ramdhani and found him lying dead below his cot and his neck was cut in the left side. PW-1 went to the village and said about the incident to the villagers. Ramesh, Bihari, Rajkumar, Banwari Lal and Ramlal son of Murli and other persons of the village came there. He got a report scribed by Man Singh and after hearing and understanding the same he put his thumb impression on the report and gave it to the police. He also put his thumb impression on the memo of blood stained and plain earth. In the very beginning of the cross-examination, he had stated that he had not seen the incident and he lodged the FIR on the basis of what Ramlal had stated to him.

8. PW-2 Ramlal has stated that the incident took place in January, 1992. He was sleeping on his tube-well in the night near his tube-well, there is a tube-well of Ramdhani also where Ramdhani was sleeping. In the early morning at 4:00 AM, he heard Ramdhani crying that he is being killed whereupon he went to the tube-well of Ramdhani with torch and stick and saw that accused Prithvi Pal and Jagat Pal having an axe in their hand and Somnath having a hockey like stick were cutting Ramdhani. He said that they had done a very wrong thing by killing Ramdhani whereupon the accused persons said that he will be put to the same condition and started beating him and he sustained injuries. After sunrise informant Putti Lal came there to whom he informed about the incident. His son took him to the police station from where he was sent to hospital where he was medically examined and he was admitted in the hospital.

9. PW-3 Sanwari has stated that at 4:00-4:30 AM in the midnight, on 8/9.01.1992 he was going to sell vegetables with his younger brother Brij Bihari Lal and Ram Avtar. They saw that accused Jagat pal, Prithvi Pal and Jhabboo were coming from the side of tube-well of Ramdhani through chak road with Jagat Pal having a tabbal, Prithvi Pal having an axe

and Jhabboo having a hockey in their hand. In the light of torch, he saw that their cloths were stained with blood. He came back at about 11:30 AM after selling his vegetables and then he came to know about the incident by his wife.

10. PW-4 Dr. Y.K. Sharma was posted as Orthopaedic Surgeon in the U.H.M., Hospital, Kanpur Nagar on 10.1.1992 when he conducted post-mortem of the dead body of deceased Ramdhani, who was sent by police station Maharajpur through constable Man Singh and Shiv Sharan along-with necessary papers in a sealed conditions. He conducted post-mortem at 11:45 am on 10.1.1992. The deceased was average built, his mouth and eyes half opened, rigour-mortis was present in his body and stomach was greenish with little swelling. Post death staining was found on his back, hip and back of the thigh. On examination, following ante mortem injuries were found on the body of the deceased-

(1). Incised wound 8 cm x 2 cm x bone deep 1 cm below the right ear ending down ward upto lower part of neck.

(2). Incised wound 11 cm x 5 cm on the upper part of left lateral side of the neck to front portion of jaw and second vertebrae of neck. Veins and arteries of neck were found cut. Second vertebrae was also found cut.

(3) Incised wound 1 cm x ¼ cm muscle deep on the right back shoulder in scapular region.

(4) Abrasion 8 cm x 2 cm in the frontal region of left thigh and knee.

In the internal examination, membrance was found blank. Both right and left lounge were found pale. Both chambers of heart were empty. Gal-bladder and both the kidneys were found pale. Semi digested food was found in the small intestine, gasses and digested food was found in the large intestine. In the opinion of the doctor the cause of death was due to shock and haemorrhage as a result of anti mortem injuries. The doctor has stated that the injuries found on the body of the deceased were possibly caused in the night at about 4:00 PM on 8.1.1992 and might have been caused by axe.

11. PW-5 Head Constable Krishna Murari has prepared chik and has entry the same in the GD.

12. PW-6 Dr. A.P. Verma had examined the injury of Ramlal on 1:45 PM, who was aged about 72 years who was brought by the home guard Uday Veer Singh of police station Maharajpur. Following injuries were found on his body-

(1). Contused abrasion 9 cm x 4 cm over the left parietal region just above the outer margin of left eye brow & 7 cm above from the left mastool process, abrasion 1.5 cm x 05 cm reddish.

(2). Contusion 5 cm x 2 cm just below the right eye, bluish red.

(3). Contusion 3.5 cm x 3 cm on right side face over the maxilla bone 0.5 cm below the injury no.2, reddish.

(4). Contusion 2.5 cm x 1 cm over the middle of upper lip 1 cm below the nose, bluish.

(5). Contusion 2.5 cm x 2 cm over the nose 1 cm below the root of nose. Injury kept under observation.

(6). Abrasion 2 cm x 1 cm left side back 9 cm below the lower border of scapula bone.

According to doctor, the injured was complaining pain on his shoulder, chest and back but there was no visible injury. All the injuries were simple in

nature, injury no.6 was caused by rubbing on hard surface and the remaining injuries might have been caused by blunt object. Injury no.5 was kept under observation and x-ray was advised and injury was half day old and it might have been caused on early morning at 4:00 AM on 9.1.1992 by hockey stick and fist.

13. PW-7 S.I. Pramod Kumar has prepared inquest report and other papers and has also proved memo of blood stained and plain earth taken from spot.

14. PW-8 Constable Man Singh has taken the dead body for post-mortem and he had stated that because it was night, therefore, on the next day in the morning the papers and the sealed dead body was given to the concerned.

15. PW-9 SI Vidya Sagar Tripathi has investigated the offence. He had stated that SI P.K. Singh prepared the inquest report. He recorded statement of injured Ramlal, informant Putti Lal, Brij Bihari, Sanwari Lal, Ram Avtar and Ramlal son of Murli and on the identification of the witnesses he prepared site plan. The statement of Head Constable Krishna Murari was also recorded after recording of other statements and obtaining the post-mortem report, he submitted charge-sheet against the accused persons.

16. It has been submitted by the learned counsel/ Amicus Curiae to the accused-appellants that the FIR is grossly delayed for which there is no convincing explanation and the explanation given by prosecution is apparently fabricated. We find that the incident took place on 8/9.1.1992 in the midnight at 4 AM and the report has been lodged at about 1.15 PM in the noon and the police station is situated at the distance of 5 km. Thus, the FIR has been lodged after about a delay of 9 hours. The reason for this delay has been mentioned in the written report itself. Accordingly, when the deceased did not return in the morning, at 10 AM, the informant went to see him and on the way, Ramlal, in his tube well, said to him about the incident. He was injured at that time. Then he went to the tube-well of Ramdhani where he found him dead. He went back to his village and said about the incident to the villagers including Sanwari who has been examined as PW-3. They all went to the tube-well and meanwhile Ramlal s/o Murali, Brijbihari and Ramautar also came and said that they had seen the incident. It is pertinent to mention that none of these three have been produced in evidence. It is commonly known that village people rise early in the morning and go to field for their natural call etc. Therefore, it looks unusual that nobody could know about the incident till the informant reached there in search of the deceased, more particularly when PW-2 was injured and was crying with pain. He is aged about more than 70 years and it is also unnatural that nobody came to search him nor his cry captured the attention of anyone till the informant reached there. In medical, 6 injuries have been found on his body, five contusion and one abrasion and they are all simple in nature and at least the injuries could not prevent him for next 6 hours to go out and alarm somebody. It was a village and field around and the villagers rise early and leave bed. Therefore, the story that informant could know only when he reached there does not suit to reasoning. It appears probable that the specific mention of 10 AM time in FIR when the informant reached there might have been an attempt to cover the delay. It looks more probable because of the fact that PW-2 has stated

that informant reached there at 8 AM. Then, what made him to pass time and when he informed witness Sanwari and villagers, he lodged the FIR. The delay in FIR becomes significant depending upon the trustworthiness and credibility of the fact witnesses. If the witnesses are trustworthy and create confidence in the mind of court, the delay hardly impacts the credibility of prosecution version, otherwise, the delay may become fatal and the whole version may become highly suspicious.

17. It has been also submitted by the learned Amicus Curiae that the fact witnesses examined by the prosecution are not trustworthy and reliable as they have stated during trial contrary to the FIR version and contradictory to their statement recorded by IO under section 161 CrPC. They are not eyewitnesses and have made huge improvement in their on oath statement during trial. FIR has been lodged and the whole prosecution has proceeded on the basis of what PW-2 said and PW-3 who is his son have inimical relation with the accused persons and PW-3 had also given statement against them in another criminal case.

18. From the reading of FIR, it is clear that whatever Ramlal said to the informant, on that basis FIR was lodged and the informant himself did not see the incident. FIR does not disclose that Ramlal said that he saw the accused persons assaulting the deceased. He heard the cry of deceased and he only said who is there and said that he is coming. It has been further provided in the FIR that on his saying so, the accused persons came to his tube-well and threatened and assaulted him by fist and hockey. PW-1 Puttilal informant has narrated same thing in his examination-in-chief. It goes to establish that the informant is not eyewitness and he lodged the FIR on the basis of what was said to him by Ramlal. During cross-examination, he has admitted this fact that he did not see the incident and he lodged FIR on the basis of what Ramlal told him.

19. The question is what will be impact if the testimony of fact witnesses is not in consonance with the FIR version and there is apparent improvement/contradiction as compared to the statement under section 161 CrPC? The law in respect of the statement given under 161 CrPC and improvement made therein by the witness during trial has been discussed by the Supreme Court in several decisions. In **State of Rajasthan v Smt Kalki, AIR 1981 SC 1390,** while dealing with this issue, this Court observed as under:

"In the depositions of witnesses there are always normal discrepancies, however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person."

20. The above observation goes to show that the credibility of witnesses is not shattered on account of normal discrepancy. But, if the same is not normal, it will certainly impact the credibility. In fact, to assess what would be normal discrepancy and what would impact the credibility, there cannot be any hard and fast formula and it depends upon so many factors. Thus, in **Alamgir v State of NCT,**

Delhi, (2003) 1 SCC 21, it has been observed that if a relevant fact is not mentioned in the statement of the witness recorded under section 161 CrPC, but the same has been stated by the witness before the court as witness, then that would not be a ground for rejecting the evidence of the witness *if his evidence is otherwise credit worthy and acceptable*. Omission on the part of the police officer would not take away nature and character of the evidence. **Alamgir (supra)** is in respect of a relevant fact not mentioned in the statement under section 161 or any *omission committed by IO* and where the statement made during trial by the witness is found to be credit worthy. It implies that when the testimony is not credit worthy or the witness has changed substantially the very nature of allegation, the same would not remain normal and would impact the credibility. In **Rudrappa Ramappa Jainpur v State of Karnataka, (2004) 7 SCC 422**, the Court finding that the witnesses made improvement and introduced new facts during trial which was not stated to the IO during investigation, remarked that the court below was justified in according acquittal to some of the accused persons. In **Bihari Nath Goswami v Shiv Kumar Singh (2004) 9 SCC 186**, the Court examined the issue and held:

"Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility."

21. It has been held in **Syed Ibrahim v State of AP, AIR 2006 SC 2908;** and **Arumugam v State, AIR 2009 SC 331** that the courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. It has been clearly laid down in **State Represented by Inspector of Police, Tamilnadu, (2008) 15 SCC 440** that, in case, the complainant in the FIR or the witness in his statement under section 161 CrPC, has not disclosed certain facts but meets the prosecution case first time before the court during trial, such version lacks credence and is liable to be discarded.

22. In **State of Rajasthan v Rajendra Singh, (2009) 11 SCC 106**, it has been held that where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and other witness also make material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. Similarly, in **State Represented by Inspector of Police v Sarvanan, AIR 2009 SC 152,** it has been remarked that while appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The Trial Court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate Court in normal course would not be justified in reviewing the same again without justifiable reasons.

23. We also find that the Supreme Court has remarked in **Mahendra Prtap Singh v State of UP, (2009) 11 SCC 334** that, as compared to the statement under

section 161 CrPC, where the discrepancies in the evidence of eye-witnesses, if found to be not minor in nature, may become a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that prosecution proved its case beyond reasonable doubt.

24. In **Sunil Kumar Shambhu Dayal Gupta Vs. State of Maharashtra, 2011 (72) ACC 699 (SC)**, the Court noted on record that there had been a lot of improvements and contradictions in his statements. The witness deposed for the first time in the court during the trial, that when he went to examine the deceased, she was found in an unkept room/store room and that he was introduced to the deceased as a Psychiatrist and that the deceased had asked him whether he treated his wife in the same way as she had been treated by her husband. None of this was mentioned in his statement recorded by the police. Nor it had been recorded therein that the deceased had told him that she was harassed by the appellants and her ornaments were taken away/worn by her mother in law. More so, he had not stated in his police statement that the deceased was merely mentally disturbed and not suffering from a gross psychological problem. Nor had he stated therein that the deceased had told him that she was not having any faith in any of her family members and she was deprived of their love, affection and sympathy. It has been also noted that the witness did not state in his statement before the police that when he went to see the appellants, they had asked him whether he had brought gold ornaments or had come empty handed or that he was told that the deceased would not be allowed to live there and they would make her condition even more miserable. Such an improvement was made while deposing in court and no explanation could be furnished by him as to why such vital facts were not stated by him at the time of recording his statement under section 161 CrPC. Holding that such statements should be discarded being major contradictions and improvements, the Court laid down:

"Such contradictions in his statements cannot be held to be mere explanations or elaborations of his version, but are tantamount to material contradictions or vital omissions. The Rules of appreciation of evidence requires that court should not draw conclusions by picking up an isolated sentence of a witness without adverting to the statement as a whole. In such a fact- situation, it is not safe to rely on his testimony for the simple reason that he had made a lot of improvements/embellishments while deposing in court and vital contradictions exist with his earlier recorded statement. Thus, no reliance can be placed on his depositions to hold that appellants had ill-treated the deceased or that appellant No.3 had taken away/worn her ornaments or that she had been deprived of their love and affection or that she was not suffering from epilepsy etc."

25. The Supreme Court also found that the prosecution witnesses who were family members of the deceased, stated new facts which were not earlier mentioned either while lodging the FIR or in their statements recorded under section 161 and such allegations had been made for the first time while making statements before the court during trial. There were material contradictions and improvements, which

were not mere elaborations of their statements already made. Therefore, the Court held:

"Thus, their statements in regard to those allegations were liable to be discarded. While deciding such a case, the Court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited."

26. In **Rohtash v State of Haryana, (2012) 6 SCC 589**, there had been major improvements/embellishments in the prosecution case and demand of Rs.10,000/- by the appellant does not find mention in the statements under section 161 CrPC, the same was held to be major improvement which effected the prosecution version adversely. In **Tomaso Bruno Vs. State of Uttar Pradesh, (2015) 7 SCC 178**, the prosecution tried to establish the case against the accused by making improvements at various stages. The version of PW-3 that he saw both the accused hugging, kissing and cuddling each other and that Francesco Montis was sitting on the other side of the table appearing depressed was not stated to the investigating officer when he recorded his statement under section 161 CrPC. Likewise, version of the witness that on the fateful night, the second accused asked him *'not to disturb till tomorrow morning'* was also not mentioned in his statement recorded by the investigating officer under section 161 CrPC. The Court held:

"If the PWs had failed to mention in their statements u/s 161 CrPC about the involvement of an accused, their subsequent statement before court during trial regarding involvement of that particular accused cannot be relied upon. Prosecution cannot seek to prove a fact during trial through a witness which such witness had not stated to police during investigation. The evidence of that witness regarding the said improved fact is of no significance.

27. In **Rambraksh v State of Chhatisgarh, AIR 2016 SC 2381**, PW3 Dasmatiya Bai in her complaint as well as her statement before the police has not told that she witnessed the occurrence during which both the accused assaulted her husband with lathi and Danda. Only in her testimony before the Court she claimed to have witnessed the occurrence. Pointing out that the High Court has rightly ignored the improved part of her testimony and placed no reliance on it, the Supreme Court laid down that improvement made by witness in his statement made in the Court during trial than what was made to the IO during investigation under section 161 cannot be relied upon.

28. On the basis of above discussion, we are of the view that the improvement made during trial by the witness which is just to eloberate and explain the prosecution version and does not materially alter the version is normal as it may take place because of lapse of time, nervousness and the ability of the witness to obsorve, memorize and reproduce. If the witness is trustworthy and credit worthy, the same becomes insignificant. But, where the witness has changed his version and has narrated a new set of facts which neither finds mention in FIR nor in his statement recorded by IO under section 161 CrPC and which changes the nature and character of his evidence, the evidence becomes

significantly contradictory and such improvement shatters his credibility as witness. It amounts to material contradiction and improvement and such evidence is not acceptable and should be discarded.

29. In the light of above, the evidence of PW-2 Ramlal is required to be examined. There, he has given a distinct version from what has been stated in FIR and under the statement under section 161 CrPC by saying that on hearing the sound of Ramdhani, he rushed and reached to the tube well of deceased with his torch and bamboo stick and saw the accused persons. Accused Prithwipal and Jagatpal with axe in their hands and Somnath with a hockey were assaulting the deceased and cutting him. On being challenged by Ramlal, accused persons started beating him by hockey, fist and shoes. In the cross-examination, he has stated that after beating him, the accused persons dragged him to his tube well, kept him there and went away. His clothes were torn and there was dragging mark on the surface. We find that no such mark has been found by IO. The doctor who examined the witness has found 6 injuries and he has accepted that two of them might be old and 5 injuries may result by falling on hard surface from face side. The medical report does not disclose mark of more than one such injuries which may have occurred to the injured on account of dragging on surface. There is only one abrasion which renders the allegation of dragging to a distance of 200 yards improbable. To cover this, PW-2 has made improvement in his statement during trial by saying that the accused persons picked him up from his shoulders and leg and brought him to his tube-well. Moreover, no such statement has been given to IO. On the contrary, he has stated to the IO that on hearing noise, the moment he reached to field, accused persons were returning after causing death of deceased. He has also not stated to the IO that he was beaten by shoes also. In fact, he has admitted that he gave such statement for the first time in the court. During cross-examination, he has further stated that at the time of hearing sound of 'bachao bachao,' he was doing morning prayer. The witness has stated that at the time of incident, there was no light in the hut of deceased. The condition of the witness is that he cannot see without goggles as demonstrated in the court. No torch was given by him to the IO nor the same has been produced in evidence. He is aged about 72 years at the time of incident. It was month of January and naturally, it must have been cold and foggy season. For an old person like him, it is not natural that he would rush and reach on the place of occurrence from a distance of more than two hundred yards. Had this witness reached on spot and personally seen the criminal incident, there was no reason why he did not tell the same to the informant and had he told the same to the informant, there is no reason for the informant not to bring this fact in the FIR. As such, we find discrepancy/contradiction/deliberate and substantial improvement in the statement of the witness which creates doubt with regards to his credibility. We are of the view that PW-2 is not reliable and trustworthy and his testimony being not reliable is liable to be discarded.

30. Coming to the statement of PW-3 Sanwari who happens to be son of PW-2 and his name also finds mention in the FIR. He has clearly stated that he did not see the murder of Ramdhani. He has stated a circumstance only. He has stated that on 8/9.1.1992 in the early morning at about 4-4.30 AM, when he was going to sell

vegetables, he saw the accused persons coming from the side of the tube well of deceased Ramdhani, accused Jagatpal carrying tabbal, accused Prithwipal with axe and Somnath carrying a hockey and in the torch light, he saw blood stains on their clothes. The statement aforesaid as stated by PW-3 does not find mention in his statement under section 161 CrPC recorded by IO and when confronted, the witness has stated that if the IO has not written so, he might have been in collusion with the accused person. He has stated that when he came back from Kanpur at about 11.30 AM, he knew about the incident from his wife. He has been also confronted with his statement given to IO that when he reached near the tube-well of deceased, they heard Ramdhani crying and they saw that the accused persons were assaulting him. He has denied to this statement. Similarly, he has been also confronted with his statement given to IO that he and Ramlal s/o Murali together took vegetables and were going to Kanpur for selling the same but to this statement again, the witness has denied. Meaning thereby, this witness has not only deposed additional thing what is in contradiction of what was stated to the IO but also he has denied to what he had stated to IO. Clearly, the witness has made substantial improvement and cannot be relied.

31. It is important to note that PW-9 IO has stated that the informant had stated that what Ramlal said to him on that basis he lodged report. The IO has stated that witness Ramlal did not state to him that he saw the accused persons who were cutting the deceased by axe, nor he said that accused persons assaulted him by shoes, nor he said that he was having torch and in the light of torch he witnessed the incident. The IO has said that Ramlal was not an eyewitness of the incident. Similarly, he has stated that PW-3 Sanwari did not state to him that he saw the accused persons on the way, nor stated that the clothes of accused persons were blood stained nor he stated that he was having torch and in the light of torch he saw the accused persons. The correctness of what has been stated by the IO can be supported by one more circumstance. PW-1 has stated that he told PW-3 Sanwari about the incident in the village. Sanwari came back from Kanpur at 11.30 AM and had he seen the accused persons coming from the side of tube-well, as he has stated, he must have immediately said about it to the informant and in that case this fact must have been mentioned in the FIR. If he did not inform the informant about this relevant fact, it must give rise to the inference that whatever he stated before the court was absolutely afterthought. Now what emerges from the statement is that no witness saw the incident and it appears correct as in the month of January, the climate remains foggy and very cold and at 4 AM in the morning, unless there is specific reason to be out, there is no possibility of anyone seeing the incident and the same is very much evident from the FIR itself.

32. It is also pertinent to mention that Pw-1 has stated that he missed his torch at the place of occurrence and someone out of many persons present might have picked the torch. This is again an attempt to cover as after 10 AM, informant went there and found Ramdhani dead and he or IO did not find the torch. In his statement under section 161 CrPC, he has not stated it to IO. PW-3 has also not handed over any torch to the IO. There is no recovery of any weapon or blood stained clothes of the accused persons. Although, all the three accused persons were in jail by 18.1.1992, no

attempt was made to take them on police remand nor any attempt was made to discover the blood stained clothes. Thus, the prosecution has not been able to show and prove the source of light at the time of incident in which the two fact witnesses saw the accused persons, nor has been able to discover any incriminatory article such as weapons and blood stained clothes.

33. In the FIR, there is no mention of weapon used in the incident. In the on oath statement of the informant also, there is no mention of any axe etc and PW-2 said to him that he was beaten by accused by hockey. PW-2 has stated that accused Prithvi Pal and Jagat Pal were having tabbal or axe in their hand and Somnath was having a hockey like stick. Two accused were cutting the deceased by axe and Somnath was assaulting by hockey. But no injury has been found on the body of deceased which could has been caused by hockey or blunt object. Only incise wounds have been found on the body of deceased. Hence, the presence and involvement of accused Somnath is also doubtful.

34. It has been also pointed out that PW-1 has stated that there was no enmity between accused persons and deceased. Some bitterness, may be out of rivalry or jealous or the case against accused in which PW-2 was a witness, was certainly existing between the accused and Ramlal and Sanwari. It cannot be a coincidence that these two have been the witnesses in this case. Therefore, this possibility cannot be ruled out that because of the existing bitterness, they have given evidence in this case. The informant has not been able to allege any motive or reason available to the accused persons for causing death of deceased.

35. On the basis of above discussion, we find that the witnesses who were examined were not trustworthy and reliable; there is delay of 9 hours in lodging and convincing and reasonable explanation has not been furnished; there is substantial improvement in the statement of witnesses; no reason or motive has been alleged nor there was any enmity between the deceased and accused persons leading to such criminal act; seemingly, two star witnesses of fact PW-2 and PW-3, being father and son and having bitter relations with accused side, might have been prompted to give evidence and there appears to be enough discrepancy and lapse in the investigation and prosecution version. The learned trial court has ignored the infirmities and shortcomings in the evidence and prosecution case. The impugned judgement is perverse, illegal and not sustainable under law and is liable to be set aside.

36. The criminal appeal is **allowed**. The impugned judgement is set aside. The surviving appellants **Jagat Pal** and **Jhaboo @ Somnath** are **acquitted** from the charge under section 302/34 and 323/34 IPC. If they are in jail, they shall be released forthwith and if on bail, they need not to surrender.

37. The learned Counsel/Amicus Curaie Sri Sukhveer Singh shall be paid Rs. Ten Thousands only for the assistance and legal service provided by him in conducting this appeal for the accused-appellants.

38. Office is directed to transmit the lower court record along with a copy of this judgement to the learned court below for information and necessary compliance.

(2020)03-05ILR A311
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DEEPAK VERMA, J.

Criminal Appeal No. 689 of 1996

Kuber Singh & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri V.S. Singh, Sri Ram Singh, Sri Arvind Kumar Srivastava, Sri Siya Ram Sahu, Sri Ram Singh, Sri J.N. Yadav

Counsel for the Respondent:
A.G.A.

A. Evidence law-Indian Evidence Act, 1872- Section 27- Indian Penal Code, 1860- Section 149- Motive cannot be ascertained every time for committing crimes- If motive is not in the F.I.R. then a report of crime cannot be discarded- Presence or absence of motive in a case of direct evidence is not of much relevance if the case of the prosecution is proved from other relevant circumstances-The fact that another eye-witness was not produced, will not affect the case of the prosecution if the evidentiary value of the testimony of the sole eye witness is sufficient to prove the prosecution case-No legal impediment in recording a conviction on evidence of a single witness-However such single testimony should be free from blemish and should also be adequate one, corroborated by the medical evidence, prompt F.I.R., and other circumstances, then it can be safely acted upon for recording a conviction-Minor contradictions here and there do not decide the fate of a murder case because human faculties of "sight', "recollection' and "expression' are "imperfect' - Section 27 of the Indian Evidence Act-Recovery was made on the joint pointing of several accused persons- If a fact is actually discovered in consequence of information given, same guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence- All ingredients of section 149 IPC present-The accused persons with intention to kill attacked on vital part of the deceased and caused grievous injuries over his head- The incident having eye witness account and injury on vital part with motive establishes the case of the prosecution.

Held- Indian Evidence Act- Section 8- Motive- Where the case is based on direct evidence, motive loses its relevance.

Evidence law-Indian Evidence Act- Section 134- It is the quality and not the quantity of evidence which is important. Conviction can be recorded on the testimony of a sole witness provided the same is credible and corroborated from other evidence.

Evidence law- Indian Evidence Act- Section 3- Minor contradictions, improvements and embellishments cannot be made a reason to discard the testimony of a witness. Since human faculties of "sight', "recollection' and "expression' are "imperfect', therefore, natural contradictions are bound to occur.

Indian Evidence Act- Section 27- Recovery on joint pointing out- If a fact is actually discovered in consequence of information given, same guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence.

Evidence law-Indian Penal Code- Section 147, 148, 149- All the accused-appellants formed an unlawful assembly and with a common object assaulted the deceased on his head (vital part) resulting in his death. There is ample direct evidence to connect the

accused persons with the crime. The findings of the trial court are found just and proper in the facts and circumstances of the case.(Para 27,31,32,33,38,40)

Criminal Appeal rejected (E-3)

List of Case cited:-

1. Puttu Vs. Emperor, A.I.R (32) 1945 Oudh 235

2. Nathu Vs. State, 1958 All 467

3. Naresh Chandra Vs. Emperor, AIR 1942 Cal 593

4. St. of M.P. Vs. Chhotelal Mohanlal, AIR 1951 Nag 71

5. Abdul Razak & ors. Vs. St. of Kar. Rep. by S.O, Hutti P. S, (2015) 6 Supreme Court Cases 282

6. Sadhu Ram & anr. Vs. St. of Raj.; 2003 (46) ACC 993 (SC)

7. Sanjay @ Kaka Vs. St. of NCT of Delhi, U.P. Criminal Rules 2007 (323)

(Delivered by Hon'ble Deepak Verma, J.)

(1) Heard Sri Arvind Kumar Srivastava and Sri Siya Ram Sahu, learned counsels for the appellant No.1, Sri Ram Singh and Sri J.N.Yadav, learned counsels for appellant Nos.2, 4 & 5 and Sri L.D.Rajbhar, learned AGA assisted by Sri Prem Shankar Mishra for the State-respondent.

(2) The instant appeal has been filed by accused-appellants Kuber Singh, Naresh Singh, Awadesh Singh, Chandra Shekhar Singh & Sukhbeer Singh against the judgment and order dated 11.04.1996 passed by Sessions Judge, Banda, whereby the appellants have been convicted and sentenced in Sessions Trial No.187 of 1991 convicting the appellant nos.1 and 2 namely Kuber Singh s/o Barku Singh Thakur and Naresh Singh s/o Ramadhar Thakur, under section 148 I.P.C. to undergo rigorous imprisonment for a period of two years each, further sentencing them to undergo imprisonment for life under section 302 read with section 149 I.P.C. and convicting the appellant nos.3, 4 & 5 namely Awadhesh Singh, Chandra Shekhar Singh & Sukhbeer Singh all sons of Ramadhar Thakur have been sentenced under section 147 I.P.C. to undergo rigorous imprisonment for a period of one year each of the appellants and sentenced under section 302 read with section 149 I.P.C. to undergo rigorous imprisonment for life, all the sentences were directed to run concurrently.

(3) The facts giving rise to the present appeal may be summarized as under:-

(4) That on 03.06.1991, the informant Shiv Mohan Singh alongwith his son Raj Kishore Singh (deceased) and grand-son Ashish Singh accompanied by one Devendra Singh (nephew of the informant), had gone to Baberu market with a bullock-cart. They had reached the said market at around 10.00 a.m. The informant purchased stones from the said market and after the same, they all were coming back to their village-Kauhara, Police Station Baberu. The bullock-cart was being driven by Raj Kishore Singh whereas Ashish Singh was sitting on the bullock-cart. The other two persons namely the informant Shiv Mohan Singh and Devendra Singh were following the said bullock-cart from a distance of 50 to 60 paces. The entire party reached the boarder of their village at about 7.00 p.m. All of a sudden, the accused-persons came out from behind the Babool trees. At that time, the accused Kuber Singh and Naresh

Singh were having axes *(Kulhari)* in their hands whereas the remaining accused-persons were armed with *lathis*. The accused persons exhorted each other by saying that the enemies were there and they had to do away with them. They approached the bullock-cart and got the same stopped. The bullocks were freed and made to run away. Thereafter the accused persons with their weapons in their hands started beating Raj Kishore Singh and Ashish Singh. Both died on the spot. The accused-persons threw the body of Raj Kishore Singh by the side of road and that of Ashish Singh on the road. The informant and Devendra Singh raised hue and cry and rushed to intervene but they were chased by the accused-persons and hence they ran away from the spot. The informant came to his village and told the village-fellows about the said incident. He could not gather courage to lodge FIR in the night. However, he could muster courage in the morning and got FIR scribed by one Rajbeer Singh and lodged the same at police station concerned. The informant had brought the dead-bodies from the spot and kept them in the house.

(5) The police registered a case mentioned in the FIR, which is shown as Exhibit Ka-4, which was lodged at 6.45 a.m. on 4th June, 1991 by Shiv Mohan Singh s/o Madhav Singh Thakur P.W.-1 at Police Station Baberu, District Banda.

(6) With the informant's report, case was registered as Case Crime No.133 of 1991, under sections 147, 148, 302 I.P.C.. S.I. Nand Kishore commenced the investigation. The case recovery memo of blood stained and plain *Khapley* and *Kappachey* at cemented jali and blood stained *safi* was prepared. On 04.06.1991, recovery of blood stained axe and two bamboo *lathis* used, was prepared on 07.06.1991 as Exhibit Ka-26 sent to Vidhi Vigyan Proyogshala (Forensic Laboratory). On 04.06.1991, inquest was done and dead bodies were forwarded for autopsy to the District Hospital. Postmortem was conducted on 05.06.1991 by Dr. M.C. Mittal P.W.-2, which are Exhibits Ka-2 and Ka-3.

(7) Dr. M.C.Mittal, P.W.-2 found following ante-mortem injuries on the dead body of Raj Kishore, s/o Shiv Mohan Singh Thakur.

Internal Examination:-

1. Head and Neck :- see injury

2. Bones of Scalp or skull :- Cut and depressed fracture of frontal and left parietal bone.

3. Membrances :-

Lacerated bone deep (sic) injury

4. Brain :-

Lacerated bone deep injury, stood fingered and liquefied.

5. Base :- None

Muscularity :-

Middle aged men of average (sic). Eyes closed, mouth semi-open. R.M. passed off compeled, deposition set in the form of (sic), Abdominal Bruits & Peeling of skin and loosing of hairs. Maggots are not seen.

External Examination:-

1. Incised wound 4 c.m.x .5 c.m.x bonedeep on the top of head 11 c.m. above left ear. Margin are clear cut. Tailing towards front or section cut and depressed fracture left parietal bone and lacerated brain matter.

2. Incised wound 3 c.m. x .5 c.m. x bonedeep on the front of head 6 c.m.

above left eye brow. Margin clear-cut, (sic) front or section cut x depressed fracture 3 c.m and lacerated brain.

3. Lacerated wound 1 c.m. x 5 c.m. x bonedeep at the right side of head, 7 c.m. above right ear.

4. Abrasion 2 c.m. x 2 c.m. on the right side head and forehead above right eye.

5. Multiple abrasion Contusion 11 c.m. x 10 c.m. above left side of lower joint (sic).

6. Abraded contusion are 8 c.m. x 6 c.m. on the front of neck and chin.

7. Abrasion 6 x 1 c.m. on the back of left hand.

(8) Following ante-mortem injuries on the dead body of Ashish Singh son of Raj Kishore Thakur.

Internal Examination:-

1. Bones of Scalp :-
Fracture right parietal deep (sic).

2. Membrances :- (sic) congested.

3. Brain :-
Lacerated injury

4. Base :- None

External Examination:-

1. Incised wound 4 c.m.x 1 c.m.x bonedeep on the front of forehead, 2 c.m. above back of neck. Margin clear cut. Tailing towards or section frontal of the (sic) cut sorace mane.

2. Lacerated wound 4 x 1.5 c.m. x bonedeep on the right side of

head 6 c.m. above ear on section. Multiple fracture of right parietal bone and sepacha of (sic) as (sic) and fractured (sic).

3. Abraded contusion 3 x 2 c.m. on the left side of face of (sic) fracture nasal bone.

4. Abrasion 7x 4 c.m. on the right side cheek.

5. Lacerated wound 1.5 c.m. x.5 c.m. bonedeep alongwith the margin of (sic).

6. Multiple abraded contusion are over front of cheek and part of chest and 10 x 8 c.m.

7. Lacerated wound 0.5 x .5 c.m. over left side of lower lib contusion and underlying fracture of body (sic).

(9) The investigating officer proceeded with the investigation and submitted chargesheet against the accused persons under sections 147, 148, 302 and 34 I.P.C. and on the pointing out of the appellants, the weapons used in the commission of offence had been recovered. The blood stained clothes were sent for chemical analysis. Human blood was found on the axe which was used by the appellants and pieces of wood taken from the Bullock-cart. On the other articles, blood was disintegrated. The report of the forensic laboratory exhibit Ka 32 was proved by the investigating officer. Charges were framed against the appellants under sections 147, 302 read with section 149 I.P.C. and Section 148 I.P.C. The appellants denied the charges and claimed to be tried as they were falsely implicated in the present case.

(10) The prosecution examined P.W.-1 Shiv Mohan Singh, father of the deceased Raj Kishore Singh and grandfather of the deceased Ashish Singh.

(11) The prosecution also examined Dr.M.C.Mittal, P.W.-2 who had conducted the postmortem report.

(12) P.W.-3 S.I. Nand Kishore, who arrested the accused persons, prepared the

site plan and recovery memo during the course of investigation. The investigating officer found clinching and credible material against the accused persons.

(13) After examination of formal witnesses, statement of accused persons were recorded under sections 313 Cr.P.C. who had tried to give different colour to the prosecution version and stated that due to previous enmity they had been falsely implicated. They denied having participated in the incident and stated that they would give evidence but as a matter of fact they led no evidence.

(14) The prosecution to prove its case, examined Shiv Mohan Singh as P.W.-1, who is the eye witness in the case. Deceased Raj Kishore Singh was his son and the deceased Ashish Singh was his grandson. He was produced to prove the factum of murder and involvement of the accused persons with their specific roles. He also proved that there was a motive for the commission of the said gruesome murder. He stated that before the said murder, an altercation between him and accused had ensued in which accused Sukhbir Singh, Awdhesh Singh, Chandra Shekhar Singh and Naresh Singh had fought with him and had also beaten him with fists and kicks. There had been F.I.R.'s from both the sides. Further he stated that the aforesaid murder was committed due to the said enmity. The informant Chandra Shekhar Singh stated that Devendra Singh, who was his nephew, had been won over by the accused persons. In that event, the prosecution did not produce him and it remained a case of single and solitary evidence of P.W.-1, so far as the facts of the case are concerned.

(15) Dr. M.C.Mittal P.W.-2 was produced by the prosecution. P.W.-2 had conducted postmortem on the dead bodies of the deceased persons. The autopsy of deceased Raj Kishore Singh s/o Shiv Mohan was done on 05.06.1991 at 5.00 p.m. and autopsy of deceased Ashish Singh s/o Raj Kishore Singh was done on 05.06.1991 at 5.45 p.m. by P.W.-2, who had found two incised wounds 4 c.m. x 5 c.m. on the top of head and 3 c.m. x .59 bone deep in front of head, three injuries as lacerated and 4, 5, 6 and 7 are abrasions on the dead body of Ashish Singh s/o Raj Kishore Singh. Dr.M.C.Mittal had found one incised injury on the front forehead and one lacerated wound 4 x 5 c.m. bone deep on the right side of the head. The doctor had opined that the injury was caused by sharp edged weapon, which was sufficient for causing death in ordinary course of nature.

(16) S.I. Nand Kishore P.W.-3 who had proved Chick FIR corroborated that the First Information Report was registered in his presence. P.W.-3 had proved that he reached the spot, prepared inquest report, sent the dead body for postmortem in supervision of chowkidar and constables with all documents necessary. After arrest of three appellants Awadhesh Singh, Chandrashekhar Singh and Sukhbir Singh, all sons of Ramadhar Singh and on their pointing out blood stained axe (Khulari) and two *lathis* had been recovered from the house of the accused persons. Accused- appellants Naresh Singh, Kuber Singh, Chandra Shekhar Singh & Sukhbir Singh examined under section 313 Cr.P.C. and they have denied the allegations made over them.

(17) We have heard learned counsels for the appellants and perused the entire record.

(18) Learned counsels for the appellants have assailed the judgment on various grounds mainly that motive is not genuine and strong and FIR is ante-dated. No witness or public has been examined. It has also been assailed on the ground that there is no source of sufficient light in which the accused-appellants could be recognized and further they have vehemently argued that witness Devendra Singh has not been produced/examined. They also assailed that joint pointing out of the three accused, out of five accused for recovery of blood stained one axe and two bamboo *lathis* has not properly explained. Further no recovery from other two appellants had been made. Recovery from the appellant Kuber Singh and presence of P.W.-1 are doubtful. The appellants also raised the recovery not being in accordance with Section 27 of the Evidence Act.

(19) Section 27 of the Indian Evidence Act is reproduced below:-

"27. How much of information received from accused may be proved- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

(20) Learned counsel for the appellants argued that the procedure prescribed under Section 27 of the Indian Evidence Act had not been properly followed by prosecution in the alleged recovery of axe and *lathis*. The said recovery is doubtful. They argued that the evidence adduced by the prosecution with regard to recovery of *kulhari* and *lathi* on the pointing out of the three accused, is not acceptable under the law because the said recovery was made on the joint pointing of several accused persons.

(21) Learned counsel for the appellants has placed reliance on the judgment passed by Hon'ble Apex Court in **Puttu vs. Emperor reported in A.I.R (32) 1945 Oudh 235,** wherein the Apex Court has considered Section 27 in a different perspective which is not applicable in this case. The decision of Puttu (supra) was dissented from the Allahabad High Court in **Nathu vs. State, 1958 All 467 relying on Naresh Chandra vs. Emperor, AIR 1942 Cal 593 and State of M.P. vs. Chhotelal Mohanlal, AIR 1951 Nag 71** and it was observed therein:- "It is easily conceivable that two or more persons simultaneously or jointly furnish an information and, as a result of that information, a common discovery is made; such a case will, if either of the conditions is satisfied be covered by the section. Each case will, however, have to be judged on its own facts, but the underlying principle seems to be that the information should be such as cannot be said to be already in the possession of the police, that the discovery is made in consequence of that information, and further that the discovery is not rediscovery of something already discovered."

(22) The appellants' counsel has also placed reliance on the Apex Court judgment reported in **Abdul Razak and others vs. State of Karnataka represented by Station Officer, Hutti Police Station, (2015) 6 Supreme Court**

Cases 282. The facts of the case has no relevance with present facts of the case.

(23) Learned counsel for the appellants argued that it is a case of double murder in which a man aged about 41 years and a minor boy aged about 12 to 13 years had been killed and for such a killing, there should have been a very strong reason. Without a very strong reason and motive, the accused persons could not have admitted to such heinous crime. Further he argued that no motive has been shown which could give indication that accused persons would kill two persons. They have argued that only a minor incident of marpeet, which occurred about two months before the alleged killing, said to be a motive, is not acceptable as sufficient motive for killing two persons. Learned counsel for the appellants argued that only one witness of facts has been examined and thus it is a case of single testimony and according to him that too was that of an interested witness. On the other hand, he tried to show that others had motive to kill. He further elaborated his argument that one Chotey's only son was killed in which deceased Raj Kishore Singh was made an accused and it could be possible that Chotey's kith and kins might have killed Raj Kishote Singh and his son Ashish Singh, so as to make the family of the present informant/P.W.1 without any male lineal descendant and the P.W.-1 falsely implicated the present accused persons.

(24) Learned counsel for the accused-appellants argued that the medical evidence is different from and in contrast with the ocular evidence. The broad intention to the incised wounds shown on the person of the deceased and the alleged weapons assigned to the accused was an effort to show that the injuries were caused by axe (*Kulhari*) whereas the nature of injuries, as found in the postmortem reports was indicative of the fact that same were caused by sharp edged weapons which could not be *Kulhari*. The margins were found clean cut and, according to him, that too was an indication of the fact that some sharp cutting weapon like Pharsa might have been used for causing death and not *Kulhari*, as alleged by the prosecution.

(25) The learned counsel for the appellants argued that the postmortem reports of the deceased are not connecting with the time of the incident. The doctor conducting postmortem had found the stomach and intestine of the deceased to be empty when the incident was stated to be of late evening and the deceased persons were returning from the market.

(26) He further argued that the informant and others had stated that the dead bodies were kept on the cot whereas the Investigating Officer says that they were kept on the ground. On this point, the statement of the accused-appellants was that P.W.-1 was telling a lie. The accused-appellants lastly argued that there was a delay in lodging of the FIR. They argued that incident had occurred on 03.06.1991 at 7.00 p.m. but FIR had been lodged on 04.06.1991 at 6.45 a.m. The informant got the time to prepare a false story and afterthought they lodged the FIR and they also argued that the time of death does not coincide with the view of the doctor concerned on the said point.

(27) Considering the said arguments, it may be noted that motive cannot be ascertained every time for committing crimes. If motive is not in the F.I.R., version of F.I.R, a report of crime cannot be discarded. The incident giving rise to

motive may be very minor, but as stated by the appellant's counsel the gravity of motive differs from man to man. A motive may be a minor issue but the same could be sufficient for the accused persons. Thus, in either way the aforesaid position does not exculpate the accused-persons and the question of their culpability can be seen only in the light of the evidence and all other accompanying circumstances as appearing in the case. We are of the considered view that the motive is not very essential in a case of direct evidence i.e. as Hon'ble Apex Court has held in various laws on this point. But in this case in evidence as stated by P.W.-1 it has come up that scuffle had ensued between the parties two months before the occurrence, in which FIR from both the sides were lodged. It is settled that motive is in the minds of the accused persons and cannot be ascertained by the Court. Presence or absence of motive in a case of direct evidence is not of much relevance if the case of the prosecution is proved from other relevant circumstances.

(28) P.W.-1 in his evidence has stated that only 7-8 years back his grandson (son of Raj Kishore) had died of drowning and he did not implicate the accused whereas he had an opportunity to falsely implicate the present accused persons, without waiting for his son and another grand-son to die. He had no enmity with Chhotey Lal after they won in all criminal cases in the murder of his son occurred in the year 1971.

(29) Learned counsel for the appellants further argued that width of the incised-wound was found 0.5 c.m. and 1.00 c.m. In that light he argued that the same could not be caused by a "*Kulhari*" (axe). The depth of the injuries has been found roughly 3.00 to 4.00 c.ms. and if a "*Kulhari*" gets pierced into head and goes only upto 4.00 c.m. in depth, one cannot expect more wider injuries than 0.5 c.m. and 1.00 c.m.

(30) Learned counsel for the appellants next argued that stomach of the deceased persons was empty and it was not believable that the stomach and intestine of both the deceased-persons could be empty when they were coming back from the market. In the statement of P.W.-1, he has categorically stated that they did not take any food, not eaten anything during their entire journey and purchasing etc. It has also come in the evidence that they had simply taken tea and water. At 7.00 p.m., when the murder was allegedly done, one cannot expect tea and water to remain in the stomach and intestine of the deceased-persons and if the doctor found these two organs empty, it was a natural and is perfectly in consonance with the ocular version.

(31) It was further raised by the appellant's counsel that only one person's testimony cannot be relied and other witnesses named in the FIR were not produced by the prosecution. We are of the opinion that the fact that another eye-witness was not produced, will not affect the case of the prosecution if the evidentiary value of the testimony of P.W.-1, sole eye witness is sufficient to prove the prosecution case. It is not obligatory that the prosecution produces all witnesses examined during the course of investigation or stated to be present on the spot. It is the choice of the prosecution to produce best evidence in its favour, i.e. it can chose to examine only those witnesses in the witness box who prove the story. The real test is that the testimony of the prosecution witnesses is credit worthy and is true

narration of the case. Moreover, it has come in the evidence that Devendra Singh, another eye witness had been won-over by the accused and that is why he was not produced.

(32) In view of law laid down by the Apex Court in **Sadhu Ram and another vs. State of Rajasthan; 2003 (46) ACC 993 (SC),** there is no legal impediment in recording a conviction on evidence of a single witness. The rule of prudence, however, demands that such single testimony should be free from blemish and should also be adequate one. If such testimony is also corroborated by the medical evidence, prompt F.I.R., and other circumstances, then it can be safely acted upon for recording a conviction.

(33) The testimony of P.W.-1 is not doubtful as P.W.-1 Shiv Mohan Singh in his deposition stated that when they were returning from Baberu market after purchasing and when bullock cart reached in the area of Kauhara about four *farlang* from *abadi* area, accused Kuber and Naresh with Kulahri, Sukhbir, Chandrashekhar and Awdhesh with *lathi* who were hidden behind the Babool tree, suddenly came out from behind the Babool tree and shouted to kill the enemies. They freed the bullocks from the cart and started beating Raj Kishore and Ashish. Deponent and Devendra was coming behind the bullock card. P.W.-1 cried to save his child and grandson, accused killed Raj Kishore and Ashish and threw their bodies on the road. P.W.-1 was present on the spot, his presence at the scene of occurrence is not doubtful. His testimony could not be brushed aside only on account of being solitary witness. Minor contradictions here and there as pointed out by the learned counsel for the appellants do not decide the fate of a murder case because human faculties of "sight', "recollection' and "expression' are "imperfect', therefore, natural contradictions are bound to occur.

(34) The appellants' counsel compared the facts narrated by P.W.-1 with the evidence of Investigating officer and pointed out a minor difference in the statement of P.W.-1, the informant and the Investigating Officer regarding the dead bodies being kept on the "Cot' as stated by P.W.-1, whereas, the Investigating Officer stated that the bodies were found by him on the ground but it was corrected after recollecting the fact that bodies were found on the "Cot'. Such minor discrepancies could not be a reason to disregard the testimony of the witnesses.

(35) The appellants' counsel raised a point that there was delay in lodging the F.I.R. We do not agree with the same, as delay has been already explained by P.W.-1 Shiv Mohan Singh informant who stated in witness that after his son and grand son were killed, he was badly terrified and had no courage to go to the Police Station in the night to lodge the F.I.R. The next date somehow he gathered courage and went to the Police Station in the early morning to lodge the F.I.R.

(36) On the point raised by appellants' counsel regarding site-plan that the dead body of Raj Kishore Singh was shown behind the bullock-cart, while the Investigating Officer found the same in front of the bullock-cart. This objection raised by the appellant's counsel is not correct as it has come up in the evidence that the bullock-cart was shifted from the place of occurrence when he visited the spot. A trail of blood from place 'A' to 'C' has been shown in the site plan and the

dead body of Raj Kishore Singh was found at place 'C' and his son at place 'B', whereas bullock cart was shown at place 'A'. Blood was found scattered on the bullock cart and blood-stained pieces were seized and exhibited as 'Ka-24'. On chemical examination, human blood was found on the said seized articles. The prosecution version of the manner in which murder was committed is, thus, proved from the occular version of P.W.-1, corroborated by other relevant material on record.

(37) The appellants' counsel placed Section 27 of the Evidence Act to create a doubt regarding recovery of the axe and *lathis*.

(38) Hon'ble Apex Court in **Sanjay @ Kaka vs. State of NCT of Delhi reported in U.P. Criminal Rules 2007 (323)** has held that if a fact is actually discovered in consequence of information given, same guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence.

(39) As discussed above, the deceased had sustained lacerated wounds and incised wounds which is proved from the postmortem report and having been caused by sharp edged weapon and *lathi*. P.W.-1 categorically stated that Kuber and Naresh had *Kulhari*/axe, Sukhbir, Chandrashekhar and Awadhesh had *lathis*. They being members of the unlawful assembly formed by all the accused appellants, are equally liable for the offences committed by any members of unlawful assembly in prosecution of the common object in which double murder was committed. They played important role as they were carrying axe/*kulhari* and *lathi* and killed Raj Kishore and Ashish. The conviction of accused under sections 147, 148, 149, therefore, is just and proper. The deceased Raj Kishore received incised wound 4 c.m. x .5 c.m. on the top of the head, 11 c.m. over left eye and incised wound 3 c.m. x 5 cm. bone deep on the front of head, 6 cm. left eye, lacerated wound 1 cm., 5 cm.. bone deep. Lacerated wound of 1 c.m. X 5 c.m. and bone deep. Deceased Ashish received injury incised wound 4 c.m., 1 c.m. on the front of the forehead and lacerated would 4 x 1.5 c.m. bone deep on the right side of above eyes, multiple fractured. Lacerated wound 1.5 c.m.x .5 c.m.colour deep. These injuries can be said to have been caused by the weapon carried by the accused persons.

(40) Further, the conviction under Sections 147, 148 & 149 I.P.C. is just and proper as all the ingredients of section 149 that (i) the offence must be committed by any member of unlawful assembly consisting of five or more members, (ii) It must be shown that the incriminating act wa* s done to accomplish the common object of the unlawful assembly. (iii) It must be within the knowledge of other members that the offence is likely to be committed in prosecution of the common object are satisfied. In the instant case, the accused persons with intention to kill attacked on vital part of the deceased and caused grievous injuries over his head. The incident having eye witness account and injury on vital part with motive coming from the statements of P.W.-1 Shiv Mohan Singh, P.W.-2 Dr. M.C.Mittal and P.W.-3 Nand Kishore, Investigating Officer are corroborating each other. The eye witness account having clinching evidence and natural narration of the occurrence cannot be discarded or brushed aside. We do not find any material fact from the evidence of the case available on the record to cause interference in the decision of the court below.

(41) Having regard to the overall facts and circumstances of the case and also the gravity of the matters, we find no reason to disagree with the view taken by the court below. There is ample direct evidence to

connect the accused persons with the crime. The findings of the trial court are found just and proper in the facts and circumstances of the case.

(42) Resultantly, this appeal fails and is, hereby, **dismissed**. The judgment and order passed by court below is affirmed.

(43) Appellants Kuber Singh, Naresh Singh, Chandra Shekhar Singh & Sukhbir Singh, are on bail. Their bail bonds are cancelled and sureties are discharged. They shall surrender forthwith before the court concerned, be taken into custody and sent to jail to serve their sentence.

(44) Certify this judgment to the court below immediately for compliance.

(45) The compliance be submitted through the Registrar General, High Court, Allahabad.

(2020)03-05ILR A321
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.02.2020

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

Criminal Appeal No. 717 of 1984
connected with
Government Appeal No. 1086 of 1984 &
Government Appeal No. 1088 of 1984

Sunil Kumar Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri D.S.P. Singh, Sri Adarsh Kumar Pandey, Sri Rajiv Kumar Mishra

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

A. Criminal Law- Indian Penal Code,1860- Section 304- Delayed FIR- After three days of the occurrence-Version in the FIR that the informant was told about the incident by the victim is a version wholly unreliable and appears to have been managed by the prosecution and in particular by the informant and cannot be believed to be correct version in the prevailing facts and circumstances of the case – Testimony of PW3 does not indicate compatibility with natural conduct that after seeing the occurrence, he being Lekhpal posted in district Varanasi at that point of time must have told /described about the incident to anyone but he kept silent for three days-Witness is not reliable and he cannot be believed to be worthy of credit-His natural conduct is inconsistent with that of a man of ordinary prudence, not fit in the prevailing circumstances of the case - Child witness- Not believed to be wholly reliable witness and she appears to have been tutored witness because she has categorically stated in her cross examination that whatever was seen by her was told to her by her parents- Claim of the defence that the air-gun was fired in the play and it somehow incidentally hit the victim can be acted upon as plausible explanation about the incident.

Criminal law-Code of Criminal Procedure, 1973 -Section 154- Delay in lodging FIR- The FIR has been lodged belatedly and the same recites a false narrative since the deceased had already expired before the time he allegedly told the First Informant about the occurrence.

Evidence Law-Indian Evidence Act,1872- Section 155- Credibility of witness- The witness having not disclosed the information for three days , his conduct was wholly unnatural and devoid of any credibility.

Evidence law-Indian Evidence Act, 1872- Section 118- Child Witness- Where the Child Witness admitted that his evidence was based on hearsay, the same goes to show that he is a tutored witness and cannot be relied upon.

Learned trial court while considering merit of the case overlooked above material

factual aspects, circumstances and testimony on record and adopted only casual approach- Appellant given benefit of doubt- Conviction u/s 304 Part II set aside. (Para 36, 37, 40, 43, 44)

Criminal Appeal allowed (E-3)

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

1. Heard Sri Rajiv Kumar Mishra, learned counsel for the accused-appellant Sunil Kumar Singh, Sri Nafees Ahmad and Sri Bhanu Prakash Singh, learned A.G.A. for the State in the present appeal and Sri Nafees Ahmad and Sri Bhanu Prakash Singh, learned A.G.A. for the State-appellant in the connected Government Appeal Nos.1086 of 1984 and 1088 of 1984.

2. The instant criminal appeal has been preferred by the accused-appellant Sunil Kumar Singh against the judgment and order of conviction dated 04.02.1984 passed by III-Additional Sessions Judge, Varanasi, in Sessions Trial No. 133 of 1981, State Vs. Sunil Kumar Singh and another, arising out of Case Crime No.207 of 1980, under Section 304 Part-II read with Section 34 I.P.C., Police Station Cant, District Varanasi whereby the accused-appellant Sunila Kumar Singh has been convicted under Section 304 Part-II read with Section 34 I.P.C. and instead of being sentenced, he was directed to be released on probation for two years to maintain peace and be of good behaviour on his furnishing a personal bond of Rs.4,000/- along with two sureties each in the like amount.

3. The aforesaid Government Appeal No.1086 of 1984 (State of U.P. Vs. Sunil Kumar Singh and another) was preferred by the State against the same judgment and order of acquittal dated 04.02.1984 and the aforesaid Government Appeal No.1088 of 1984 (State of U.P. Vs. Sunil Kumar Singh and another) has been preferred by the State for enhancement of the sentence.

4. It is relevant to mention that the appeal qua accused Ram Daras stood abated on 20.05.2019.

5. Since the aforesaid appeals arise out of one and the same judgment dated 04.02.1984 passed by III-Additional Sessions Judge, Varanasi, therefore, the instant appeals are being disposed of by way of a common judgment.

6. The prosecution facts as discernible from record suggest that the written report was lodged at Police Station Cant, District Varanasi by the informant Omkar Nath Dubey against the accused-appellant on 11.04.1980 at 7:10 p.m. by describing that the informant's son Atul Kumar was injured by shot at quarter to 5:00 p.m. on 08.04.1980 in front of the office of A.D.M. (Project), Bhuwneshwar Colony Orderly Bazar, Varanasi. The injury was caused by firing with air-gun by Sunil Kumar Singh son of Sabhajeet Singh. On being asked, Chhotey uncle of Sunil Kumar Singh informed that boys were playing and the shot was fired in the play itself. Since condition of the victim Atul Kumar was serious, therefore, actual occurrence could not be known. After three days of the occurrence, Atul Kumar somehow regained consciousness and was able to speak then it transpired that Sunil Kumar Singh deliberately and intentionally fired on him (Atul Kumar). The air-gun belonged to Ram Daras who is peon in Sarada Sahayak Pariyojana. The injured Atul Kumar was taken to the hospital in the evening on 08.04.1980 and got admitted in the hospital in the serious condition at B.H.U. (E.N.T.).

The pellet is entangled in the neck of the injured. Request was made for lodging the first information report.This written report is Ext. Ka-1.

7. The first information report was lodged at Police Station Cant., District Varanasi on 11.04.1980 at Case crime no.207 of 1980 under Section 307 I.P.C. The check FIR is Exhibit Ka-15.

8. On the basis of entries made in the check FIR, case was registered against the accused persons at serial no.56 of G.D. on the same day at 07:10 a.m. at Case Crime No.207 of 1980 under the aforesaid Section of I.P.C. at Police Station Cant., District Varanasi. G.D. entry is Ext. Ka-16.

9. Record reflects that the injured Atul Kumar was medically examined by Dr. T.B. Rai, on 08.04.1980 at 07:05 p.m. who noted the following injury:-

1. Lacerated penetrating wound 3/4 cm x 1/2 cm x depth not proved on front of neck.

10. Injury report is Ext. Ka-5.

11. It so happened that during the treatment, the victim Atul Kumar died on 12.04.1980 at 6:15 p.m. in B.H.U. Hospital Varanasi and the matter was reported at Police Station Cant. on 13.04.1980 due to which the case was altered under Section 302 I.P.C.

12. Record signifies that after coming to know about death of the deceased Atul Kumar, Ali Mohd Khan, PW-8 rushed to the B.H.U. Hospital where he prepared relevant papers pertaining to the inquest of deceased Atul Kumar after appointing inquest witnesses. He started inquest of Atul Kumar at 11:50 a.m. on 13.04.1980 and completed at 3:50 p.m., the very same day and has proved the same as Exhibit Ka-2.

13. In the process, inquest witnesses expressed opinion for conduction of postmortem examination of the dead body in order to ascertain real cause of death. Therefore, relevant papers were prepared by Ali Mohammand Khan, PW-8 for sending the dead body for postmortem examination. Apart from that, relevant papers -say challan dead body, photonash dead body and letter to C.M.O. etc. have been proved as Ext. Ka-7, Ext. Ka-8, Ext. Ka-9, respectively.

14. Record reflects that the postmortem examination on cadaver of the deceased was conducted at mortuary, Varanasi by Dr. H.M. Agarwal, PW-6 at 3:15 p.m. on 13.04.1980. The doctor found the following ante-mortem injuries:-

1. Healing wound 0.8 cm x 0.3 cm on front of neck, 0.5 cm left of mid-line, 8 cm above supra external notch, direction horizontally backward piercing through and through anterior and posterior walls of trachea and oesophagus. One pellet (air gun pellet) found behind oesophagus in front of sixth cervical vertebrae. Frank pus in moderate amount present in front of the vertebrae column behind oesophagus and up to upper media-stinum lower down.

15. Cause of death was asphyxia. The postmortem examination report of the deceased is Exhibit Ka-4.

16. The investigation of this case commenced and the Investigating Officer, PW-8 besides recording statement of prosecution witnesses prepared site plan of place of occurrence Ext. Ka-6. In the meanwhile, accused-appellant Sunil Kumar Singh was arrested by S.O. Shyam Sunder Tiwari PW-10. The investigating was transferred to another Investigating Officer Shyam Sunder Tiwari PW-10, who also took various steps in completing the investigation and papers prepared by the Investigating Officer PW-8 were proved as Ext. Ka-11, Ext. Ka-12 and Ext. Ka-13. He recorded statement of the various persons and also recorded statement of another accused Ram Daras. After completing the Investigating, he filed charge sheet Ext. Ka-14 against the accused-appellant.

17. Pursuant to committal proceeding, case was transferred from the Sessions Court to the aforesaid trial court i.e. III-Additional Sessions Judge, Varanasi for conduction of trial and its disposal.

18. Prosecution opened its case by stating the charges brought against the accused and it also stated the evidence by which it proposed to prove guilt of the accused. The trial court heard the accused as well as prosecution on the point of charge and was, prima-facie, satisfied with the case for framing charges under Sections 302 read with Section 34 I.P.C. Accordingly, trial court framed charge against accused-appellant. Charge was read over and explained to the accused-appellant who abjured charge and opted for trial.

19. Consequently, the prosecution was asked to adduce its testimony in respect of charges. The prosecution produced in all 11 witnesses. A brief reference of them is ut infra:

20. Godawari Devi PW-1 is the mother of the deceased Atul Kumar. Sanjay Singh PW-2 appeared on the spot subsequent to the occurrence and is a witness of the post incidental development. Shyam Bihari Lal PW-3 claims himself to be eyewitness of the occurrence and he has testified about the incident. The child Nisa is the star witness of this case, she was 8 years of age when her testimony was recorded before the trial court. Omkar Nath Dubey PW-5 is the informant. Dr. H.M. Agarwal PW-6 has conducted post mortem examination on the cadaver of the deceased and has proved post mortem examination report Ext. Ka-4. Dr. T.D. Rai PW-7 has medically examined the victim on 08.04.1980 at 07:05 p.m. at S.S.P.G. Hospital Varanasi and has proved medical examination report of the victim as Ext. Ka-5. Ali Mohammad Khan PW-8 is the first Investigating Officer of this case. Constable Brij Kishor Tiwari PW-9 took the dead body in sealed condition to the mortuary at Varanasi and has proved the same. Shyam Sundar Tiwari PW-10 is the subsequent Investigating Officer who after completing the investigation has filed charge sheet against the accused-appellant. Balbhadra Tiwari PW-11 has proved the concerned Check FIR and relevant entry made regarding the same as Ext. Ka-16.

21. No further evidence was adduced by the prosecution, therefore, evidence for the prosecution was closed and statement of accused was recorded under Section 313 Cr.P.C. wherein he has termed the incident as incidental caused in play and has denied fact that injury was intentionally inflicted upon the deceased. In turn, defence also led testimony of several witnesses namely Krishna Mohan Saxena DW-1 regarding some entries made in the relevant record i.e. electoral papers. Hari Prasad DW-2 was

posted in Udai Pratap Degree College and has proved the record regarding date of birth of the accused-appellant. Dinesh Chandra Srivastava is DW-3 and Ramkesh Rai is DW-4.

22. The trial court after hearing both the sides on merit and appraising facts and evaluating the evidence, returned the aforesaid finding of conviction and passed the aforesaid sentence thus instead of passing sentence upon the accused-appellant Sunil Kumar Singh gave him benefit of probation for two years to maintain peace and be of good behaviour on his furnishing a personal bond of Rs.4,000/- along with two sureties each in the like amount.

23. Consequently, the aforesaid three appeals- the first against conviction and sentence by the accused-appellant, the second against the order of acquittal qua aforesaid accused-appellant and the third for enhancement of the sentence by the Government.

24. Sri R.K. Mishra, learned counsel for the accused-appellant has submitted that the entire prosecution story is concocted and highly motivated in the sense that nothing happened on the spot and no one saw the occurrence. It so happened that the deceased Atul Kumar and the accused-appellant Sunil Kumar Singh were playing together and some air-gun was used in the play which in fact caused harm to the deceased. This harm cannot be imputed to a single person that he had any animus to commit crime. Both the accused-appellant and the deceased were of the some tender age. What happened prior to the occurrence has not been accounted by any eye-account testimony.

25. Nisha Devi PW-4 is the only eye-account witness who has also not detailed in her examination in chief as to what transpired prior to the occurrence. The prosecution story is silent on the genesis of the incident created on the spot. Both the children - say accused-appellant Sunil Kumar Singh and the deceased Atul Kumar were playing and their playful activity somehow brought incidental hit by air-gun to the deceased Atul Kumar.

26. Now it so happened that after air-gun hit on the neck of the deceased Atul Kumar, his parents were infuriated and with a view to take revenge lodged false first information report regarding the firing and imputed to the accused-appellant Sunil Kumar Singh by tutoring Nisha Devi PW-4 on the point that the incident occurred in such and such manner. Assuming it to be that any incident as alleged in the first information report took place then version of Nisha Devi PW-4 ipso-facto becomes dubious, vague and tutored as this witness is wholly unreliable, for the reason that as per her testimony, she has described particular manner of the incident that the gun was pointed on the neck of the deceased Atul Kumar, at that particular moment when the incident took place, some conversation between the accused-appellant Sunil Kumar Singh and the deceased Atul Kumar took place that conversation is of particular nature and it has come in her testimony that she told about the incident to her parents after the occurrence took place. But this part of conversation is absolutely silent in the first information report.

27. However, a twist has been given to the entire situation by claiming that the informant was intimated by the injured himself that the accused-appellant Sunil Kumar Singh fired upon him with air-gun which aspect of the case is self-explanatory of fact that there is no iota of evidence or circumstance which may indicate the point that the deceased Atul Kumar ever regained his consciousness and was in fit mental condition to spell / utter any single word.

28. The doctor witness has also not been examined by the prosecution on this point who can testify fact that the deceased Atul Kumar was in fit mental condition to spell / utter word then the point as to how and under what circumstance the informant was intimated by the deceased Atul Kumar himself is an episode self-created by none other than the informant himself and has been wrongly relied by the trial court. Charges against appellant have not been proved beyond reasonable doubt.

29. Contention by the learned A.G.A., in brief, is that conviction recorded under Section 304 Part-II is itself indicative of fact that charge though was framed under Section 302 I.P.C. but conviction was recorded under Section 304 Part-II I.P.C. which deviation by the trial court under facts and circumstances of the case is not justified, for the reason that eye-account testimony of Nisha Devi PW-4 is direct, accurate in consonance with the prosecution version described in the first information report. Her testimony is innocuous and unimpeachable on the point of the occurrence. The intention to cause harm when considered vis-a-vis the attendant facts and circumstances of the case would end in commission of offence of death and it actually occurred in this case. An innocent boy lost his life because of the indolent behaviour of the accused-appellant Sunil Kumar Singh and this case should not be viewed with leniency and no mercy can be shown to the accused-appellant Sunil Kumar Singh on the ground that the accused-appellant Sunil Kumar Singh was at that particular time of this incident a boy of tender age of 12 years. The prosecution witnesses have proved all the relevant facts which are required to be proved by it.

30. In this case, as per allegations the intention to commit the crime was apparent, however, the conviction, if converted, from Section 302 I.P.C. to one under Section 304 I.P.C. then it ought to have been confined to Part-I of Section 304 I.P.C. and the animus which was playing in the mind of the accused-appellant was very much apparent by the criminal act done by him. The trial court wrongly convicted the accused-appellant under Part-II of Section 304 I.P.C. instead it should have convicted the accused-appellant under Part -I of Section 304 I.P.C.

31. Lastly added that the case of the prosecution has been consistently proved and investigation of this case has been done properly and fairly. Testimony of the prosecution witnesses of fact is clinching, sans embellishment and improvement and under circumstances, is natural and inspires confidence. Nisha Devi PW-4 is the star witness who has described every relevant details of the incident and participation of the accused-appellant in the incident.

32. After hearing learned counsel for the parties and considering rival submissions of the respective parties, core consideration that arise in these appeals are two pronged - one relates to fact whether the prosecution was not able to prove its

charges against appellant Sunil Kumar Singh in the aforesaid Criminal Appeal (717 of 1984) and second relates to fact whether finding of acquittal is based on conjectures and surmises rather than grounded on material on record and third relates to enhancement of the sentence in the aforesaid Government Appeals?

33. The very genesis of the crime, as we gather from reading of the first information report, describes the incident to have taken place on 08.04.1980 at 4:45 p.m. and description is to the magnitude that with intention to kill, shot was fired with air-gun upon the victim Atul Kumar by the accused-appellant Sunil Kumar Singh. The shot hit on the neck of the victim.

34. The condition of the victim was serious, therefore, details of the incident could not be known and after three days of the incident when the victim was able to speak then it transpired that the accused-appellant Sunil Kumar Singh deliberately shot him with air-gun and the air-gun was owned by peon Ram Daras posted in the office at Sarada Sahayak Pariyojana. The victim was taken to the hospital in the injured condition where he was admitted in serious condition. The pellet was entangled in his neck. If this version of the incident is taken to be correct then we have star witness of this incident namely Nisha Devi PW-4.

35. As regards the occurrence, we have best testimony in the form of PW-4 and PW-3. We scanned the entire testimony of Shyam Bihari Lal PW-3 who happened to be Lekhpal posted in district Varanasi. The place of the occurrence is adjacent to the office of Tehsil. He has described about the incident in his examination in chief that at the relevant point of time, he saw the occurrence when accused-appellant Sunil Kumar Singh was possessing air-gun and was standing at some pace from the victim this air-gun was given by Ram Daras to the accused-appellant Sunil Kumar Singh.

36. As soon as the victim Atul Kumar arrived on the spot, the accused-appellant Sunil Kumar Singh pointed air-gun on his neck and put the trigger on. This is particular piece of testimony regarding the incident. The natural conduct of this witness is to be considered for evaluating veracity of his testimony. In the cross examination, it is admitted to this witness that for over three days, he did not make any statement to any authority about the incident then what to say to the Investigating Officer that after three days, he gave statement to Daroga Ji.

37. Here we come across contrary statement given / made to Daroga Ji and testimony given in the cross examination before the trial court. His testimony does not indicate compatibility with natural conduct that after seeing the occurrence, he being Lekhpal posted in district Varanasi at that point of time must have told /described about the incident to anyone but he kept silent for three days. May be, he is a procured witness, managed by the prosecution in order to articulate things in its favour. Therefore, this witness is not reliable and he cannot be believed to be worthy of credit. He is vacillating on material point and his natural conduct is inconsistent with that of a man of ordinary prudence, not fit in the prevailing circumstances of the case.

38. Now we have testimony of the only star witness Nisha Devi PW-4, sister of the deceased Atul Kumar. After careful

perusal of her testimony, we can take note of the description of the incident as testified in her examination in chief wherein she has categorically stated that the deceased Atul Kumar was her brother and the accused-appellant Sunil Kumar Singh fired upon him. The gun was pointed on the neck, with point blank range, and shot was fired at that relevant point of time when the gun was put on the neck of the deceased by the accused-appellant Sunil Kumar Singh, the deceased Atul Kumar asked him not to do so whereupon the accused-appellant Sunil Kumar Singh insisted that he will do this. After sustaining shot, the deceased Atul Kumar fell down to the eastern side of the electric pole on the spot.

39. Upon perusal of the first information report, it is revealed that the incident occurred around 5:00 p.m. on 08.04.1980. This description emerging in examination in chief of this witness (Nisha Devi PW-4) is to be cautiously scrutinized in view of fact that PW-4 is a child witness and at the time of the occurrence, she was about 6 years of age.

40. But before proceeding further, we would like to reflect on the point as we have scanned testimony of the doctor witness who medically examined the deceased and also perused relevant part of the testimony of the Investigating Officer Ali Mohammad Khan PW-8 who went to the B.H.U. Hospital in emergency ward after the investigation was taken over by him on 12.04.1980 then he found the victim Atul Kumar in unconscious state which indicates that the victim was not able to speak at that point of time when the Investigating Officer PW-8 arrived at B.H.U. Hospital Varanasi in the emergency ward on 12.04.1980 and his testimony is admitted on the point that the death occurred on 12.04.1980 in the evening around 6:15 p.m. itself. This being so an independent circumstance, the version in the first information report that the informant was told about the incident by the victim Atul Kumar is a version wholly unreliable and appears to have been managed by the prosecution and in particular by the informant and cannot be believed to be correct version in the prevailing facts and circumstances of the case.

41. Upon careful scrutiny of the entire testimony - say examination in chief and cross examination of the star witness Nisha Devi PW-4, we gather fact that after the occurrence, she told each particular of the occurrence to her parents and Omkar Nath Dubey - informant who is none other than the father of Nisha Devi PW-4.

42. Now the moot point is concerning fact that after the incident took place, each particular of the incident was described and the first information report was lodged on 11.04.1980 much after the occurrence took place on 08.04.1980, how and why was reference to the magnitude that the injured was in fit condition to speak and he told about the incident to the informant then the informant came to know that offence was deliberately committed by none other than the accused-appellant Sunil Kumar Singh. This particular aspect is unimpeachable under existing circumstance of this case and requires explanation by the prosecution and the prosecution has tried to manage things to a degree to bring the case beyond reasonable doubt which it failed on account of certain infirmities creating serious dent in the prosecution story.

43. That way, no doubt the prosecution witness PW-4 is not believed to

be wholly reliable witness and she appears to have been tutored witness because she has categorically stated in her cross examination that whatever was seen by her was told by her to her parents. During treatment of the the deceased, the conversation took place between PW-4 and her parents as emerging in her cross examination on page nos.34 and 35 of the paper-book then how and why improvement by PW-5 on point of talk with Atul Kumar that he had conversation with him (the deceased). The prosecution could not come out specifically about any such testimony or circumstance explicit or implicit reflecting on the point that the deceased regained consciousness and was in fit physical condition to speak. Under these circumstances as a measure of caution, PW-4 who is a child witness cannot be wholly relied by us and doubt is created about the very manner and style of the incident in which the offence is claimed to have been committed by the accused.

44. The claim of the defence that the air-gun was fired in the play and it somehow incidentally hit the victim can be acted upon as plausible explanation about the incident. Under these circumstances, we can hold that the case was not proved within the four corners of Section 304 I.P.C. and the trial court did not consider this vital unimpeachable point / circumstance of the case which is self-revealing instead the prosecution on the point of actual occurrence is all the times improving and vacillating and the statement of the prosecution witnesses on the vital point as such are contrary to the Section 161 Cr.P.C. which contrast has been elaborately pointed out by the defence in cross examination of the prosecution witnesses. The prosecution witnesses PW-3 and PW-4 have been specifically challenged by the defence, which has been denied but specific challenge to the witnesses cannot be overlooked by us in view of several infirmities appearing in the testimony and we hold in the final count that the charge has not been proved beyond reasonable doubt and the accused-appellant is entitled to benefit of doubt - acquittal.

45. Learned trial court while considering merit of the case somehow overlooked above material factual aspects, circumstances and testimony on the whole on record and adopted only casual approach. Thus, the trial court erroneously recorded finding of conviction against the accused-appellant under Section 304 Part-II I.P.C. which finding in the absence of consistent and clinching testimony on point of occurrence becomes unsustainable and in the result liable to be set aside by us.

46. Therefore, the judgment and order of conviction dated 04.02.1984 passed by III-Additional Sessions Judge, Varanasi, in Sessions Trial No. 133 of 1981, State Vs. Sunil Kumar Singh and another, arising out of Case Crime No.207 of 1980, under Section 304 Part-II read with Section 34 I.P.C., Police Station Cant, District Varanasi, is hereby set aside. Accused-appellant Sunil Kumar Singh is acquitted of the charge. Accordingly, the instant criminal appeal is allowed.

47. In this case, the accused-appellant is on bail. He need not surrender before the court concerned. His bail bonds are cancelled and sureties are discharged. However, he shall furnish surety bonds in compliance with Section 437A Cr.P.C.

48. Accordingly, Government Appeal No.1086 of 1984 and Government Appeal No.1088 of 1984 being devoid of merit are dismissed.

49. Let a copy of this order be certified to the trial court for its intimation and necessary follow-up action.

(2020)03-05ILR A330
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.04.2020

BEFORE
THE HON'BLE ANIL KUMAR, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 720 of 1982

State of U.P.(State Appeal) ...Appellant
Versus
Smt. Chhoti & Anr. ...Respondents

Counsel for the Appellant:
Govt. Advocate

Counsel for the Respondents:
Nagendra Mohan, Som Narain Saxena, Wasim Ahmad

A. One of the essential condition for taking into consideration of such confession against another co-accused is that both the accused must have been jointly tried before the Trial Court and if the accused has not been tried jointly before the Trial Court, the extra judicial confession made by him cannot read against another co-accused and such confession is inadmissible in evidence- Accused will be presumed as innocent unless and until the prosecution has succeeded to prove its case beyond reasonable doubt and the presumption of innocence of accused is further strengthened if he is acquitted by the Trial Court- In an appeal against acquittal, if two views are possible, one is in favour of accused-person and judgment of Trial Court is not illegal or manifestly perverse, the appellate Court should not disturb the order of acquittal.

B. Evidence Law-Indian Evidence Act, 1872- Section 30- Extra judicial confession- Admissibility- Extra judicial confession made by co-accused is a weak type of evidence -The requirement of law for making the said evidence admissible is that both the accused must have been jointly tried before the Trial Court and in absence of such joint trail for any reason, the extra judicial confession made by one accused cannot be read against another co-accused.

C. Criminal Law-Code of Criminal Procedure, 1973- Section 378 (1)- Appeal against acquittal- Presumption of innocence in favour of the accused- Where the accused is acquitted by the trial court, there is a double presumption of innocence in his favour and the view in favour of the accused will be ordinarily accepted unless there is a patent illegality or manifest error apparent from the judgement of the trial court.
(Para 30,31,36,37,39)

Government Appeal rejected (E-3)

List of case cited:

1. Achey Lal Singh Vs. Emperor, AIR 1947 Patna 90 DB

2. Surajpal Singh & or.s Vs. State, AIR 1952 SC 52

3. St. of M.P Vs. Mukesh & ors., (2007) 2 SCC 680

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

1. The instant criminal appeal has been filed against the judgment and order dated 01.01.1982, passed by 3rd Additional District and Sessions Judge, Sitapur in Sessions Trial No.382/1979 (State vs. Smt. Chhoti and others), arising out of Case Crime No.60/1977, under Sections-302 read with 34 and 201 I.P.C., Police Station (P.S.)-Kamlapur, District-Sitapur, whereby the respondents-accused (hereinafter referred to as respondents)- Smt. Chhoti and Ram Swarup have been acquitted by

the Trial Court from the charges of offence under Sections-302 read with 34 and Section 201 I.P.C.

2. During pendency of the appeal, respondent no.1-Smt. Chhoti had died and the present appeal, filed against her, has been abated by this Court vide order dated 24.01.2020.

3. The prosecution case, in brief, is that the deceased-Jaswant Singh (hereinafter referred to as deceased) was brother of Jagdish (P.W.-1) (informant). Jagdish Singh (P.W.-1) is resident of village-Kumharanpurwa, P. S.-Kamlapur, District-Sitapur. Babu Ram (P.W.-3), Bachan (P.W.-5) and Mool Chand (P.W.-6) are co-villagers of Jagdish Singh (P.W.-1). The deceased and one Shyam Lal resident of village-Dalelnagar, P.S.-Kamlapur, District-Sitapur, since deceased during committal proceeding, (hereinafter referred to as co-accused-Shyam Lal) were inimical for last two years from the incident as they had quarreled in respect to the irrigation of their field, due to which, the co-accused-Shyam Lal was in search of opportunity to eliminate the deceased. For last one month, the co-accused-Shyam Lal was trying to have friendly relations with the deceased, whereupon the informant (P.W.-1) had warned the deceased that he would not have confidence of co-accused-Shyam Lal as he was a notorious criminal. In addition to it, there was an estrange relationship between the respondent-Ram Swarup and deceased due to dispute regarding a grove between one Saktu and the respondent-Ram Swarup wherein the deceased was supporting the cause of Saktu and Barati Pasi, who were estranged from the respondent-Ram Swarup.

4. On 17.07.1977, at about 9:00-10:00 A.M., the deceased told the Jagdish Singh (P.W.-1) and his family members that he along with Bachan (P.W.-5) was going to the house of the co-accused-Shyam Lal in order to purchase some chaff ***(Bhusa)*** for Bachan (P.W.-5) and at that time, the deceased had weared a Dhoti and Baniyan and having a Titan Crystal Watch on his wrist. Since the deceased did not return till 9:00-10:00 P.M. on that day, the informant (P.W.-1) inquired of Bachan (P.W.-5) the whereabouts of deceased, who (P.W.-5) told that the deceased had gone with him to the house of co-accused-Shyam Lal and had talked with co-accused for purchasing of chaff ***(Bhusa)*** whereupon the co-accused-Shyam Lal told that he would sell chaff ***(Bhusa)*** in 2-3 days. Bachan (P.W.-5) also informed the informant (P.W.-1) that the co-accused-Shyam Lal had taken the deceased inside his house, at that time the respondent-Ram Swarup had also come there and both of them had gone with the deceased inside the house of the co-accused-Shyam Lal. Sensing some suspicious conduct of the co-accused-Shyam Lal as he was a notorious criminal, Jagdish Singh (P.W.-1) along with Sobaran (not examined), Babu Ram (P.W.-3), Bhagwati (not examined) and Bachan (P.W.-5) proceeded to the house of co-accused-Shyam Lal. They reached there at 10:00 P.M. and knocked the door of the co-accused-Shyam Lal by asking the whereabouts of the deceased. In response the respondent-Smt. Chhoti (since deceased) told them that the deceased had not come towards her house since morning. When she was asked to open the door, she refused to do so. Thereafter, the informant (P.W.-1) and other witnesses namely Shiv

Charan (not examined), Sobaran (not examined), Mool Chand (P.W.-6), Ram Swarup Yadav (not examined) and Maiku Lal (not examined), who are resident of village-Dalelnagar, made another attempt to get the door of the co-accused-Shyam Lal opened but they also failed to succeed. As the informant (P.W.-1) failed to receive any information regarding whereabouts of his brother (deceased) and got suspicious that his brother might have been killed by the co-accused-Shyam Lal (since deceased) and the respondent-Ram Swarup, he (P.W.-1) put surveillance (Garabandi) around the house of the co-accused-Shyam Lal. The informant (P.W.-1) along with Shiv Charan sat on the terrace of the house of Shiv Charan. At about 4:00 A.M. in the intervening night of 17-18th July, 1977, some fire flames were sighted by them in the south-west corner of the court-yard of the house of the co-accused-Shyam Lal, which resulted in the burning of Chhappar. It created sufficient light at the place of occurrence and in that light, the informant (P.W.-1) and Shiv Charan (not examined) saw that the co-accused-Shyam Lal and the respondent-Smt. Chhoti (since deceased) were pouring Kharphoos whereas the respondent-Ram Swarup was also pouring diesel from a can. The informant (P.W.-1) and Shiv Charan (not examined) got frightened and remained silent till morning. They made another attempt to get the door of co-accused-Shyam Lal opened but again they could not succeed. On 18.07.1977 at about 10:00 A.M., Ramdhan (P.W.-2) (Village Pradhan) resident of village-Garhi and so many people of villages i.e. Dalelnagar and Kumharpurwan gathered there. Ramdhan (P.W.-2) (Village Pradhan) also requested co-accused-Shyam Lal to open the door but the co-accused-Shyam Lal refused to do so. Thereupon Ramdhan (P.W.-2) asked one Babu Ram (P.W.-3) to enter into the house of the co-accused-Shyam Lal. Thereupon Babu Ram (P.W.-3) entered into the house of the co-accused-Shyam Lal with the help of bamboo ladder and opened the door. Thereafter, the informant (P.W.-1) and other witnesses entered into the house of the co-accused-Shyam Lal and saw that the co-accused-Shyam Lal, the respondent-Smt. Chhoti (since deceased) and the respondent-Ram Swarup were burning the body of the deceased. Seeing the informant and other witnesses, the respondent-Ram Swarup managed to escape from the place of occurrence through back window whereas the co-accused-Shyam Lal and respondent-Smt. Chhoti (since deceased) were caught on the spot. When the co-accused-Shyam Lal was interrogated by Ramdhan (P.W.-2) (Village Pradhan), he admitted that he along with the respondent-Smt. Chhoti (since deceased) and the respondent-Ram Swarup had killed the deceased and packed the dead body of the deceased in a jute bag but they failed to take it out as they were surrounded by the informant (P.W.-1) and other witnesses. He further confessed that he along with other accused were burning the body of the deceased in order to destroy the evidence.

5. The informant (P.W.-1) got the Tahrir (Ext.-Ka-1) written by Babu Ram (P.W.-3) and leaving the semi burnt body of the deceased, at the place of occurrence, reached the P. S.-Kamlapur and lodged the F.I.R. at 3:05 P.M. on 18.07.1977. The said information was entered in G.D. No.-160 on the same day by Head Constable namely Bashir Ahmad (P.W.-8) and First Information Report (Ext. Ka-15) was registered as Case Crime No.60/1977 in the presence of Sri Uday Narain Singh, (P.W.-7), S.O., P.S.-Kamlapur, who took the investigation of the case, recorded the

statement of Jagdish Singh (P.W.-1) and proceeded to place of occurrence. When he reached the place of occurrence, he found that semi burnt dead body of the deceased was lying in the kitchen of co-accused-Shyam Lal under his chhappar. He also found that both the co-accused-Shyam Lal and the respondent-Smt. Chhoti (since deceased) were present inside the house and arrested them. He inspected the body of the deceased and recovered half burnt cotton from mouth of deceased.

6. The inquest proceeding of dead body of the deceased was conducted, inquest report (Panchnama) (Ex.-K2-A) as well as other relevant papers required for post-mortem examination were prepared and after sealing the dead body of the deceased, the same was handed over to Constable-Indira Narain Tewari (P.W.-9) and Chaukidar Shiv Ram (not examined) with a direction to proceed for District-Hospital, Sitapur for postmortem examination.

7. Udaya Narain Singh (P.W.-7) also inspected the place of occurrence and prepared the site plan (Ext.Ka-11), recovered the half burnt tat, rope, piece of cloth, some bamboo pieces, half burnt ashes, and also took sample of blood stained earth from the place of occurrence. The recovery memos (Ext.Ka-7 to Ka-10) were prepared in the presence of one Gaya Prasad (not examined) and Saryu (not examined). During interrogation, the co-accused-Shyam Lal told that the deceased was killed by spear ***(Bhala)*** and the same had been put in the Ghoora of one Ram Sagar. On the pointing out of the co-accused-Shyam Lal, the said Bhala was recovered in the presence of Ramdhan (P.W.-2), Barati Lal (not examined) and Ram Sagar (not examined) and was handed over to the Investigating Officer (P.W.-7) by co-accused-Shyam Lal.

8. Dr. R. S. Agarwal (P.W.-4), the then Superintendent, P.A.C., Hospital, Sitapur, conducted the postmortem examination of the dead body of the deceased on 19.07.1977 at 3:00 P.M.. According to him, the dead body of the deceased was about two days old and the whole body was burnt from head to toes ; skull bone was visible and there was no skin or muscle present on the head. Intestines were coming out from the right lumber region Right hand and both the feet were amputated due to burn. He found following anti mortem injuries :

"Stabbed wound between 8th and 9th ribs right chest 5cm x 2cm x cavity deep underneath. 8th rib found fractured.

Incised wound from mid of neck to right side of neck anteniorly 5 cm x 1 cm x trachea cut, thyriod cartilage broken and big vessels of right side cut.".

9. According to doctor, the death of the deceased was caused due to shock and haemorrhage as a result of anti mortem injuries and it could have been caused at any time after 10:00 A.M. on 17.07.1977. He prepared the postmortem report (Ext. Ka-2) at the time of examination.

10. After investigation, the charge sheet (Ext. Ka-14) under Section 302 read with 34 and 201 I.P.C. was filed against the co-accused-Shyam Lal, the respondent-Smt. Chhoti (since deceased) and the respondent-Ram Swarup before the concerned Judicial Magistrate, Sitapur, who took the cognizance of offence. During committal proceeding, the co-accused-Shyam Lal died. Since the case was exclusively triable by the Court of Sessions, after providing the copies of

relevant police papers, concerned Magistrate committed the case to Court of Sessions, Sitapur for trial.

11. The charges for offence under Section 302 read with Section 34 and 201 I.P.C. were framed against the respondent-Smt. Chhoti (since deceased) and the respondent-Ram Swarup which were read over to them. Both the respondents denied the charges levelled against them and claimed for trial.

12. During trial, the prosecution, in order to prove its case, examined Jaswant Singh (P.W.-1), Ramdhan (P.W.-2), Babu Ram (P.W.-3), Dr. R. S. Agarwal (P.W.-4), Bachan (P.W.-5), Mool Chand (P.W.-6), Uday Narain Singh (P.W.-7), Head Constable, Bashir Ahmad (P.W.-8) and Narain Tewari (P.W.-9).

13. Jaswant Singh (P.W.-1), Ramdhan (Pradhan) (P.W.-2), Baburam (P.W.-3), Bachan (P.W.-5) and Mool Chand (P.W.-6) are witnesses of fact whereas rest witnesses are formal witnesses.

14. After conclusion of the prosecution evidence, the statement of the respondents were recorded under Section 313 Code of Criminal Procedure, 1973 (hereinafter referred to as Code) wherein they denied the prosecution evidence and stated that they have been falsely implicated. The respondent-Ram Swarup further stated that he had dispute (Jhaghra) with Village Pradhan, Ramdhan (P.W.-2) and due to that enmity, he had been falsely implicated. He further stated that all the witnesses are under the influence of Ramdhan (Village Pradhan) (P.W.-2). The respondent-Smt. Chhoti (since deceased) further stated that she is widow and her elder brother-in-law (Jeth)-Sanatan wanted to grab her land and under the conspiracy, Jagdish Singh (P.W.-1) had falsely implicated her so that she might abandoned her house. She further stated that she had litigation with Sanatan.

15. The respondents-Ram Swarup and Smt. Chhoti (since deceased) were given an opportunity to produce evidence in their defence. The respondent-Smt. Chhoti (since deceased) filed certified copies of two documents i.e. Ext.-Kha-1 and Ext.-Kha-3. Ext.-Kha-1 is a copy of order dated 08.05.1979 passed by Munsif Biswana, Sitapur in Civil Suit No.12 of 1979 (Smt. Kapura vs. Sanatan) and Kxt.Kha-3 is the copy of the judgment dated 29.02.1980 passed by Munsif Biswan in Civil Suit No.12 of 1979 (Smt. Kapura vs. Sanatan). These documents were filed to show that she was in litigation with her elder brother-in-law-Sanatan in respect of agricultural land.

16. The Trial Court, after hearing the learned counsel for both parties and considering the material available on record, disbelieved the prosecution story on the ground that the conduct and presence of the prosecution witnesses were unnatural and unreliable because no effort was made to lodge the first information report promptly, even when Jagdish Singh (P.W.-1) saw at 4:00 A.M. on 18.07.1977 that his brother-deceased was killed and dead body was being brunt by the respondents and co-accused-Shyam Lal. The Trial Court also disbelieved the prosecution witnesses on the ground that no effort was made to get the door opened till 10:00 A.M. on 18.07.1977 even after knowing that the deceased was killed inside the house of the co-accused-Shyam Lal and the dead body was being burnt. The Trial Court also disbelieved the prosecution witness that the

deceased was being burnt by the respondents as well as co-accused-Shyam Lal by 4:00 A.M. on 18.07.1977 till 10:00 A.M. on that day. The Trial Court also disbelieved the extra judicial confession of co-accused in the absence of substantive piece of evidence.

17. The Trial Court, in view of aforesaid defect and lacuna in the prosecution case, held that the prosecution had miserably failed to prove its case beyond reasonable doubt against the respondents and accordingly, acquitted them. Aggrieved by the impugned judgment and order passed by learned Trial Court, State has preferred the present appeal.

18. We have heard Sri Badrul Hasan, learned A.G.A. for the State-appellant, Ms. Devika Singh, learned counsel for the respondent and gone through the records.

19. Learned A.G.A. has submitted that the impugned judgment and order, passed by the learned Trial Court, is against the provisions of law and also against the evidence available on record. Learned A.G.A. further submitted that the fact and evidence, that the death of the deceased was caused in the house of the co-accused-Shyam Lal and body of the deceased was found in his house, has not been disbelieved by the Trial Court. Learned A.G.A. further submitted that the presence of respondent-Ram Swarup at the time of occurrence inside the house of co-accused-Shyam Lal i.e. place of occurrence and his culpability in the offence has been proved by the prosecution witnesses and also by the extra judicial confession of co-accused-Shyam Lal but the Trial Court did not rely on the evidence of prosecution witnesses only on the ground that they are not independent witness. Learned A.G.A. further submitted that there is sufficient evidence on record against the respondent-Ram Swarup, the prosecution has succeeded to prove its case beyond reasonable doubt, the judgment of Trial Court is liable to be set aside and the present appeal be allowed.

20. Per contra, learned counsel for the respondents submitted that the prosecution story is unnatural and unreliable. Learned counsel further submitted that the prosecution witnesses are interested witnesses and their presence and conduct on the place of occurrence are unnatural. The respondents were falsely implicated in this case due to enmity. Learned counsel further submitted that the extra judicial confession of co-accused is not admissible in evidence. Learned counsel further submitted that the presence of the respondent-Ram Swarup has not been proved by the prosecution and nothing has been recovered either from his possession or on his pointing out. Learned counsel further submitted that the ocular evidence is not supported by the medical evidence and the prosecution story is based only on surmises and conjecture, which cannot be relied upon. Learned counsel further submitted that the impugned judgment and order passed by Trial Court is well discussed and well reasoned and according to settled principle of law ; there is no illegality in the said judgment and accordingly, hence, the present appeal is liable to be dismissed.

21. We have considered the rival submissions of learned counsel for both the parties and gone through the records.

22. Jagdish Singh (P.W.-1), informant, star witness of the prosecution,

supporting the prosecution case, has stated that he is resident of village-Kumaharanpurwa, P.S.-Kamlapur and village-Dalelnagar is situated one kilometer (K.M.) away to south of his village where co-accused-Shyam Lal and respondent-Smt. Chhoti (since deceased) were resided whereas the respondent-Ram Swarup is residing in village-Gadhi which is situated from one K.M. away to North-East of his village. He further stated that he knew very well the co-accused-Shyam Lal, the respondent-Smt. Chhoti (since deceased) and the respondent-Ram Swarup prior to the alleged occurrence. He stated that husband of the respondent-Smt. Chhoti (since deceased) had died and she used to reside with co-accused-Shyam Lal, who was notorious criminal, was convicted in 2-3 cases and was killed after one year of the alleged occurrence. He (P.W.-1) further stated that Shiv Charan (not examined) and Mool Chand (P.W.-6) are co-villager of co-accused-Shyam Lal. He further stated that there was enmity between the deceased and co-accused-Shyam Lal for last two years as they had quarreled in respect to the dispute of irrigating of their field and for the last one month co-accused-Shyam Lal was trying to have friendly relations with the deceased and informant had warned him to be cautious with the co-accused-Shyam Lal as he would not repose confidence on him. He further stated that in addition to above, the respondent-Ram Swarup was also inimical to the deceased because there was litigation regarding grove between the Saktu, Barati Pasi and the respondent-Ram Swarup wherein the deceased was supporting the cause of Saktu and Barati Pasi. He further stated that on 17.07.1977, at about 9:00-10:00 A.M., the deceased had gone with Bachan (P.W.-5) to the house of co-accused-Shyam Lal for purchasing of chaff ***(Bhusa)*** for Bachan (P.W.-5) and when the deceased did not return to his house till late night on that day, he (P.W.-1) inquired Bachan (P.W.5) whereabout of deceased, whereupon Bachan (P.W.-5) replied that he had gone with deceased to the house of co-accused-Shyam Lal to purchase the chaff ***(Bhusa)*** and since the transaction of the chaff was not finalized, the deceased stayed at the house of co-accused-Shyam Lal. He (P.W.-5) further informed that the co-accused-Shyam Lal had taken the deceased inside his house and at that time, the respondent-Ram Swarup was also present there. This witness further stated that sensing some untoward, he (P.W.-1), along with other witnesses, went to the house of co-accused-Shyam Lal and knocked his door but the respondent-Smt. Chhoti (since deceased) denied to open the door ; thereupon he (P.W.-1) with help of Ramdhan (Village Pradhan) (P.W.-2), Babu Ram (P.W.-3), Bachan (P.W.-5), Mool Chand (P.W.-6), Sobhran (not examined), Maiku Lal (not exained), Shiv Charan (not examined) and so many people of Village-Dalelnagar and Kumaharanpurwa surrounded the house of co-accused and seized his house. He (P.W.-1) further stated that he and one Shiv Charan (not examined) sat at the terrace of Shiv Charan in order to watch the activity going on inside the house of co-accused-Shyam Lal and had found that at about 4:00 A.M., some flames were sighted in the house of co-accused-Shyam Lal on the south-west corner of the house and also saw that the co-accused-Shyam Lal as well as Smt. Chhoti (since deceased) were putting hey ***(kharpoos)*** and the respondent-Ram Swarup was pouring diesel oil from can on the body of the deceased. He further stated that on the next day i.e. 18.07.1977, he (P.W.-1) with the help of other prosecution witnesses again tried to get the door of the house of co-accused-Shyam Lal opened but

they did not succeed, thereupon at about 10:00 A.M. on the instructions of Ramdhan (Village Pradhan) (P.W.-2) a ladder was brought by the Babu Ram (P.W.-3) and in order to open the door of the house of co-accused-Shyam Lal, Babu Ram (P.W.-3) climbed on the wall of court-yard of the house and saw that the respondent-Ram Swarup, the respondent-Smt. Chhoti (since deceased) and co-accused-Shyam Lal were burning the body of the deceased. He (P.W.-3) jumped inside the court-yard of the house of the co-accused-Shyam Lal and opened the main door and thereafter, some people including the prosecution witnesses entered into the house of co-accused-Shyam Lal. The co-accused-Shyam Lal and the respondent-Smt. Chhoti (since deceased) were caught at the place of occurrence but the respondent-Ram Swarup managed to escape therefrom through back side window of the house of the co-accused-Shyam Lal. He further stated that the co-accused-Shyam Lal made extra judicial confession to Ramdhan (P.W.-2) that he and the respondent-Smt. Chhoti (since deceased) had caught the deceased and the respondent-Ram Swarup had killed the deceased by spear ***(Bhala)***. He (Shyam Lal) further confessed that due to (Garhabandi) of his house, they failed to take out the dead body of the deceased from his house and hence they were disposing the dead body by burning it. Thereafter, he (P.W.-1) reached the police station and lodged the first information report on 18.07.1977 at 15:05 P.M.

23. Bachan (P.W.-5) is also resident of village-Kumaharanpurwa and according to the prosecution case, he and deceased had gone to the house of co-accused-Shyam Lal (since deceased) to purchase the chaff (Bhusha) for Bachan (P.W.-5). The alleged occurrence was happened in the month of July. Bachan (P.W.-5) has admitted that he had eighteen Bigha agricultural land and had only four Goi (Oxen) and one buffallow. In addition to it, he was also cultivating seven Bigha agricultural land on batai. He has further admitted that he had sufficient chaff ***(Bhusa)*** for two months of his animals and had also bought some chaff from his uncle prior to two months of occurrence.

24. In our view, the statements of prosecution witnesses i.e. Jagdish Singh (P.W.-1) and Bachan (P.W.-5), that the deceased had gone to the house of co-accused-Shyam Lal, to purchase the chaff ***(Bhusa)*** for Bachan (P.W.-5), who had already sufficient chaff ***(Bhusa)*** at the time of occurrence, are unreliable because if there was no urgent necessity for purchasing Bhusa to Bachan (P.W.-5), the conduct of deceased to go for purchasing of Bhusa for Bachan (P.W.-5) to the house of co-accused-Shyam Lal, who was inimical to him and was a notorious criminal and staying at his house without any justification in the presence of the respondent-Ram Swarup, who was also inimical to deceased, is highly unnatural and improbable. This inherent defect is fatal to the prosecution case.

25. According to prosecution, apprehension, that some untowards might have been caused to deceased by co-accused-Shyam Lal, was caused to Jagdish (P.W.-1) on 17.07.1977 at 10:00 P.M. when Bachan (P.W.-5) informed him that deceased was carried by co-accused-Shyam Lal inside his house in presence of respondent-Ram Swarup and he (P.W.-1) could not succeed to get the door of house of co-accused-Shyam Lal opened. Such apprehension further strengthened when he (P.W.-1) saw on 18.07.1977 at about 4:00

A.M. that respondent-Ram Swarup was burning the dead body of deceased with the help of co-accused-Shyam Lal and respondent-Smt. Chhoti (since deceased), but F.I.R. of the occurrence was lodged by him on 18.07.1977 at 3:05 P.M. Thus huge delay has been caused in lodging F.I.R. It is settled principle of law that undue delay in lodging F.I.R., if not properly explained, is fatal in each and every cases. In this case, prosecution has failed to explain the delay caused in lodging the F.I.R. and explanation given by Jagdish (P.W.-1) for delay in lodging the F.I.R. that if he had gone to the Police Station or had gone to call the Chaukidar, his companions might have lifted the Garabandi, is not reliable and has rightly been disbelieved by Trial Court on the ground that he (P.W.-1) did not even sent anyone to his house to call his family members who could go to the police station or atleast to call the Chaukidar of the village. Failure of the prosecution to explain the delay, caused in lodging the F.I.R., has further created serious doubt and loopholes in the prosecution case.

26. In addition to the above, there is another lacuna in the prosecution story which also created it wholly unreliable because according to Jagdish Singh (P.W.-1) when he along with other witnesses entered into the house of the co-accused-Shyam Lal, the co-accused-Shyam Lal and the respondent-Smt. Chhoti were caught on the spot whereas the respondent-Ram Swarup managed to escape from the place of occurrence. This version has also been repeated by Ramdhan (Village Pradhan) (P.W.-2), Babu Ram (P.W.-3) and Bachan (P.W.-5). None of the prosecution witnesses has stated that the respondent-Ram Swarup had run away from the place of occurrence with any weapon. Further all the witnesses have stated that the co-accused-Shyam Lal and respondent-Smt. Chhoti (since deceased) were detained at the place of occurrence till the police arrived there and Investigating Officer (P.W.9) has stated that he had arrested the co-accused-Shyam Lal and the respondent-Smt. Chhoti (since deceased) from the place of occurrence on 18.07.1977 at about 18:30 P.M. According to this witness, the spear ***(Bhala)*** used in the occurrence, was recovered from Ghoora of one Ram Sagar on the pointing out of the co-accused-Shyam Lal at 8:00 P.M. on 18.07.1977. Thus, if the house of the co-accused was surrounded by the prosecution witnesses since 17.07.1977 at about 10:00 P.M. and the co-accused-Shyam Lal did not succeed to escape from the place of occurrence as he was caught and arrested, then how the spear used in the occurrence was screened inside the Ghoora of Ram Sagar by the co-accused-Shyam Lal has not been explained by the prosecution side. Thus, on this point, the prosecution case further becomes doubtful.

27. In addition to above, according to the prosecution case, on the basis of extra judicial confession made by co-accused ; the deceased was killed by the respondent-Ram Swarup by using spear ***(Bhala)*** but according to Dr. R. S. Agarwal (P.W.-4) two anti mortem injuries were found on the body of the deceased ; one was stabbed wound and another was incised wound. In cross-examination, this witness has fairly admitted that injury no.2 i.e. incised wound is not possible by using spear ***(Bhala)*** and it would have been caused by any sharp edged weapon. No sharp edged weapon was recovered by any witnesses including Udai Narain Tiwari, S.I., Investigating Officer, (P.W.-7) from the place of occurrence. Prosecution is silent as to how the incised wound would have been caused on the person of deceased. On this account,

also the prosecution case becomes doubtful.

28. In addition to above, further according to prosecution, the alleged offence was caused inside the house of co-accused-Shyam Lal r/o village-Dalelnagar and at the time of occurrence, so many people of Village-Dalelnagar i.e. Shiv Charan (not examined), Sobhran (not examined), Mool Chand (P.W.-6), Ram Swarup Yadav (not examined), Maiku Lal (not examined) had appeared at the place of occurrence and made efforts to get the door of the house of co-accused-Shyam Lal opened but they failed to succeed. Further, according to prosecution, these people along with other co-villager of Village-Dalelnagar surrounded the house of co-accused-Shyam Lal but the prosecution has failed to produce any witness of Village-Dalelnagar except Mool Chand (P.W.-6) who did not support the prosecution story because other prosecution witnesses i.e. Jagdish Singh (P.W.-1), Babu Ram (P.W.-3), Bachan (P.W.-5) are resident of Village-Kumharpurwa whereas Ramdhan (P.W.-2) is the resident of Village-Harpalpur. The prosecution has failed to explain as to why any person, who is resident of Village-Dalelnagar, were not produced in support of prosecution case and even Shiv Charan on whose terrace Jagdish Singh (P.W.-1), sat with him and saw that the respondents were burning deceased, was also not produced. Non production of any witness of Village-Dalelnagar is also fatal to the prosecution case.

29. There is one another reason why the prosecution case becomes further doubtful. According to the prosecution, when the prosecution witnesses failed to get the door of the house of co-accused-Shyam Lal opened, they surrounded that house and Jagdish Singh (P.W.-1) along with Shiv Charan (not examined) sat at the terrace of the Shiv Charan in order to watch the activity happened inside the house of co-accused-Shyam Lal and found that at about 4:00 A.M. flames were sighted in the south-west corner of the court-yard of the house of the co-accused-Shyam Lal and also saw that the co-accused-Shyam Lal, the respondent-Smt. Chhoti (since deceased) were pouring Kharphoos whereas the respondent-Ram Swarup was also pouring diesel from a can on the body of the deceased. Shiv Charan was not examined by the prosecution. Jagdish Singh (P.W.-1), in his cross-examination, has admitted that in the intervening night of the occurrence, it was raining the whole night. He has further admitted that he (P.W.-1) told the Investigating Officer that it was raining in the night of the occurrence. He further stated that he had put the plastic seat upon him in the rainy night but persons, who had surrounded the house of co-accused-Shyam Lal had not put any plastic seat (barsati) while the night of the occurrence was very rainy night. In our view, if it was so rainy night that Jagdish Singh (P.W.-1) had covered himself by a plastic seat in the night of the occurrence, his statement, that he saw flames inside the house of co-accused-Shyam Lal due to fire, is self contradictory and not trustworthy, which makes his statement that he had seen the respondent-Ram Swarup, pouring diesel oil on the body of the deceased and was present inside the house of co-accused-Shyam Lal, unreliable and doubtful.

30. So far as the consideration of extra judicial confession made by co-accused-Shyam Lal referred herein above against respondent-Ram Swarup is concerned, the Trial Court has disbelieved the statement of the prosecution witnesses

in the absence of substantive piece of evidence. The confession of co-accused is relevant under Section 30 of the Evidence Act, 1872, which reads as under :-

"S. 30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.--

*"When more persons than one are being **tried jointly** for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.*

Explanation.--"Offence", as used in this section, includes the abetment of, or attempt to commit the offence.

Illustrations :

*(a) A and B are **jointly tried** for the murder of C. It is proved that A said--"B and I murdered C". The Court may consider the effect of this confession as against B.*

*(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said--"A and I murdered C". **This statement may not be taken into consideration by the Court against A, as B is not being jointly tried."***

(Emphasis supplied)

31. Although extra judicial confession is very weak type of evidence but such evidence can be taken into consideration against respondent-Ram Swarup, when it is also used against the co-accused-Shyam Lal. One of the essential condition for taking into consideration of such confession against another co-accused is that both the accused must have been jointly tried before the Trial Court and if the accused has not been tried jointly before the Trial Court, the extra judicial confession made by him cannot read against another co-accused and such confession is inadmissible in evidence.

32. In Achey Lal Singh v. Emperor, AIR 1947 Patna 90 DB, Hon'ble Court held as under :

*"The principle underlying Section 32 (3) is that when a person makes a statement rendering himself liable to criminal prosecution the statement is likely to be a true statement. The section can, therefore, have no application to a statement of a person against whom there is already in existence evidence which would inevitably lead to his prosecution and might by itself lead to his conviction. **Consequently, where a person makes a confessional statement incriminating other accused but dies before the commencement or completion of the inquiry his statement is inadmissible either under Section 30 or Section 32 (3) of the Evidence Act, in a trial of the other accused."***

(Emphasis Supplied)

33. Now a question arises whether co-accused-Shyam Lal was jointly tried with the respondent-Ram Swarup in this case.

34. It is settled principle of law that no criminal proceeding starts unless cognizance of the offence is taken by the concerned Magistrate/Judge under the relevant provisions of Chapter XIV of the Code and if the offence is exclusively triable by the Court of Sessions, it was committed to the Court of Sessions after complying the provisions of Chapter XVI of the Code. In addition to it, Chapter XVII deals with the framing of charges and Chapter XVIII of the Code deals with trial

before the Court of Sessions. Sections 190, 193, 209, 223, 225, 226, 227 and 228 Cr.P.C. are relevant in the context of this case, which are as follows :

Section 190 :- Cognizance of offences by Magistrates :-

"(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts ;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

Section 193 : - Cognizance of offences by Courts of Session :-

"Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

Section 209 : - Commitment of case to Court of Session when offence is triable exclusively by it :-

"When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session."

Section 223 :- What persons may be charged jointly "-

"The following persons may be charged and tried together, namely:-

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) .....

(d) .....

(e) .....

(f) .....

(g) .....

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate may, if such persons by an application in writing, so desire, and if he is satisfied that such persons wold not be prejudcially affected thereby, and it is expedient so to do, try all such persons together."

Section 225 :- Trial to be conducted by Public Prosecutor :-

"In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor."

Section 226 :- Opening case for prosecution :-

"When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused."

Section 227 :- Discharge :-

"If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

Section 228 :- Framing of charge :-

"(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate (or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or , as the case may, the Judicial Magistrate of the first class, on such date as he deems fit, and and thereupon such Judicial) shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

35. Thus, it is clear that as soon as the police report is filed before the competent Magistrate, if the Magistrate finds that offence is exclusively triable by the Court of Sessions, he, after compliance of necessary requirements as provided in Section 209 of the Code, shall commit the offence to the Court of Sessions and the Court of Sessions, after examining the accused and hearing learned counsel for prosecution as well as defence, either will discharge the accused or frame charge against him. In addition to above, if trial of more than one accused is to be conducted before the concerned Court, all the accused may be charged and tried together subject to the provisions of Section 223 of the Code.

36. Thus, it is further clear that the accused, whose case was not committed to the Court of Sessions with other accused and he was not charged with any offence either due to his death or for another reason whatsoever, it cannot be said that he was such co-accused, who was jointly tried with other co-accused as required in Section 30 of Evidence Act. In the present case, the co-accused-Shyam Lal had died before the commencement of trial, his case was not committed for trial by the concerned Magistrate, hence, he was not charged and tried by the Trial Court for any offence.

Thus, it cannot be said that the respondent-Ram Swarup was jointly tried with co-accused-Shyam Lal in this case, hence, extra judicial confession of co-accused-Shyam Lal cannot be read against the respondent-Ram Swarup.

37. It is settled principle of law that the accused will be presumed as innocent unless and until the prosecution has succeeded to prove its case beyond reasonable doubt and the presumption of innocence of accused is further strengthened if he is acquitted by the Trial Court after considering the material evidence available on record. In appeal against acquittal the prosecution has to show that gross mistake has been committed by the Trial Court in appreciating the evidence on record or application of settled principle of law.

38. Hon'ble the Apex Court in ***Surajpal Singh and others Vs. State, AIR 1952 SC 52*** held as under :-

"It is well-established that in an appeal under section 417 of the Criminal Procedure Code, the High Court has full power to review the evidence upon which the order of acquittal was founded, ***but it is equally well-settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."***

(Emphasis supplied).

39. It is also well settled principle of law that in an appeal against acquittal, if two views are possible, one is in favour of accused-person and judgment of Trial Court is not illegal or manifestly perverse, the appellate Court should not disturb the order of acquittal. Hon'ble the Apex Court in ***State of Madhya Pradesh vs. Mukesh and others, (2007) 2 SCC 680*** held as under :-

"Moreover, it must be borne in mind that we are dealing with a judgment of acquittal passed by the High Court. If two views are possible, ordinarily this Court would not interfere therewith. The State has not been able to show any illegality in the judgment of the High Court. We, therefore, do not intend to interfere therewith. The appeal is dismissed."

40. In the light of above discussions, we are of the view that the impugned judgment and order passed by Trial Court is well reasoned, well discussed and requires no interference. The prosecution has miserably failed to prove its case beyond reasonable doubt and there is no illegality or infirmity in the impugned judgment and order dated 01.01.1982 passed by Trial Court in Sessions Trial No.382 of 1979, whereby the respondents-accused were acquitted. The appeal is liable to be dismissed.

41. The judgment and order dated 01.01.1982 passed by Trial Court in Sessions Trial No.382 of 1979 is affirmed. The appeal lacks merit and is ***dismissed.***

42. The respondent-Ram Swarup is in jail. He shall be released forthwith, if not wanted in any other case.

43. Copy of this judgment be sent to District Sessions Judge, Sitapur with Lower Court Record for information and compliance.

(2020)03-05ILR A344
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.02.2020

BEFORE
THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 828 of 2019

Matru ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Jail Appeal, Sumit Kumar Srivastava

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal law-Indian Penal Code, 1860 - Section 376-In the written report, F.I.R. and the statement under Section 161 Cr.P.C. there is allegation of only attempting to commit rape- In her statement under Section 164 Cr.P.C., the prosecutrix for the first time has levelled the allegation of committing rape-The statement of the prosecutrix at every stage has improved, changed and has contradicted its earlier statement and the testimony of the prosecutrix suffers from material inconsistency and as per the settled law conviction cannot be based on such testimony of the prosecutrix which is not worthy of credence and therefore some more corroborative material, may be even short of corroboration is needed to convict the accused-appellant-Though an accused can be convicted under Section 376 I.P.C. on the basis of sole testimony of the prosecutrix if such testimony is worthy of credence and inspires confidence and is of sterling quality then corroboration from other evidence is not required, but like in this case where statement of the prosecutrix suffers from material inconsistency and contradictions, is infirm and does not inspire confidence and there is no other material may be even short of corroboration to support the prosecution case.

Held- Indian Evidence Act- Section 3, Section 155 - Where the testimony of the prosecutrix is contradictory on material points and suffers from inherent inconsistencies and fails to get corroborated from other evidence, then such evidence is not worthy of credence.

Although conviction of an accused can be recorded on the basis of the sole testimony of the prosecutrix but the same should be credible and no corroborative material is required to be looked into, but where the testimony of the prosecutrix is inconsistent and contradictory, then the Court has to look for corroboration of the same from other evidence.
(Para 24,25,26,30, 35)

Criminal Appeal allowed (E-3)

List of case cited:-

1. Mohd. Ali @ Guddu Vs. St. of U.P (2015) 7 SCC 272

2. Hem Raj Vs. St. of Har., (2014) 2 SCC 395

3. Dola Vs. St. of Odisha 2018 SCC Online SC 1224

4. Sham Singh Vs. St. of Har. 2018 SCC Online SC 1042

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard Sri Sumit Kumar Srivastawa, learned Amicus Curiea and Sri Diwakar Singh, learned A.G.A. for the State and perused the record.

2. Learned trial court vide judgment and order dated 03.08.2018 passed in Sessions Trial No. 21/2016 "State Vs. Matru" convicted the appellant under Section 376(1) I.P.C. for a period of seven

years rigorous imprisonment and a fine of Rs. 20000/-. Learned trial court has further convicted the appellant under Section 506 (2) I.P.C. for a period of three years rigorous imprisonment and a fine of Rs. 5000/-. Both the sentences were to run concurrently.

3. The prosecution case in brief as per the written report is that on 08.09.2015 while she was returning from the place of Ex- Pradhan regarding the ghoor dispute with her Devar (brother-in-law) and as soon as she arrived near the field of Raj Kumar Mahtiyak then the appellant caught hold of her from behind and dragged her inside the sugarcane field and tried to commit rape while threatening to kill and when she cried he ran away by extending threats towards his village.

4. A written report regarding the incident was given by the prosecutrix on 09.09.2015 which is exhibited as Ka-1. Consequently chik F.I.R. was registered on 09.09.2015 which is exhibited as Ka-7. Thereafter the statement of the prosecutrix as well as statement of the other prosecution witnesses were taken by the investigating officer. The prosecutrix also gave her statement under Section 161 Cr.P.C. before the court. On 12.09.2015, the prosecutrix was medically examined and her clothes were taken by the Doctor Yamini Badal and sent it for forensic examination for examining the D.N.A.

5. The investigating officer filed the charge sheet. Thereafter cognizance was taken and charges were framed against the accused persons vide order dated 13.05.2016 under Section 376/506 I.P.C. which was read over to the accused to which he denied and pleaded to be tried. Thereafter the statement of the accused under Section 313 Cr.P.C. was taken wherein his defence of total denial and false implication due to enmity relating to the election of Gram Pradhan.

6. The prosecution in support of its case has examined the prosecutrix as PW-1. PW-2 is Dr. Yamini Badal, who medically examined the prosecutrix. PW-3 is women constable Geeta Rajput, who took the statement of the prosecutrix under Section 161 Cr.P.C. PW-4 is Constable Longshri, who wrote the chik report. PW-5 is the Investigating Officer Sri Jeevan Singh.

7. PW-1 while stating before the Court has said that written report was written by the Inspector at the police station on which she put her thumb impression. While in her examination-in-chief before the court she has denied the version in the written report as well as in the F.I.R. that she was dragged inside the sugar cane field and accused was trying to rape her and once she cried he ran away. She stated that she has told the Inspector that she was dragged inside the sugarcane field and was raped by the accused-applicant. She tried to escape during the occurrence. She was medically examined. She further stated that appellant no. 2 is in collusion with his Devar and took his side. She further stated that when she returned from the place of occurrence to her home, the Pradhan was called upon by the villagers. She further stated that she went to lodge the report along with Gram Pradhan. She further stated that she has not received any injury at the time of occurrence. She has also stated that she is not aware as in whose field the incident had taken place. In her chief she has stated that Guddu Pradhan has called the ambulance and on the ambulance she went to Bijwa Hospital for medical examination, but no medical was conducted

on that date rather the same was conducted on the next date. The prosecutrix has denied the suggestion that since the appellant happens to be the friend of her brother-in-law, therefore, she is falsely implicating him. She has further denied the suggestion that no rape has been committed on her.

8. PW-2 Yamini Badal, who conducted the medical examination of the prosecutrix has stated that no injury either upon external or internal has been found on the person of the prosecutrix. The hymen of the prosecutrix was old and torn and has filled up. She has further stated that no blood was oozing from the person of the prosecutrix and she has also stated that the clothes which the prosecutrix was wearing were taken by her and sent for D.N.A. Test to the Forensic Laboratory, Mahanagar at the time of medical examination i.e. on 12.09.2015. Then in the supplementary report prepared on 16.09.2015 no live or dead spermatozoa was found. Lastly it has been stated that on the basis of medical examination and pathology report, no opinion regarding the rape can be given.

9. PW-3 is Sheela Rajput, women constable, who recorded the statement of the prosecutrix under Section 161 Cr.P.C. and has proved Exhibit Ka-6. She recorded the statement of the prosecutrix under Section 161 Cr.P.C. and she sent the prosecutrix to Nari Niketan after the medical examination.

10. PW-4 who is scribe of the chik report and has proved it. She has denied the suggestion that on the saying of gram pradhan, the F.I.R. has been lodged.

11. PW-5 is the investigating officer who has prepared the site plan and has proved it as Exhibit Ka-7. He has taken the statements of the prosecution witnesses. He has further stated that on 17.09.2015 he has seized the clothes which were stained by blood and semen and prepared the fard which is Ex. Ka-3 which is in his writing and signature. Later on, he has stated that he tried to record the statement of the prosecutrix under Section 164 Cr.P.C. On 04.10.2015 and on 10.10.2015 but the prosecutrix refused to give the statement under Section 164 Cr.P.C. and he further stated that it appears to him that the prosecutrix does not want to give statement under Section 164 Cr.P.C., however, on 19.10.2015, the statement of prosecutrix was recorded under Section 164 Cr.P.C. and on the basis of the statement the prosecutrix under Section 164 Cr.P.C., the offence was converted under Section 376/506 I.P.C. and the offence under Section 511 I.P.C. was dropped. He further stated that on 10.11.2015, the statements of the witness of fard namely Jagdish Gautam, Mahila Arakshi Geeta Rajput and Sripal were recorded under Section 161 Cr.P.C. as witnesses of Fard. He again stated that the clothes worn by the prosecutrix at the time of occurrence were sealed and sent to the forensic laboratory on 09.11.2015. He further stated that the restatement of the prosecutrix was recorded on 30.10.2015.

12. Learned counsel for the appellant contends that at the time of occurrence the prosecutrix is 40 to 45 years old widow lady having one child. He further contends that there is unexplained delay of one day in lodging the F.I.R. In the written report as well as in the F.I.R. and also in the statement under Section 161 Cr.P.C., no allegation of rape has been made by the prosecutrix upon the appellant. The allegation of rape has been levelled for the first time in her statement under Section

164 Cr.P.C. He further submits that even in the statement under Section 164 Cr.P.C., she has stated that she lost lot of blood during the occurrence, however, while testifying before the court as PW-1, she has clearly stated that no blood was lost during the occurrence, whereas in the statement under Section 164 Cr.P.C. she has stated that her entire clothes were dipped in blood and that blood had oozed out due to the offence committed by the appellant.

13. The next submission of learned counsel for the appellant is that once PW-2 has taken the clothes of the prosecutrix after the medical examination which were containing human blood and semen and sent it for forensic examination on 12.09.2015 after that there is no occasion for the I.O. to recover and seize the clothes of the prosecutrix which were worn by her on the date of incident. The alleged seizure memo of the investigating officer dated 17.09.2015 is false and planted and no explanation has been given by the prosecution as to what happened in the forensic examination of the clothes which were sent by the PW-2 on 12.09.2015. The silence of the prosecution falsifies the entire prosecution story. The independent fard witness Sri Pal, in whose presence, the clothes of the proseuctrix have been seized, has not been produced before the Court and therefore, the fard recovery cannot said to be proved.

14. Learned counsel for the appellant further contends that in the F.S.L. Report only human blood said to have been found which is not enough. In support he has relied on the judgment of this Court in the case of "Khalid and another Vs. State of U.P." Criminal Appeal no. 2717/2011, para no. 29 and 31. Para No. 29 and 31 is reproduced herein as under:-

"29. Although in the forensic lab report the Salwar bore the spot of sperm and human semen, but that alone would not be sufficient to record a finding of the conviction against the accused.

31. No doubt, when the forensic lab examines semen and blood on the garments of the victim, the part of the cloth is cut and examined, which contains spots of blood, semen or spermatozoa. But at least the cloth i.e. Salwar will remain in its original shape. In this particular case a 10 to 12 inches cloth cannot be termed to be a Salwar, hence this part of the prosecution case too, is not reliable."

He further submits that in the medical examination of the prosecutrix, no injury on her internal or external part has been found, whereas the statement of the prosecutrix under Section 164 Cr.P.C. depicts that the clothes of the prosecutrix were dipped in the blood as she lost lot of blood during the occurrence, however, while testifying before the court she has denied her earlier version and said that no blood was lost due to the offence. He further submits that enmity with the accused has been admitted by the prosecutrix in her examination-in-chief, statement under Section 161 Cr.P.C. and under Section 164 Cr.P.C. The accused persons have taken the defence of enmity under Section 313 Cr.P.C. and stated that they have been falsely implicated due to the village enmity relating to the election of Pradhan. It is next contended that the ambulance driver has not been examined to support the prosecution story as prosecutrix went to the police station initially on the ambulance along with Pradhan. He further submits that Sub-Inspector/scribe of the written report who has written it has not been produced before the court therefore the written report has not been proved. It is lastly contended that the Village Pradhan

was present at every stage of the proceedings as per the statement of the PW-1, however, the investigating officer has not produced him which casts a doubt on the prosecution story. Lastly it is contended that apart from the testimony of the prosecutrix alone, there is no corroborative material to hold the appellant guilty. He submits that the testimony of the prosecutrix has changed at every stage. In the written report, F.I.R. and statement under Section 161 Cr.P.C. there is allegation of attempting to commit rape, whereas in the statement under Section 164 Cr.P.C., , for the first time, there is allegation of committing rape. While giving statement under Section 164 Cr.P.C. she has stated that she was laying in pool of blood and lost lot of blood during occurrence, whereas while deposing before the court she has stated that she has not lost any blood during the occurrence.

15. It is further contended by the learned counsel for the appellant that the testimony of the prosecutrix is inconsistent at every stage, does not inspire confidence and as such the other corroborative material is needed to sustain the conviction. He further submits that learned trial court has not given any finding on the fact that how blood stained/semen stained clothes of the prosecutrix could be seized twice, first by the doctor on 12.09.2015 and second by the investigating officer on 17.09.2015 and what happened to the clothes seized by the doctor which was sent to the forensic lab. The prosecution is silent at this aspect and therefore the benefit of doubt must go in favour of the appellant as the prosecution has failed to prove its case beyond reasonable doubt.

16. Learned A.G.A. opposed the appeal but could not dispute the fact that the clothes of the prosecutrix which were seized on 12.09.2015 and sent for forensic lab. There is no forensic lab report neither there is any examination, however he submits that I.O. on 17.09.2015 has seized the clothes of the prosecutrix and sent it for forensic examination on which human blood has been found. The statement of the prosecutrix has supported the prosecution version. The prosecutrix has denied the suggestion regarding the enmity and false implication of the accused-appellant. He further submits that the defence taken by the accused person in their statement under Section 313 Cr.P.C., is vague and is of no benefit to him.

17. Having heard the arguments of learned counsel for the parties, this Court carefully proceeds to examine the evidence of prosecution witnesses. A written report regarding the occurrence was lodged 09.09.2015 and the F.I.R. is of the same day. In the written report, it has been alleged by the prosecutrix that the appellant has tried/attempted to commit rape, however, since she raised alarm, then he left the prosecutrix and ran towards village. In the F.I.R. same story has narrated in the written report has been reiterated by the prosecutrix, however, in her statement under Section 164 Cr.P.C. recorded on 19.10.2015 for the first time. The prosecutrix has levelled the allegations of committing rape on the appellant and has further stated that her entire clothes were dipped in blood and the police took those clothes. Then she came home and narrated the incident to one Ram Chandra and thereafter the Pradhan Gudde called the ambulance and took her to Bijwa but there her medical was not conducted and till 19.10.2015 she has not been medically examined. The report was lodged on the next day at police station.

18. The record reveals that the prosecutrix was medically examined on 12.09.2015 at 2:00 P.M. at District Hospital Lakhimpur Kheri. No abnormality was detected in internal genital examination. The clothes of the prosecutrix were sealed and sent for DNA examination by the concerned doctor. No injury was found in the external examination of the prosecutrix. As per the pathology report no spermatozoa was seen either dead or alive. The report of the district hospital is exhibited as Ka-5. In her statement under Section 161 Cr.P.C. the prosecutrix has not levelled allegation of rape on the appellant rather has alleged that he attempted to rape her and on her raising alarm he ran towards the village by extending threat to her. While deposing before the Court, PW-1 prosecutrix in her examination-in-chief stated that one year eight months before while she was returning after talking to the Pradhan of Bibipur, the appellant met her on the way of Bibipur to Kamiapur, he followed the prosecutrix, hence she ran and fell on the khadanja (brick road) then the appellant showed her knife and picked her in her lap and took her into the sugarcane field and there she was raped by the appellant and due to this her clothes were stained with blood. After coming home, she told the incident to Ram Chandra who is son of her elder sister and then Guddu Pradhan called the ambulance from which she went to Bijua hospital there no medical examination took place and the next day she went to police station and written report was written by an unknown person. She proved her statement under Section 164 Cr.P.C. after seeying it. In her cross she stated that clothes which were taken by the police are not produced in the Court. She contradicted her statement in the examination-in-chief and said in the cross-examination that the written report was written by the inspector at police station. She admitted the enmity with the appellant Matru as he took side of her brother-in-law. In the cross she further stated that at the time of occurrence she did not receive any injury.

19. PW-2 Doctor Yamini Badal in her statement has stated that in her internal and external examination no injury was found on the person of the prosecutrix. Hymen was old and torn and filled up and no bleeding was found on the person of the prosecutrix. She further stated that the clothes of the prosecutrix were sent for DNA examination to the forensic lab Mahanagar, Lucknow. She further stated that on the basis of the pathology report, the supplementary medical report was prepared by her in which no live or dead spermatozoa was found and on the basis of the medical examination and the pathology report, she stated that no definite opinion about rape could be given.

20. PW-3 is the woman constable who took the statement of the prosecutrix under Section 161 Cr.P.C. She stated that after taking statement of the prosecutrix she took the prosecutrix to the District Hospital where she was medically examined on the same day.

21. PW-4 is constable Longshri who has written the chik first information report and has proved it.

22. PW-5 is Jeevan Singh, the investigating officer who has stated that on 17.09.2015, the clothes of the prosecutrix which she was wearing at the time of incident and which were stained with blood and semen were sealed. He further stated that the prosecutrix twice refused to give statement under Section 164 Cr.P.C. and

because of that he felt that she is not willing to give statement under Section 164 Cr.P.C. However, ultimately she gave statement under Section 164 Cr.P.C. and on that basis Section 376/506 were added and Section 511 Cr.P.C. was dropped. In his cross examination he again stated that the clothes of the prosecutrix which she worn at the time of incident were sealed on 19.11.2015 for forensic examination. He in the cross examination, further stated that he has taken restatement of the prosecutrix on 30.10.2015.

23. In the offence of rape, statement of the prosecutrix is of utmost importance and law in this regard is settled that on the sole statement of the prosecutrix the accused can be convicted.

24. In this case, in the written report as well as in the F.I.R. the allegation of committing rape is absent rather attempt to commit rape has been alleged by the prosecutrix. In her statement under Section 161 Cr.P.C. again the attempt to commit rape has been alleged against the accused-applicant. Second/restatement of the prosecutrix taken on 30.10.2015 has not been exhibited. For the first time while giving statement under Section 164 Cr.P.C. i.e. after more than one month and eight days, for the first time the prosecutrix has levelled allegation of rape against the appellant and on that basis section 376/506 I.P.C. have been added and Section 511 I.P.C. has been dropped by the investigating officer. In her statement before the Court as PW-1, the prosecutrix stated that village Pradhan called the ambulance and from the ambulance she was taken to hospital and in the hospital no medical examination was conducted and on the second day, the F.I.R. was lodged through an unknown person. She further stated that blood/semen stained clothes were taken by the police, however, in the cross she has stated that the clothes sealed by the police have not been produced in the Court. She has further admitted the enmity with the appellant in her cross.

25. On the contrary, the medical report which is exhibited as exhibit Ka-4 shows that the prosecutrix was medically examined on 12.09.2015 between 2 PM to 3 PM and clothes of the prosecutrix were sealed and sent for D.N.A. examination. In her statement under Section 164 Cr.P.C., the prosecutrix stated that she lost lot of blood during the occurrence, however, it is while testiying before the Court as PW-1, she contradicted her earlier statement and stated that no blood was lost during the occurrence. The testimony of the prosecutrix has changed at various stages. In the written report, F.I.R. and the statement under Section 161 Cr.P.C. there is allegation of only attempting to commit rape. In her statement under Section 164 Cr.P.C., the prosecutrix for the first time has levelled the allegation of committing rape and stated that she was lying in the pool of blood and lost lot of blood during the occurrence. On the contrary when deposing before the Court as PW-1 she stated that she has not lost any blood during the occurrence. Thus, the above contradictory statement of the prosecutrix are not worthy of credence and do not inspire confidence particularly looking into the facts that the prosecutrix has

admitted enmity with the accused, the ambulance driver has not been examined from whom the prosecutrix says that he went to police station initially, the village Pradhan who arranged the ambulance and went with the prosecutrix to the police station, has also not been produced, further casts a doubt on the statement of the prosecutrix as well as the prosecution case.

26. After going through the evidence of the prosecutrix witness, it is evident that the statement of the prosecutrix at every stage has improved, changed and has contradicted its earlier statement and the testimony of the prosecutrix suffers from material inconsistency and as per the settled law conviction cannot be based on such testimony of the prosecutrix which is not worthy of credence and therefore some more corroborative material, may be even short of corroboration is needed to convict the accused-appellant.

27. PW-2 doctor Yamini Badal has stated that she had taken the clothes of the prosecutrix and sent it for D.N.A. examination to the forensic lab, Mahanagar, Lucknow. The medical examination report of the prosecutrix which is on record shows that the prosecutrix was medically examined on 12.09.2015 between 2 to 3 PM and her clothes were sent for forensic examination and once the bold stained and semen stained clothes of the prosecutrix have been taken during the medical examination and sent by the doctor for forensic examination on 12.09.2015 then there was no occasion for the investigating officer to take the clothes of the prosecutrix on 17.09.2015 and there could not be a second set of clothes for the investigating officer to seize them and sent them for forensic lab. The entire prosecution story is silent on this aspect as to what happened to the clothes of the prosecutrix which were sent by the doctor on 12.09.2015 and this casts a doubt on the prosecution case and the appellant is entitled to be given the benefit of doubt. The PW-2 doctor Yamini Badal has not supported the prosecution story. She has clearly stated that no injury was found on the person of the prosecution either on the internal or external part. Hymen of the prosecutrix was old and torn and filled up and she was not bleeding and therefore, no opinion of rape has been given by her.

28. The investigating officer at one place while deposing before the court has stated that on 17.09.2015 he seize the clothes of the prosecutrix which were stained of blood and semen and prepared the fard. Later on in the cross examination he stated that the clothes worn by the prosecutrix at the time of occurrence were sealed and sent for forensic lab on 09.11.2015 which is in contradiction to his earlier statement.

29. The independent fard witness Sripal in whose presence the clothes of the prosecutrix are said to be seized by the investigating officer which has not been produced before the Court. This fact coupled with the contradictory statement of the investigating officer wherein he has said that the clothes worn by the prosecutrix were sealed and sent for forensic examination. The seizure memo prepared by the investigating officer dated 17.09.2015 of the clothes of the prosecutrix is doubtful. In view of the fact that once the clothes of the prosecutrix containing human blood and semen were already taken by PW-2 on 12.09.2015, the Investigating Officer could not seal it again on

17.09.2015. Coupled with the fact that independent witness of fard Sripal in whose presence the clothes are said to have been seized has not been produced before the Court creates a serious doubt on the fard recovery and this Court has noticed that the learned trial court while convicting the appellant has not given any finding on this aspect as to what happened to the clothes of the prosecutrix which were seized by PW-2 and sent for forensic examination to Mahanagar laboratory.

30. Since the statements of the prosecutrix has changed at various stages and do not inspire confidence, the other corroborative material may be even short of corroboration is needed. The statement of PW-2 does not support the prosecution case. The statement of PW-5 also does not inspire confidence as once the clothes of the prosecutrix were already seized and sent for forensic examination by the PW-2 on 12.09.2015, the I.O. could not have taken clothes of the prosecutrix again on 17.09.2015. Coupled with the fact that independent witness of the alleged seizure on 17.09.2015 namely Sripal has not been produced before the court.

31. The Hon'ble Supreme Court in **Mohd. Ali @ Guddu vs. State of Uttar Pradesh (2015) 7 SCC 272** has held as under :-

"Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned Trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be appropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testiony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon."

32. In **Hem Raj v. State of Haryana, (2014) 2 SCC 395** it has been held that :-

"10. Faced with such a situation, we were anxious to find out whether there can be any clinching medical evidence suggesting rape, but, unfortunately, the prosecuton has failed to examine Dr.Anjali Shah, who had examined the prosecutrix. The MLR was produced in the Court by P.W.6 J.B. Bhardwaj, Medical Record Technician. This is a serious lapse on the part of the prosecution. We are aware that lapses on the part of the prosecution should not lead to unmerited acquittals. This is, however subject to the rider that in such a situation the evidence on record must be

clinching so that the lapses of the prosecution could be condoned. Such is not the case here. The MLR does suggest that the hymen of the prosecutrix was torn. It is also true that the prosecutrix has brought on record FSL report which shows that human semen was detected on the salwar of the prosecutrix and on the underwear of the accused. However, it is difficult to infer from this that the prosecutrix was raped by the appellant. The prosecutrix herself has vacillated on this aspect. It was pointed out that no injuries were found on the prosecutrix. We do not attach much importance to this aspect because presence of injures is not a must to prove commission of rape. But the prosecutrix's evidence is so infirm that it deserves to be rejected. Her brother has come out with a case that the appellant tried to rape the prosecutrix. He did not say that the appellant raped the prosecutrix. Taking an overall view of the matter, we find it difficult to sustain the prosecution case that the prosecutrix was raped by the appellant. This is a case where the appellant must be given benefit of doubt. "

33. In **Dola vs. State of Odisha 2018 SCC Online SC 1224** it has been held that in para 31 which is reproduced as under :-

31. In our considered opinion, the Trial Court as well as the High Court have convicted the appellants without considering the aforementioned factors in their proper perspective. The testimony of the victim is full of inconsistencies and does not find support from any other evidence whatsoever. Moreover, the evidence of the informant/victim is inconsistent and self-destructive at different places. It is noticeable that the medical record and the Doctor's evidence do not specify whether there were any signs of forcible sexual intercourse. It seems that the First Information Report was lodged with false allegations to extract revenge from the appellants, who had uncovered the theft of forest produce by the informant and her husband. The High Court has, in our considered opinion, brushed aside the various inconsistencies pointed out by us only on the ground that the victim could not have deposed falsely before the Court. The High Court has proceeded on the basis of assumptions, conjectures and surmises, inasmuch as such assumptions are not corroborated by any reliable evidence. The medical evidence does not support the case of the prosecution relating to the offence of rape. Having regard to the totality of the material on record and on facts and circumstances of this case, it is not possible for this Court to agree with the concurrent conclusions reached by the courts below. At best, it may be said that the accused have committed the offence of hurt, for which they have already undergone a sufficient duration of imprisonment, inasmuch as they have been stated to have undergone two years of imprisonment. Accordingly, the appeal is allowed. The judgments of the Trial Court as well as the High Court are set aside. The appellants are acquitted of the charges levelled against them. They should be released forthwith, if they are not required in any other case."

34. In **Sham Singh vs. State of Haryana 2018 SCC Online SC 1042, it has been held in paras 26 and 27:**

"26. The evidence of the victim/prosecutrix and the Aunt P.W.10 are unreliable, untrustworthy inasmuch as they are not credible witnesses. Their evidence bristles with contradictions and is full of improbabilities. We cannot resist ourselves

to place on record that the prosecution has tried to rope in the appellant merely on assumption, surmises and conjectures. The story of the prosecution is built on the materials placed on record, which seems to be neither the truth, nor wholly the truth. The findings of the court below, though concurrent, do not desire the merit of acceptance or approval in our hands with regard to the glaring infirmities and illegalities vitiating them, and the patent errors apparent on the face of record resulting in serious and grave miscarriage of justice to the appellant.

27. We find that the trial court and the High Court have convicted the accused merely on conjectures and surmises. The Courts have come to the conclusion based on assumptions and not on legally acceptable evidence, but such assumptions were not well founded, inasmuch as such assumptions are not corroborated by any reliable evidence. Medical evidence does not support the case of the prosecution relating to offence of rape."

35. In view of the aforesaid law laid down by the Hon'ble Supreme Court (supra), law can be reiterated that though an accused can be convicted under Section 376 I.P.C. on the basis of sole testimony of the prosecutrix if such testimony is worthy of credence and inspires confidence and is of sterling quality then corroboration from other evidence is not required, but like in this case where statement of the prosecutrix suffers from material inconsistency and contradictions, is infirm and does not inspire confidence and there is no other material may be even short of corroboration to support the prosecution case, so also the fact that statement of PW-2 (Dr. Yamini Badal) does not support the prosecution case and the statement of PW-5 (investigating officer) also does not inspire confidence as once the clothes of the prosecutrix were already seized and sent for forensic examination by PW-2 on 12.09.2015, the investigating officer (PW-5) could not have again seized the clothes of the prosecutrix on 17.09.2015 and no explanation regarding this could be given by the prosecution and coupled with the fact that independent witness of the alleged seizure on 17.09.2015 namely Sri Pal has not been produced before the Court and no finding on this aspect has been recorded by the learned trial court, I am of the view that looking to the totality of the evidence and other material on record, I am unable to agree with the conclusion arrived at the trial court. Accordingly, the judgment dated 03.08.2018 passed by Additional Sessions Judge, F.T.C., Lakhimpur Kheri, is set aside. The appellant is acquitted of all the charges levelled against him. The appellant is directed to be released forthwith if he is not required in any other case.

36. The appeal is accordingly **allowed.**

(2020)03-05ILR A354
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE RAVI NATH TILHARI, J.

Criminal Appeal No. 871 of 1996

Mohan @ Mohan Singh ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri A.R.B. Kher, Ms. Mahima Maurya[A.C.]

Counsel for the Opposite Party:

A.G.A.

A. Duty of the prosecution to prove its case by producing truthful and trustworthy witnesses, may be only one- Quality and not the quantity of witnesses is important- Any effort of the prosecution to prove its case by producing untrustworthy or untruthful witnesses has to be viewed seriously- It is not possible for the Court to discard the testimony of an injured witness ordinarily.Identification by voice – Is a weak piece of evidence- Court has to be extremely cautious in basing the conviction purely on the evidence of Voice identification- The evidence led by the prosecution must be cogent, positive, affirmative and assertive and must establish beyond all reasonable doubts that the witness had ability to identify voice and additionally there was sufficient opportunity for the witness to identify the assailant by voice only.The maxim "falsus in uno, falsus in omnibus" (false in one thing, false in everything) has not received general acceptance in different jurisdiction in India, nor has this maxim came to occupy the status of rule of law- It is merely a rule of caution- All that it amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called a 'mandatory rule of evidence"-The ocular evidence of prosecution witnesses is so inextricably mixed up that it is not possible to sever one from the other-Difficult to separate grain of truth from the chaff of falsehood, the only course open is to discard the evidence in toto.

Held- **Indian Evidence Act- Section 9 - Evidence – Reliability of - Identification by voice – Is a weak piece of evidence -** Court has to be extremely cautious in basing the conviction purely on the evidence of Voice identification- The evidence led by the prosecution must be cogent, positive, affirmative and assertive and must establish beyond all reasonable doubts that the witness had ability to identify voice and additionally there was sufficient opportunity for the witness to identify the assailant by voice only**.**(Para 25)

Evidence Law-Indian Evidence Act – Section 134 - Quality and not the quantity of witnesses is important -Duty of the prosecution to prove its case by producing truthful and trustworthy witnesses, may be only one- Any effort of the prosecution to prove its case by producing untrustworthy or untruthful witnesses has to be viewed seriously. (Para 19)

Evidence Law- Indian Evidence Act- Section 5-"falsus in uno, falsus in omnibus" (false in one thing, false in everything) - The maxim has not received general acceptance in different jurisdiction in India, nor has this maxim come to occupy the status of rule of law- It is merely a rule of caution- It is the duty of the court to separate the grain from the chaff but where the two are inextricably mixed up, then the evidence has to be discarded completely.(Para 26, 28, 29)

The trial Court gave undue weightage to testimony of injured witness ignoring all material contradictions without ascertaining the truthfulness of the prosecution witness - prosecution failed to prove its story by producing truthful witnesses – appellant given benefit of doubt- the **conviction of the appellant for the offences under Sections 302 and 307 IPC set aside - Criminal Appeal allowed**.(Para 19,25,26,28,35)

Criminal Appeal allowed (E-3)

List of case cited:

1. Sainudeen Vs. St. of Kerala, (1992) Cri L.J. 1644

2. Nilesh DinkarParadkar Vs. St. of Maha., Cril. Appeal No.537 of 2009 dec. on 9th March 2011

3. Pratap Singh Vs. St. of M.P ,Crl. Appeal no.00601 of 2004

4. Kripal Singh Vs. St. of U.P. ,1965 AIR 712

5. Kedar Singh &ors. Vs. St. of Bih, 1998 SCC (cri) 907.

6. Dalbir Singh Vs. St. of Har., (2008) 11 SCC 425

7. State of Raj. Vs. Kalki&anr , (1981) 2 SCC 752

8. Sohrab S/O Belinayata&Anr Vs. State of M.P ,(1972) 3 SCC 751

9. UgarAhir Vs. St. of Bih,AIR 1965 SC 277.

10. Nisar Ali Vs. St. of U.P , AIR 1957 SC 366

11. ZwingleeAriel Vs. St. of M.P ,AIR 1954 SC 15

12. Balaka Singh Vs. The St. of Punj.(1975) 4 SCC 511

13. Anwar Hussain Vs. St. of U.P., (1982) 1 SCC 491

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Ravi Nath Tilhari, J.)

1. Heard Ms.Mahima Maurya, learned Amicus Curiae appearing for the appellant and Sri L.D.Rajbhar, Prem Shankar Mishra, learned A.G.As for the State respondent.

2. This criminal appeal is directed against the judgment and order dated 18.5.1996 passed by the IVth Additional Sessions Judge, Jhansi in Sessions Trial No.144 of 1991 (State vs Mohan @ Mohan Singh) under Sections 307 & 302 IPC, P.S -Kotwali, District-Jhansi, whereby appellant Mohan @ Mohan Singh has been convicted for the offences under section 302 and sentenced for life imprisonment and under section 307 I.P.C., sentenced for seven years rigorous imprisonment. Both the punishments are to run concurrently.

3. The prosecution story as unfolded with the First Information Report, dated 10.6.1991 registered at about 5.30 a.m at P.S-Kotwali, District-Jhansi that on 10.6.1991 at about 4.30 a.m, when deceased Jamna (wife of the first informant) and his aunt Rajabeti, wife of Nathhu were going to get drinking water from the Public (Sarkari) Tap and the first informant was accompanying them to attend the call of nature, Mohan (appellant) son of Kallu Kachhi and two other young boys met them at a place inside the outer gate of the village. Seeing them standing, on their way, his aunt Rajabeti stopped them, Mohan then said "rw vkxs c<" and attacked Jamna by knife in her chest while his two accomplices caught hold of Jamuna (deceased). The first informant Parikshit (husband of deceased) challenged them in the torch light and his aunt Rajabeti hit them by the metal pot (Kasedi) which she was carrying to fill water. Mohan also hit back Rajabeti by knife causing injury in her left hand. The deceased fell down and died. Amidst the chaos, on the challenge raised by the first informant, three assailants ran away towards the grove. Some people took deceased Jamna and injured Rajabeti to the District Hospital. The motive to commit the crime as stated in the report is that around five days prior to the occurence, an alteration took place between wife of first informant Parikshit and his neighbour Mohan s/o Kallu Kushwaha also his mother Rama. In the said altercation, Mohan had threatened the deceased with dire consequences. Since it was a normal dispute and hence no report was lodged by the first informant. It was stated that the first informant and his aunt Rajabeti had seen the assailants Mohan and his two accomplices clearly in the torch light and they knew accused Mohan by name whereas his two other accomplices were

not known to them. They, however, could recognize them, if the assailants were brought before them. The report is scribed by one Kalicharan s/o Narayan Das.

4. The record indicates that the police swung into action and recoveries were made, site plan prepared and accused Mohan was arrested. The recovery memo of the torch which the first informant was carrying, had been prepared, marked as Exhibit Ka-2. Three Kaseria (metal pots for filling water) carried by deceased and injured Rajabeti recovered from the spot of the crime on 10.6.1991, were sealed in a recovery memo, which was proved and exhibited as 'Exhibit Ka-6'. Blood-stained clothes of injured Rajabeti recovered on 12.6.1991 were kept in Exhibit Ka-7. Recovery memo of blood stained earth and plain earth collected from the spot of crime dated 10.6.1991 has been proved as Exhibit Ka-8.

5. The injury report of Rajabeti wife of Nathhoo aged about 70 years is dated 10.6.1991 which records that she was brought to the district hospital Jhansi on 10.6.1991 at about 5.a.m by one Laxmi Narayan s/o Ram Charan resident of the same village. The injuries found on the person of Rajabeti are as under:-

(1) A punctured wound on the medial surface of Right upper arm. Size 3 cm x 1 cm x 2 cm and is 13 cm above elbow joint. Rt side wound is severly bleeding, margins are sharply cut. regular.

(2) An Incised wound 2.5 cm x 1 cm x-Muscle deep on the ventral surface of Right fore arm. 9 cm above wrist joint sever fresh bleeding present along with some dust particles.

(3) An incised wound 3 cm x 0.5 cm x muscle deep on the dorsal surface of Rt fore arm 10 cm above wrist joint. Fresh bleeding present.

6. It was opined by the doctor that injury nos.1 and 2 (kept under observation) were caused by sharp edged weapon and their duration was fresh. X-ray was advised.

7. The post mortem of deceased Jamna was conducted on 10.6.1991 at about 3.00 pm. Clean cut wound of 2 &1/2 cm x 1 cm was found on the left chest so deep that it punctured the heart of deceased, which was found filled with blood. It was opined by the doctor that death was caused due to the said injury resulting in asphyxia and shock.

8. The inquest was done at the mortuary of the district hospital, Jhansi, which commenced at 9.15 a.m and ended at 11.15 a.m. The person who gave first information to the police, as mentioned in the inquest report, is Parikshit husband of deceased. Cause of death is shown as injury caused by knife. The inquest report records that body was taken out from the mortuary of the District Hospital, lock of which was opened in the presence of the inquest witnesses and other people after police came to the hospital.

9. It is pertinent to note here that the Investigating Officer, who submitted the chargesheet in the Court, had died before his deposition could be recorded in the trial. However, the site plan, charge sheet and other papers prepared by the Investigating officer had been proved to be in his handwriting and signature, by P.W.-5 Constable, Dhani Ram Tiwari P.S-Kotwali, District-Jhansi and marked as Exhibit 'Ka-6' to 'Ka-10' (site plan as Exhibit Ka-9 and chargesheet as Exhibit Ka-10).

10. Amongst the witnesses produced by the prosecution, the first informant (P.W-1) and injured Rajabeti (P.W-2) gave eye-witness account of the incident. P.W-3, Doctor R.N. Sharma who conducted post mortem had proved his report. P.W-4, S.I Ram Bharose Kushwaha is the Head Constable who prepared Chik F.I.R (proved as Exhibit Ka-4) on the written report (proved as Exhibit Ka-1). He stated that the Chik F.I.R was prepared by him at about 5.30 a.m on 10.6.91 and entered in the G.D no.9, which was proved from the original G.D and marked as Exhibit 'Ka-5' being in his own handwriting and signature.

11. Thus, according to the prosecution, deceased was accompanied by P.W-1 the first informant and injured witness P.W-2 at the time of the incident. The trial court discarded the presence of the first informant on the spot of crime noticing that his deposition indicates that he was supposed to be on duty at the time of the incident. The statement of the first informant in the cross examination that he was an employee in railway and his duty was changing in three shifts, and from 7th June to 15th June his shift duty was from 12:00 midnight to 8:00 a.m, was noted by the trial court to hold that the presence of the first informant on the spot was improbable. We may note, at the outset, that the prosecution could not demonstrate that this part of the finding recorded by the trial court is either perfunctory or against the evidence on record.

12. This apart, having carefully read the evidence of P.W-1, we further find that his deposition is full of contradictions and clearly reveal that his presence on the spot was not possible. The first informant states that he was ten steps behind his wife and the injured witness when they were attacked by accused Mohan. As per his version, accused Mohan was intercepted by his aunt Rajabeti when he attacked deceased Jamuna and during the course of occurence Rajabeti was also hit by knife in her right arm. It is astonishing that the first informant being husband of deceased did nothing but witnessed the entire sequence of events in the torch light. Further, in his deposition before the Court, though P.W-1 states that he alongwith others brought deceased Jamuna and injured Rajabeti to the district hospital, but in the written report it is averred that other people took the injured and deceased to the district hospital. When confronted in cross-examination, P.W-1 gave an explanation that since his brother and sister-in-law also accompanied him to the hospital he dictated so in the F.I.R. A suggestion was also given to him that someone else brought deceased and injured to the hospital and he reached the hospital directly on hearing the news. In reply P.W-1 states that he remained at the site after the incident for about 10-15 minutes, then took deceased and the injured to the Hospital where he reached within 10-15 minutes. He remained in the hospital for about 2-3 hrs. In the meantime, police reached the hospital. One hour later, the police took him to the police station to lodge the report. The inquest was done in the hospital. He then states that by the time he reached the police station, sun had risen. His brother Laxmi Narayan and a neighbour namely Kali Charan also accompanied him to the police station. He then states that the entire sequence of events was narrated by him to the Station House Officer (Daroga ji) who dictated it to Kali Charan who wrote the report, and it was then signed by him as the first informant.

13. Analysing the above naration of the P.W-1, this much is evident that the written report scribed by Kali Charan was not dictated by the first informant rather it was scribed on the dictation of the police officer and P.W-1 merely endorsed it. P.W-1 admitted that he was a railway employee

and his duties were changing weekly in three shifts, i.e. 8.00 am to 4.00 p.m, 4 p.m to 12.00 mid night and 12:00 mid night to 8.00 a.m. In the month of June 1991, from 1st June to 7th June, his duty shift was 8.00 a.m to 4.00 p.m and from 7th June to 15th June, it was 12.00 midnight to 8.00 a.m. Thus, in the cross examination, he had admitted that on the fateful day, at the time of incident, he was supposed to be on duty. There is no whisper nor any indication in the entire evidence as to how he could be present at his home to accompany the deceased at about 4.00 a.m when she went to get drinking water from the public tap. The prosecution has not explained this circumstance by bringing any cogent evidence on record rather it is completely silent on the issue. This, in our opinion, is a clear dent in the prosecution story.

14. Further, as far as motive narrated by P.W-1 in the First Information Report is concerned, in cross examination P.W-1 admitted that he was neither present during the altercation which took place around 5 days back between accused Mohan and his wife nor was told by his wife that Mohan had threatened her. The narration of motive by P.W-1 in the First Information Report, therefore, seems to be his own creation. When confronted as to why he did not make any effort to save his wife, P.W-1 states that he hit the assailants from the 'Dibba' which he was carrying and challenged them by showing the torch light, but no such "Dibba" was recovered.

15. He further admitted that he did not make any effort to release deceased from the clutches of the assailants, nor he thought of hitting them from the metal pots carried by his wife. He did not touch the dead body of his wife on the spot. We find it difficult to believe that P.W.-1 though was present on the spot but he did not even lift the body of his wife to take her to the hospital. For the above statement and admission of P.W-1 about his duty time on the fateful day which clashed with the time of the incident, we find that the trial court has rightly concluded that P.W-1 was not accompanying the deceased. The prosecution version of P.W-1 being the eye witness has been rightly discarded.

16. Presence of P.W-1 on the spot is also belied from the statement of P.W-2 who states in the examination-in-chief that apart from her no one else had seen the assault. The relevant part of the statement of P.W-2 is to be noted as under:

"मौके पर जब मोहन ने मेरी बहू व मुझे चाकू मारा था उस समय और किसी ने नहीं देखा था। वहॉ पर पडोस में प्लेट फार्म पर काफी लोग सो रहे थे। जो कि वाकया होने के बाद अपने –2 घरो में चले गये थे व अपनी –2 खटिया भी ले गये थे।"

17. P.W-2 further states that first one to reach the spot was a neighbour Jamna wife of Param, who in turn called Laxmi Narayan, she then states that her nephew Parikshit (first informant) was present about 50 paces behind them, but in the very next sentence she stated that she could only remember that wife of Param and Laxmi Narayan reached the spot and who else came, she could not recollect. This part of statement of P.W-2 (in her examination in chief) is also relevant to be noted hereunder:-

"सबसे पहले मुहल्ले के एक बहू परम की बीबी जमुना हमारे पास आयी थी वहीं लक्ष्मी नारायण को बुलाकर लायी थी।

मेरा दूसरा भतीजा पारीक्षत घटना के समय करीब 50 कदमदूरी पर था बरगद के पेड के और आगे था। फिर कहा कि मैं बेहोश हो गयी थी

मुझे नहीं मालूम कि कौन आया कौन नहीं आया। मुझे केवल बहू परम की बीबी व लक्ष्मी नारायण के आने का ध्यान है बाद में कौन आया कौन नहीं आया। मुझे नहीं मालूम। पारीक्षत ने कहा था कि मैं लैट्रिन जा रहा हूँ । यह बात उसने घर पर ही कही थी।

X X X X X X By R.C.A

मौके पर अन्धेरा था मैंने मोहन या उसके साथी का चेहरा देखकर नहीं पहिचाना था बल्कि उसकी आवाज सुनकर पहिचाना था कि वह मोहन था।

अन्धेरे के कारण मैं यह नहीं देख सकी कि उसे मोहन ने मारा था या सबने मिलकर मारा था।

मैने दरोगा जी को भी यही बताया था कि जब मोहन ने आवाज दी तब मैंने उसे आवाज से पहिचाना था । यदि मोहन आवाज न देता और कोई बात न करता तो मुझे पता भी नहीं चलता कि हमें कौन मार गया।

मुझे 2 दिन बाद होश आया था।"

18. P.W-2 further states that she could not see whether Mohan hit them or any of the other assailants as there was dark. There is no whisper in the statement of P.W-2 about the presence of any source of light, especially the torch light wherein they could have seen the assailants. P.W-2 rather categorically stated that she could recognize Mohan accused, only from his voice. As per P.W-2, had Mohan not spoken a few words she could not have known as to who had assaulted them. This part of extracted statements of P.W-2 belied the whole version of P.W-1 and also makes the recovery of torch wholly farce.

19. Having noticed the contradictions in the statement of P.W-1 as also material contradictions in the statement of both the witnesses of fact (P.W-1 and P.W-2), there remains no doubt that the testimony of P.W-1 (projected as eye witness) is liable to be discarded as a whole. P.W-1 is proved to be a liar. It seems to us that P.W-1 was on duty and he came to know about the incident only after he returned from duty in the morning and that could be only after 8:00 a.m. Apart from the above, further record indicates that police was intimated about the incident through the letter of the hospital authorities which was entered in G.D rapat no.9, time 5.30 a.m. As per the entries therein, deceased was admitted in the hospital at about 4.50 a.m. The district hospital was located at a very short distance (less than one furlong) from the police station. The G.D entry shows that the first information (chik report) was also registered at 5.30 a.m. But P.W-1 states that police reached the hospital on its own and one hour later they took him to the police station to lodge the report. The first informant thus admits that he did not go immediately to the Police Station to lodge the report. The inquest commenced at about 9.15 a.m and in the meantime body was locked in the Mortuary. There is no explanation by the prosecution as to when and on whose information police had reached the hospital. It is also not explained as to when the hospital authorities had reported murder at 5.30 a.m, what action was taken by the police authorities, i.e. what was done between 5.30 a.m to 9.15 a.m.? Why the police took 2 & 1/2 hours to reach the hospital? The inquest indicates that it commenced after lodging of the F.I.R as the time and date of the F.I.R and the name of the first informant has been mentioned therein. P.W-1 has admitted that F.I.R was scribed by Kalicharan not on his dictation rather it was written on the dictation of the police officer (Daroga Ji) to whom he narrated the whole story. From the above conspectus of facts, it is unbelievable that the First Information Report came into picture at 5.30 a.m. It seems to us clearly that the first informant was on duty when the incident had occured.

He reached the hospital after 8.00 a.m when his duty was over or may be sometime before that on hearing the news of the murder of his wife and, thereafter, he went to the police station to lodge the report. But by that time, police were already intimated about the murder through the letter sent by the hospital. In any eventuality, the time of lodging of Chik F.I.R could not be same as the time when letter of the hospital was received in the police station and both could not be entered at G.D no.9, 5.30 a.m. In other words, it seems impossible from the above circumstances culled out from the record that the first information report was lodged at 5.30 a.m. The whole gamut of evidence on record clearly prove the F.I.R being an Ante-timed report having been lodged after deliberations of the police officer (Station house Officer) with the first informant. The first informant has been proved to be a liar considering all surrounding circumstances as his testimony being full of concoctions and contradictions seems a cooked up story. It seems to us that P.W-1 was projected as an eye witness by the Investigating Officer in an overzealous effort to solve the crime. Had the Investigating Officer entered in the witness box, some light could have been thrown on all these aspects bothering the Court. But unfortunately, that could not happen. We are, however, of the opinion that the effort of the prosecution to prove its case by producing a liar in the witness box creates not only a scar but a deep dent in its story. It is always the duty of the prosecution to prove its case by producing truthful and trustworthy witnesses may be only one. The quality and not the quantity of witnesses is important. Any effort of the prosecution to prove its case by producing untrustworthy or untruthful witnesses has to be viewed seriously. In the instant case, the prosecution is guilty of bringing false evidence before a court of law and this act of it makes its story untrue from the beginning. The residue, that is the testimony of P.W-2, therefore, has to be sifted very carefully and with greater circumspection by the Court to assess as to whether the conviction can be based solely on the same.

20. It is argued before us on behalf of the appellant that the decision of the trial court to base the conviction on the sole testimony of P.W.-2 is faulty, in as much as, P.W.-2 cannot but be said to be a tutored witness. A clear suggestion was given by the defence to P.W-2 during the course of examination that she was a tutored witness which could not be overruled from her reply. Once it is established that P.W-1, the creator of the whole story, was telling a lie and the F.I.R is a result of deliberation, it cannot be ruled out by all means that P.W-2 was tutored to take the name of the assailant being accused Mohan. Placing the abovenoted statement of P.W-2, it is contended that she was tutored to take the name of Mohan as the main assailant. Further, as per the prosecution, there were three persons who were involved in the assault, looking to the version of P.W-2, it is not possible for the prosecution to fix the liability for murder on accused Mohan and to prove that other two assailants only caught hold of deceased. It was, thus, not justifiable for the trial court to base the conviction on the testimony of solitary residue witness P.W-2 who categorically admitted that she did not see the real assailant.

21. It is further urged that, the trial court has rested the conviction on the only evidence against the appellant which is voice recognizition by P.W-2, a weak piece of evidence. Reliance is placed on

judgment of the ***Kerala High court in Sainudeen vs State of Kerala*** reported in ***(1992) Cri L.J. 1644*** and of the Supreme Court in ***Nilesh Dinkar Paradkar vs State of Maharastra in Criminal Appeal No.537 of 2009 decided on 9th March 2011*** as also of ***M.P High Court in Pratap Singh vs State of M.P in Criminal Appeal no.00601 of 2004*** decided on 17.5.2017 to urge that identification of persons by voice is a risky proposition and it is not safe to base the conviction on identification of voice alone as there is always possibility of mistakes in identifying persons by voice. Accurate Voice identification is much more difficult than visual identification. The Courts have to be extremely cautious in basing conviction purely on the evidence of Voice identification. The ability of the individual to identify voice in general and the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a listener, must be established beyond all reasonable doubts by cogent, positive, affirmative and assertive evidence. Voice can also be identified by means of voice identification parade.

22. It is vehemently contended by the learned Amicus Curiae that the court below has not taken due care while basing conviction solely on the identification of voice of assailant by P.W-2 who was an old lady of about 70 years at the time of incident. No voice identification parade was done by the trial court to satisfy itself that she was able to identify voice of her neighbour. Submission is that casual approach adopted by the trial court in treating the P.W-2 as a truthful and reliable witness ignoring inconsistencies in her deposition has resulted in conviction of the appellant in absence of any cogent evidence. In fact the prosecution evidence as a whole is to be discarded and the appeal deserves to be allowed.

23. Learned A.G.A, on the other hand, relying upon the judgment of the Apex Court in **Kripal Singh vs State of U.P** reported in **1965 AIR 712** vehemently urged that identification of the assailant by the injured witness Rajabeti P.W-2 by voice was possible, in as much as, the appellant was her neighbour and she was well acquainted with his voice. It is contended that in the similar facts and circumstances, the Apex Court had upheld conviction on the testimony of witness who asserted that he was able to recognize the assailant and his other accomplices from their gait and voice. It was held therein that even in pitch dark night, it is possible to identify a person through the shape of his body, clothes, gait, manner of walking etc., and identification is possible by voice too. Submission is that the position of law in this regard is well settled with a long line of decisions by the Apex Court, one of them being ***Kedar Singh and others vs State of Bihar*** reported in ***1998 SCC (cri) 907.***

24. Learned A.G.A further urged that P.W-2, Rajabeti is an injured witness and for this reason her testimony on its own has efficacy and relevancy. The logic is that the witness who sustained injuries on her body would prove that she was present at the place of occurence and had seen the occurence by herself. Convincing evidence would be required to discredit an injured witness. The evidence of an injured witness must be given due weightage being a stamped witness as his presence cannot be doubted. His statement is generally considered to be very reliable as it is unlikely that he spares the actual assailant in order to falsely implicate some-one else. The testimony of an injured witness is accorded special status in law. Moreover, every discrepancy in the statement of witness cannot be treated as fatal as a discrepancy which does not affect the prosecution case materially cannot create

an infirmity. Unless there are grounds for rejection of evidence of an injured witness on the basis of major contradictions and discrepancies therein, it should be normally relied upon.

25. Considering the above, we may note at the outset, that there is no dispute about the legal principle with regard to the identification of the assailant being possible by voice only and that the evidence of an injured witness acquired special status in law has to be given due weightage. That, it is not possible for the Court to discard the testimony of an injured witness ordinarily. However, at the same time there cannot be a quarrel to the proposition that identification by voice is a weak piece of evidence. Court has to be extremely cautious in basing the conviction purely on the evidence of Voice identification. The evidence led by the prosecution must be cogent, positive, affirmative and assertive and must establish beyond all reasonable doubts that the witness had ability to identify voice and additionally there was sufficient opportunity for the witness to identify the assailant by voice only. There cannot be quarrel also to the proposition that conviction based on the identification of voice alone is somewhat risky and it will always depend on the facts of a case as to what weight has to be attached to a particular piece of evidence. If the Court is satisfied about the identification of persons by evidence of identification of voice alone, no rule of law prevents its acceptance as the sole basis for conviction. In any case, the assessment of prosecution evidence based on voice idenification has to be made in the surrounding circumstances of an individual case.

26. It is settled law that the duty of the Court is to find out truth from the statement of witnesses as the whole body of the testimony cannot be rejected because witnesses were evidently speaking an untruth in some aspect. Minor discrepancies occuring in the statements of witnesss due to normal error of observation, normal error of memory, due to lapse of time, due to mental disposition such as shock and horror at the time of occurence cannot be given much importance. It is often seen that the witnesses tend to decorate their testimony so as to make it more acceptable for the fear of being rejected in a Court of law. An attempt has, thus, to be made to separate grain from chaff, truth from falsehood. Reference **Dalbir Singh vs State of Haryana, (2008) 11 SCC 425.**

27. The Apex Court in ***State of Rajasthan vs Kalki and anothers*** reported in ***(1981) 2 SCC 752***, has held that normal discrepancies in evidence are always there even in the testimony of most honest and truthful witness. The Courts have to label the category to which discrepancies may be categorised. Material discrepancies are those which are not normal and not expected of a normal person. While normal discrepancies do not corrode the credibility of party's case, material discrepancies do so. That it is to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient or is sceptical on placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that such evidence must be discarded in all respects as well. It is held that the doctrine "falsus in uno, falsus in omnibus' is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries

or embellishments. Reference ***Sohrab S/O Belinayata & Anr vs State of M.P*** reported in ***(1972) 3 SCC 751*** and **Ugar Ahir vs State of Bihar** reported in **AIR 1965 SC 277.**

28. Coming to the applicability of the principle of "falsus in uno, falsus in omnibus," it was held in ***Nisar Ali vs State of U.P*** reported in ***AIR 1957 SC 366*** that even if a major portion of evidence is found to be deficient, residue is sufficient to prove guilt of an accused. It is the duty of the Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnessess cannot be branded as liars taking aid of the said doctrine. The maxim "falsus in uno, falsus in omnibus" (false in one thing, false in everything) has not received general acceptance in different jurisdiction in India, nor has this maxim came to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called a 'mandatory rule of evidence."

29. However, it was enunciated by the Apex Court in ***Zwinglee Ariel vs State of M.P*** reported in ***AIR 1954 SC 15*** and followed in ***Balaka Singh vs The State of Punjab*** reported in ***(1975) 4 SCC 511*** that in the process of sifting or assessment of weight of evidence, where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is discard the evidence in toto. The same is true from the observations in **Sohrab** also. This principle has further been noted with approval in a recent decision of the Apex Court in ***Dalbir Singh vs State of Haryana (supra)*** wherein on acquittal of other accused persons, it was urged that the evidence was partisan, lacks cogency and credibility and could not be made basis to convict the appellant therein. In that case, the trial court had directed the acquittal of the co-accused whereas the appellant was convicted on the basis of identification of his voice. The High court and the Apex Court had held therein that identification was possible, particularly when the accused was the grandson of the witness. Further, reliance was placed therein on the decision in ***Anwar Hussain vs State of U.P*** reported in ***(1982) 1 SCC 491***, to hold that in a dark night, ocular identification may be difficult in some cases but if a person is acquainted and closely related to another, from the manner of speech, gait and voice, identification is possible.

30. In light of the above legal position, coming to the facts of the instant case, once we have held that the First Information Report is an Ante-timed report and the prosecution has deliberately presented a false evidence by projecting husband of deceased as an eye witness we cannot rule out the possibility of false implication of the appellant. The F.I.R

which is entire edifice and fabric of the prosecution case has been demolished as it lost its authenticity. In our opinion, if the prosecution could go to the extent of producing a false evidence by projecting the husband of deceased as an eye witness, though he was not, it could have added the name of the appellant also falsely. We may also note that though there is no evidence of animosity between the prosecution party and the appellant, but being neighbour or having fought over a dispute relating to a common drain, false implication of appellant by the prosecution witness, (husband of the deceased), creator of the story, cannot be said to be a remote possibility.

31. Sole remaining witness P.W-2 though is an injured witness but she admitted that she did not see the faces of assailants as it was pitch dark. In her examination-in-chief, P.W-2 made contradictory statements as to the presence of first informant P.W.-1. In her examination-in-chief, in the first sentence she stated that no one had seen the incident and in the very next sentence she states that P.W-1 was behind them at a distance of about 50 paces. In third sentence, she denied the presence of P.W-1 on the spot by saying that she did not remember that apart from Laxmi Narayan and Jamuna, wife of Param, who else came on the spot. Her deposition in examination-in-chief itself shows that she was not stating the presence of P.W-1 on the spot of crime on her own volition. Further, in the cross examination, P.W.-2 admitted that there was pitch dark and she did not see the faces of three assailants including accused Mohan.

32. The injuries on the person of P.W-2 were simple in nature, but she stated that she remained unconscious for two days. The discrepancies in the statement of P.W-2 in her examination-in-chief extracted in the foregoing paragraphs cannot be said to be normal discrepancies which occured due to normal error of observance or memory due to lapse of time. The statement of P.W-2 was recorded after four years of the incident, it, therefore, cannot also be accepted that discrepancy in her evidence had occured due to mental disposition of the witness due to shock and horror she suffered at the time of occurence. It seems to us that P.W-2 gave a parrot-like version of the entire case in her statement in examination-in-chief while describing the assault on the deceased and herself.

33. Moreover, though in the cross examination, she accepted that she had not seen the assailant being the appellant as it was pitch dark but deposed to have recognized him by three words "rqe tkvksa cm" (spoken by the appellant). To us, the sentence spoken by assailant is so short that it cannot be accepted that P.W-2 was confident enough to recognize the assailant being the appellant by his voice. When confronted, in the cross examination, P.W-2 admitted that had Mohan not spoken those words, she could not know as to who had assaulted them.

34. It is not understandable why the prosecution introduced P.W.-1 when there was another eye-witness. The effort of the prosecution to prove the presence of P.W-1 at the place of occurence through the inconsistent statement of P.W-2, (the injured witness) is a material embellishment, and inherent discrepancy in the prosecution story.

35. Having read the whole testimony of both prosecution witnesses, namely P.W.-1 and P.W-2, we find that the ocular

evidence of prosecution witnesses is so inextricably mixed up that it is not possible to sever one from the other. Having discarded the testimony of P.W-1 being full of falsity, it would be dangerous to accept the statement of P.W-2 to base the conviction of the appellant. We make it clear that we can not and we are not doubting the presence of P.W-2 at the place of occurence but we have a serious doubt about her ability to identify the main assailant being the appellant and her creditworthiness too. Additionally, the statement of P.W.-1 about the enimity between his family and the appellant in the first information report also raises a doubt in the mind of the Court with regard to the possibility of false implication of appellant in the crime. In totality of facts and circumstances of the present case, we find it difficult to separate grain of truth from the chaff of falsehood, the only course open before us, therefore, is to discard the evidence in toto. We are afraid to base the conviction on the building of prosecution evidence, edifice of which is a blatant lie.

36. It appears to us that the trial court was swayed away by the only fact that P.W-2 was an injured witness and as such her presence at the scene of occurence was proved and, thus, giving undue weightage to her testimony, ignoring all material contradictions therein, she was treated as a truthful witness. According to us, the trial court has not taken proper care and due precaution to ascertain the truthfulness of the prosecution witnesses. Further, there were three assailants and no effort was made by the trial court to ascertain as to whether P.W-2, (a 70 years old lady) was able to recognize voice of the appellant. No voice identification parade was conducted.

37. It is fundamental principle of criminal jurisprudence that the prosecution has to prove its case beyond reasonable doubts and in case of any doubt, (reasonable one), benefit must go in favour of the accused.

38. Taking into consideration the entire sequence of events, the occular evidence and the surrounding circumstances, we find that the prosecution has failed to prove its story by producing truthful witnesses. The benefit of doubt which arose in the minds of the Court regarding truthfulness of the case of the prosecution has to go in favour of the accused. And as such, giving benefit of doubt to the appellant, we set aside the conviction of the appellant for the offences under Sections 302 and 307 IPC.

39. Accordingly, the judgment and order dated 18.5.1996 passed by the IVth Additional Sessions Judge, Jhansi in Sessions Trial No.144 of 1991 (State vs. Mohan @ Mohan Singh) arising out of Case Crime No.253 of 1991, Police Station- Kotwali, District-Jhansi, convicting and sentencing the accused-appellant Mohan @ Mohan Singh, under Sections 307, 302 IPC is set aside. The accused-appellant Mohan @ Mohan Singh is acquitted of all the offences/charges.

40. The appeal deserves to be allowed and is hereby allowed.

41. The accused-appellant **Mohan @ Mohan Singh** is on bail. His whereabouts are not known. Necessary steps shall be taken by the court below to notify this judgment to all concerned.

42. Certify this judgment to the court below for information and necessary compliance.

43. The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad within one month.

44. Ms.Mahima Maurya, learned Advocate rendered valuable assistance to the Court. The Court quantifies Rs.15,000/- to be paid to Ms.Mahima Maurya, Advocate towards fee for the able assistance provided by her in hearing of this Criminal Appeal. The said payment shall be made to Ms.Mahima Maurya, Advocate by the Registry of the Court within the shortest possible time.

(2020)03-05ILR A367
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2020

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

CRIMINAL APPEAL No. 1033 of 1986

Vijai Pal Singh ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri P.C. Misra, Sri Bhawishya Sharma (A.C.)

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

Criminal law- Indian Penal Code - Sections - 302, 307, 324 and 309 - Appeal against conviction.

Proof beyond reasonable doubt -

Held :- The testimony of witnesses are natural and consistence the site plan indicates place of occurrence which is proved by the Investigating Officer. (para 22) Prosecution has proved the case beyond reasonable doubt. (Para 24)

Appeal rejected. (E-2)

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

1. This appeal has been preferred by the appellant - Vijai Pal Singh, son of Sri Babu Singh against the judgment and order of conviction dated 10.03.1986, passed by the Sessions Judge, Etawah in Sessions Trial No. 255 of 1984 (State vs Vijai Pal Singh), arising out of Case Crime No. 45 of 1984, under Sections - 302, 307, 324 and 309 I.P.C., Police Station - Barhpura, District - Etawah, whereby the appellant was convicted under the aforesaid sections and was sentenced to life imprisonment under Section - 302 I.P.C.; three years' rigorous imprisonment under Section - 324 I.P.C.; and one year rigorous imprisonment under Section - 309 I.P.C.

2. All these sentences were directed to run concurrently.

3. In the same trial, accused was found not guilty under Section - 307 I.P.C. and was acquitted of the charge.

4. Factual chronology of the case, culminating into lodging of the F.I.R. by informant Chhotey Singh (P.W.1), on 23.06.1984 at 01.55 a.m,. at Police Station - Barhpura, District - Etawah, at Case Crime No. 45 of 1984, under Sections - 307, 309

I.P.C., was that the informant was a Company Hawaldar of 37 Batallion P.A.C. and was posted as such at Police Station - Barhpura. Today i.e. on the date of occurrence (23.06.1984), Constable/P.A.C. 19520 - Vijai Pal Singh was on Sentry duty at the said police station from 11:00 p.m. (to be precise 22.06.1984) to 01:00 a.m. (on 26.06.1984) in the night intervening 22/23.06.1984 and his duty was to be followed by another Sentry Constable - 20185 Arun Kumar, whose duty was to run from 01:00 a.m. to 03:00 a.m. on 23.06.1984. Neither did Constable Vijai Pal Singh wake up/report the informant after his duty was over, nor did he wake up Constable Arun Kumar for taking on his duty (after 1:00 a.m. in the night). It was around 01:30 a.m. (in the night intervening 22/23.06.1984) when a sound of fire was heard. This awakened the informant as well as the other personnel of the force. Vijai Pal Singh was sighted running towards the office of the police station with rifle and he was chased by the informant (Chhotey Singh), Constable 20251 Shanker Bux, Constable 19596 Siddh Nath Rai. Constable 19766 Bhai Lal Yadav and Sentry of the Police Station - C/C.P. 294 Ramesh Singh and Constable 119 Devi Prasad, who were holding torches in their hands. Suddenly, Vijai Pal Singh pointed his rifle towards them and fired two shots on the informant and others, with intention to kill, from the verandah of the office of police station, but the informant and others, escaped unhurt as the bullet missed target and did not hit them. In the meanwhile, Constable Bhai Lal Yadav moved ahead to overpower Vijai Pal Singh, when he effected blow by bannet of his rifle on the back of Bhai Lal Yadav and caused injury to him and entered into the male lockup and confined himself there in the male lock up of the police station, and tried to commit suicide by shooting himself with his rifle on his abdomen. Consequently, he fell down in the lock up. When the informant and others also rushed to the well of the police station, they found Constable Rama Shanker groaning in pain on account of gunshot injury on his stomach. F.I.R. also contains details about the background of this happening that on 21.06.1984, Constable Vijai Pal Singh had rebuked P.A.C./Constables in the barrack, including Constable Shanker Bux. When Rama Shanker objected to the rebuking, Vijay Pal Singh threatened him with dire consequences and on account of that animosity, he shot Rama Shanker with Rifle No. 38458 and Butt No. F632 along with bannet, which were recovered from Vijai Pal Singh. There was one empty cartridge entangled in the chamber of rifle and there was one live cartridge in the magazine. Apart from that, 45 live cartridges were recovered from the belt of Vijai Pal Singh along with 10 chargers. 3 empty cartridges were found from the verandah. All these articles were deposited at the police station and request was made for lodging the report. The written report is Ext.Ka.1, whereas the Check F.I.R is Ext. Ka.12, whereafter a case was registered at aforesaid case crime number against the appellant in the relevant G.D. of the aforesaid date and time at aforesaid police station.

5. The investigation was taken over by P.W.8 Chandra Shekhar, who recorded statement of various witnesses. Besides that, he also recorded the statement of Rama Shanker and has proved the same as Ext. Ka.14. Thereafter, he prepared Site-plan (Ext. Ka.15) and various memos. Prime being one pellet, which was recovered from male lockup. The recovery memo of the same was prepared and

marked as Ext.Ka.16. All the materials collected from the spot were kept in the police malkhana and description of the same was entered in the relevant G.D. of the police station. The same is proved as Ext.Ka.17. He also prepared memo of torches, which were marked as Ext.Ka. 3 and Ext. Ka.19, respectively. He was also informed about the death of Rama Shanker, whereupon the case was converted from one under Sections - 307, 309 I.P.C. to one under Sections 302, 307, 309 I.P.C. Relevant note was made in the G.D. Concerned as Rapat No. 2 of date 24.06.1984. This witness has proved the G.D. entry as Ext. Ka.20, which was prepared in the hand writing of one Chhatrapal (Constable), with whom he is well acquainted and knows his handwriting as well. The Investigating Officer has also proved the inquest report of deceased - Rama Shanker as Ext. Ka.21. However, it is noticeable that during course of investigation, Vijai Pal Singh was medically examined on 23.06.1984 at 04:35 a.m. at District Hospital, Etawah by P.W.7 Dr. Diwakar Sharma, wherein he found the following injuries on his person :-

1. Gun shot wound 1 cm x 1 cm x cavity deep on the front of abdomen 6 cm above umbilicus at 1 o' clock position. Margins inverted. Blackening present (Entry).

2. Gun shot wound 5 cm x 5 cm x cavity deep on the back of left side 8 cm above iliac crest 11.5 cm away from mid line. Margins everted. Fresh bleeding present. (wound of exit)

In the opinion of doctor, the condition of patient was poor. The patient was admitted and police was informed. Plain X-ray of abdomen was advised. Nature of injury was "kept under observation". Injury was stated to have been caused by firearm. Duration of the injury was noted fresh. The injury report of Vjai Pal Singh - Constable - is on record and the same is marked as Ex.Ka.6.

6. P.W.7 Dr. Diwakar Sharma had also medically examined the injuries of deceased Rama Shanker (as he was then alive) on 23.06.1984 at 4:50 a.m. at District Hospital, Etawah, wherein he found the following injuries on the person of the deceased:-

1. Gun shot wound 1 cm x 1 cm x cavity deep on front of lower abdomen 6 cm below umbilicus at 7 o' clock position 1 cm away from midline (right). Margins inverted. Blackening present (wound of entry).

2. Gun shot wound 2.5 cm x 3.5 cm x cavity deep on the right side back 36 cm below the root of neck. Margins everted. Bleeding present. (wound of exit)

In the opinion of the doctor, the condition of patient was poor. He was admitted and police was informed. Plain X-ray of abdomen was advised. Nature of injury was "kept under observation". Duration of the injury was found fresh. The injury report of Rama Shanker, Constable is on record and the same is marked as Ex.Ka.7.

7. Besides, Dr. Diwakar Sharma also examined Constable Bhai Lal Yadav at 06:15 a.m. on 23.06.1984 and found the following injury on his person:-

1. Incised wound 2 cm x 0.8 cm x muscle deep on left scapular region 14 cm

below top of left shoulder tailing present downwards. Wound was longitudinal.

In the opinion of doctor, the injury was simple and caused by sharp-edged weapon. Duration of injury was found fresh. The injury report of Bhai Lal Yadav-Constable-is on record and the same is marked as Ex.Ka.8.

8. Dr. Diwakar has also proved fact that the condition of patient Rama Shanker was at the admission and during treatment serious, therefore, he informed the Magistrate for recording his statement, whereupon Tehsildar, Etawah recorded statement of Rama Shanker in his (Dr. Diwakar) presence after his certification about the fit condition of the patient prior to and subsequently to the recording of the statement, was given. This certification has been proved on the original sheet of the statement and marked as Exts.Ka.9 and Ext.Ka.10, respectively. The statement of the injured Rama Shanker, as recorded by the Tehsildar, Etawah has been proved as Ext. Ka-5. Pertinent to observe that P.W.6 Tej Pal Singh-the then Tehsildar of the area - posted in Etawah on 23.06.1984, has proved recording of the statement of Rama Shanker in the morning and has proved his handwriting and the statement recorded at 05:00 a.m. and ended at 05:07 a.m. (on 23.06.1984) as Ext.Ka.5. However, the injured Rama Shanker died during the course of treatment. P.W.7 Dr. Diwakar Sharma has testified to the fact that the information of death of Rama Shanker in the hospital was conveyed to S.H.O., Kotwali by Dr. H.N. Singh, with whom this witness was earlier posted and as such, was acquainted with his handwriting. He has proved the communication letter made by Dr. H.N. Singh as Ext. Ka.11.

9. The post postmortem examination on the cadaver of the deceased Rama Shanker was done by Dr. M. Ali, wherein the following ante mortem injuries were found:-

1. Gun shot wound of entry 1 cm x 1 cm x cavity deep in front of abdomen 7.5 cm below the umbilicus in midline directing upward & backward.

2. Gun shot wound of exit 4 cm x 3.5 cm x cavity deep on back of lumbar regions in midline 33 cms below the neck.

Both the wounds were dressed.

3. Two wounds of cut open in both legs.

Cause of death was due to shock and haemorrhage. The postmortem examination report of deceased Rama Shanker is on record and has been proved as Ext.Ka.4.

10. After completing the investigation, charge-sheet (Ext.Ka.24) was submitted against the accused under the aforesaid sections of I.P.C.

11. Charges were framed under Sections - 302, 307, 324 and 309 I.P.C. The same were denied and trial was opted by the accused.

12. Prosecution, in all, produced 8 witnesses, out of which, P.W.1 Chottey Singh, P.W.2 Bhai Lal, P.W. 3 Shanker Bux, P.W.4 Siddh Nath Rai and P.W.5 Ramesh Singh were examined as witnesses of fact. Apart from that, the following formal witnesses were also examined - P.W.6 Tej Pal Singh was the Tehsildar, Etawah, he recorded statement of both the accused as well as the deceased and has proved it as Ext.Ka. 5. Apart from that, he

has also proved certain statement recorded by him, which he has admitted in his cross examination as Ext.Ka.12. P.W.7 Dr. Diwakar Sharma has medically examined the deceased prior to his death as well as the other injured constables including the accused after the occurrence on 22/23.06.1984 at District Hospital, Etawah and he has proved the process. P.W.8 S.I. Chandra Shekhar, is the Investigating Officer. He has detailed the investigation carried out by him and fact of filing the charge-sheet.

13. As no other testimony was adduced, evidence for the prosecution was closed and the statement of the accused was recorded under Section - 313 Cr.P.C., wherein allegation of firing on Rama Shanker was denied by him and he claimed to have been falsely implicated by levelling baseless charges by the informant side. However, in his submission, he has stated that Head Constable- Kashi Prasad had fired on him when he had gone to the chabutra to call Arun Kumar. In order to avert danger to himself, he also fired, which fire, instead of hitting Kashi Prasad, hit Rama Shanker.

14. No evidence, whatsoever, was led by the defense.

15. The trial court after vetting the testimony on record and properly appraising the facts and circumstances, recorded aforesaid finding of conviction and sentenced the appellant to imprisonment for life under Section - 302 I.P.C; three years' rigorous imprisonment under Section - 324 I.P.C.; and one year rigorous imprisonment under Section - 309 I.P.C. which paved way for this appeal.

16. We have heard Sri Bhawishya Sharma, learned Amicus Curiae appearing on behalf of the appellant, Sri Krishna Pahal, learned A.A.G. assisted by Sri Bhanu Prakash Singh, learned A.G.A. for the State and perused the record.

17. Contention has been raised on behalf of the appellant that in this case, all the prosecution witnesses are highly interested witnesses. They are highly motivated and influenced by the higher authorities and they are deliberately stating false theory before the court after forming their group. The fact is that the accused himself was shot at by another constable and in order to avoid danger and in self defense, the appellant fired, but the bullet missed its target and hit Rama Shanker. The statement given to the Tehsildar was not correctly recorded and the Tehsildar has sided with the informant side. The circumstances show that no one saw the actual occurrence as to when Rama Shanker, the deceased was hit by bullet/pellet fired by the appellant. The origin of the incident is shrouded in mystery.

18. Learned A.A.G. has claimed that all the prosecution witnesses were present on the spot at the time of occurrence and the incident took place around 01:30 a.m. in the night intervening 22/23.06.1984, when a fire was shot by the appellant and due to the sound of the fire all those sleeping over there got awakened and the accused was at that point of time seen rushing towards the office of the police station with a rifle in his hand and after reaching on the verandah of the police station, he pointed out his rifle towards the informant and the other personnel of the force and fired two shots, thought it did not cause any harm to anyone. Thereafter, the accused locked himself in the male lock up and tried to commit suicide by shooting himself on his abdomen with his rifle. Each and every detail of the occurrence has been proved reasonably beyond any shadow of doubt. P.W.6 Tej Pal Singh is the *Tehsildar* of Etawah, who recorded statement

of the victim as well as the accused, wherein also, the victim has categorically stated that the shot, which hit on his abdomen, was shot by Vijai Pal Singh - the accused. There is no reason to falsely implicate the accused.

19. In the light of the rival submissions, the moot point that arises for adjudication of this appeal relates to fact, whether the prosecution has been able to establish the charge beyond all reasonable doubt ?

20. It can be conveniently observed that the incident in question is admitted to the defense but with difference (he was Constable Kashi Prasad, who shot at the accused first) that the fire shot by the accused in self-defense though aimed at Constable Kashi Prasad, because he had shot at the accused first, but it missed him and instead hit the deceased Rama Shanker. Now, we have to contemplate on this set-up, whether the same is gathered in the attendant facts and circumstances and the same is probable or not ?

21. After arduous scrutiny of the record and the wholesome scrutiny of the five prosecution witnesses, namely, P.W.1 Chhotey Singh - the informant, P.W.2 Bhai Lal Yadav - the injured witness, who was hit on his back by the bannet of the rifle by accused, P.W.3 Shanker Bux Singh, P.W.4 Siddh Nath Rai, P.W.5 Ramesh Singh, it trickles out that in the night intervening 22/23.06.1984, the accused was on patrolling/guard duty at Police Station - Barhpura from 11:00 p.m. in the night (intervening 22.23.06.1984) up to 1:00 a.m. It so happened around 01:30 a.m. (in the night intervening 22/23.06.1984), that a sound of fire awakened these witnesses and the injured - Rama Shanker, when they saw the accused running away towards the office of the police station with rifle in his hand. A number of constables present over there tried to overpower him and in the process, P.W.2 Bhai Lal Yadav, when moved ahead to take him in his grip, the accused gave blow with his bannet of the rifle on his back, which caused injury on his back. The injury of P.W.2 Bhai Lal Yadav has been proved as incised wound 2 cm x 0.8 cm x Muscle deep on left scapular region 14 cm below top of left shoulder tailing present downwards. Wound was longitudinal and it was rated simple and caused by sharp edged weapon. Duration was the fresh. This medical examination was done by P.W.7 Dr. Diwakar Sharma at District Hospital at 06:15 a.m. on 23.06.1984 and the injury report is Ext. Ka.8. Apart from that, the accused also tried to commit suicide by locking up himself in the male lockup of the police station and self suffered one rifle shot on his abdomen. His injuries have also been examined by the same doctor P.W.7 Dr. Diwakar Sharma and has been proved as Ext. Ka.6. In his medical examination, one gun shot wound of entry and one gun shot wound of exit have been noted and the same has been proved as Ext.Ka.6. The testimony of all the witnesses of fact commensurates with the medical documents/evidence and there is no glaring or material inconsistency of any sort, which may reflect anything adverse than the consistent version of the prosecution witnesses regarding the occurrence on the whole and the nature of the injuries caused both on the informant side as well as the accused and the same cannot be doubted by any stretch of imagination. Thus, the statement of the accused as submitted under Section - 313 Cr.P.C. becomes a hollow claim not supported by any evidence or circumstances of the this case.

22. It is important to note that we have, before us, particular testimony of the then *Tehsildar*, Etawah, who recorded statement of the victim Rama Shanker on 23.06.1984 around 05:00 a.m. and a certification of fitness was previously obtained by him, which was given by Dr.

Diwakar Sharma, who certified that the injured Rama Shanker was, at that point of time, in fit mental/physical condition to give statement. The certification given by the doctor has been proved as Exts.Ka.9 and Ext.Ka.10. Apart from that, the same fact has been fortified by P.W.6, the then *Tehsildar*, Etawah- Tej Pal Singh. As per testimony of P.W.6-Tej Pal Singh, he himself recorded statement of Rama Shanker Singh on 23.06.1984 in the morning, after obtaining certification from Dr. Diwakar Sharma. He has categorically stated that whatever was stated by the injured-Rama Shanker, was noted by him and after recording the statement, he also obtained signature of Rama Shanker on the statement. On perusal of the statement marked Ext.Ka.5, it is found that Rama Shanker has stated that he had some altercation with the accused on 21.06.1984. In the night intervening 22/23.06.1984, at around 12.30 a.m., while he was sleeping, Constable Vijai Pal was on duty. Vijial Pal shot him, whereupon he got up and in squatting position saw the accused. This piece of testimony is virtually unimpeachable, relevant and admissible under the provisions of The Indian Evidence Act, 1872. The fact of injury being caused to the victim by the accused thus stands proved by the victim by the accused thus stands proved himself and the claim of the appellant, as submitted in his statement recorded under Section 313 Cr.P.C., that he was first shot at by Kashi Prasad and then he fired on Kashi Prasad, but the fire missed its target and hit Rama Shanker) is not supported by any corroborating attendant circumstances or facts and not even a whisper is gathered by us after careful scrutiny of the entire record that it in fact so happened. A wholesome and cumulative reading of the testimony of all the five prosecution witnesses of fact has elaborately detailed about the occurrence and their testimony is natural and consistent on point of occurrence. They are worthy of credit. There is no doubt that apart from Rama Shanker (the deceased), no one else saw the shot being fired by the accused and hitting the deceased (Rama Shanker), while he was asleep in the fateful night at the well of the police station. However, the site-plan Ext. Ka.15 indicates, in all niceties, the very topography of the place of occurrence and gives a pictorial sketch of the incident as it originated and ended. Thus, the place of occurrence is also proved by the P.W.8 The Investigating Officer Chandra Shekhar.

23. To claim that the patient/deceased was not in fit mental and physical condition to give any statement, would not, in the absence of any supporting material, give advantage to the accused because fitness certificate prior to and subsequently to the recording of the statement by P.W.6 Tehsildar Tej Pal singh was given by P.W.7 Dr. Diwakar Sharma and who remained present throughout the period when the statement was being recorded. Recording of the statement commenced at 05:00 a.m. on 23.06.1984 and the process was completed by 05:07 a.m. i.e. within seven minutes. The extract of statement proved as Ext. Kha.1 and Ext. Kha.2 loses significance in view of the statement of the deceased himself as to how it all occurred. Assuming it to be that the version of the appellant is correct on point that he was shot by Head Constable Kashi Prasad, when he had gone to the 'chabutra' to wake up Constable Arun Kumar, had it been so, then the theory of sound of one fire being made around 01:30 in the night intervening 22/23.06.1984 goes into oblivion, for the reason that no two shots have been fired at that point of time and sound of one and

only one fire was heard by the witnesses. It being so, the claim of the accused that he was shot by Head Constable Kashi Prasad, itself stands falsified and cannot be accepted by us.

24. In view of above scrutiny of evidence and analogy of facts and circumstances of this case, obviously it cannot be said that the charges have not been proved beyond reasonable doubt against the accused and that the trial court erred while it recorded finding of conviction against the accused under Sections - 302, 324 and 309 I.P.C. and imposed the sentence on him.

25. We do not find any infirmity in the judgment and order of conviction and sentence passed by the trial court in Sessions Trial No. 255 of 1984 (State vs Vijai Pal Singh), arising out of Case Crime No. 45 of 1984, under Sections - 302, 307, 324 and 309 I.P.C., Police Station - Barhpura, District - Etawah.

26. Accordingly, this appeal is **dismissed.**

27. Let a copy of this order be certified to the court below for its intimation and necessary compliance. The lower court record is directed to be remitted to the court concerned.

(2020)03-05ILR A374
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE ALI ZAMIN, J.

CRIMINAL APPEAL No. 1164 of 2002

Devendra Singh & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Arimardan Yadav, Sri Jadu Nandan Yadav, Sri Rajendra Kumar Srivastava, Sri Ravindra Singh, Sri Rajendra Kumar Yadav

Counsel for the Opposite Party:
A.G.A., Sri Aklank Jain

A. Criminal law- Indian Penal Code- Section 302/201-The delay in recording the statement of the witness by the Investigating Officer and the witness not telling about the incident to the Investigating Officer casts a serious doubt about his being an eyewitness of the occurrence which may suggest that the Investigating Officer was deliberately marking time with a view to decide about shape to be given to the case and eyewitnesses to be introduced.- Contradictions between statements of witnesses on all material points.

Indian Evidence Act- Section3, Section 155- Credibility of Witnesses - Where there is an inordinate delay in recording the statement of the eye witness, the testimonies of the witnesses of fact are contradictory on material points and there is absence of corroboration of the ocular evidence from other evidence, the conviction of the accused cannot stand. **.**
(Para 13, 14, 17, 18)

Criminal Appeal allowed (E-3)

List of case cited:

Shahid Khan Vs. St. of Raj. AIR 2016 SCC 1178

(Delivered by Hon'ble Ali Zamin, J.)

1. Heard Sri Rajendra Kumar Yadav, learned counsel for the appellant nos.1 and 2, Sri J.N Yadav, learned counsel for the appellant no.3 and learned A.G.A for the State.

2. This appeal has been preferred against the judgment and order dated 12.02.2002, passed in S.T. No.160 of 1991

(State vs. Devendra Singh and others) by which the learned Additional Sessions Judge, Court No.31, Firozabad, has convicted and sentenced each of the appellants to undergo imprisonment for life under Section 302 I.P.C. and to pay a fine of Rs.10000/- in default of payment of fine to undergo six months simple imprisonment and to undergo five years rigorous imprisonment under Section 201 I.P.C. and to pay fine of Rs.5000/- each in default of payment of fine three months simple imprisonment.

3. Prosecution case, in brief, is that in the intervening night of 19/20.01.1990 Raghuvir Singh, father of the informant Bachan Singh, was sleeping as usually in the Machan situated in the field, some unknown persons committed his murder and threw the dead-body in a well by tying his hands and legs. The dead-body was taken out from the well with the help of the villagers. Injury marks were found on the dead body. On the basis of written report (Ex.Ka-1), Chik F.I.R (Ex.Ka-7) Case Crime No.23 of 1990, under Sections 302, 201 I.P.C, Police Station Nagla Khangar, District Firozabad, was registered on 20.1.1990 at 11.50 a.m. Investigation of the case was entrusted to S.O. V.S. Singh (DW-6). The Investigating Officer reached the spot, on his instruction, S.I. Sri Harish Chandra Sharma (PW-4) prepared inquest memo (Ex.Ka-12) and relevant papers. After completion of inquest memo dead-body was dispatched for postmortem.

4. PW-7 Dr. H.M Agarwal conducted postmortem on 21.01.1990 at 2.00 p.m. and prepared inquest report (Ex.Ka-16). According to postmortem, following injuries were found on the body of the deceased:-

"(1) Incised wound of 3 x 1 x bone deep on Rt. cheek, opp. the tragus of Rt. ear (2) Incised wound of 2 x 1-1/2 cm on mandible deep on Rt. side face (3) Incised wound of 4 x 3 cm muscle deep on the Rt. side neck below mandible (4) Incised wound of 3 x 1 cm muscle deep on Rt. side neck 2 cm away from Inj. no.3 (5) Incised wound of 5 x 2 cm x deep structure of Rt. (oesophagus, trachea, blood vessels & nerves) side neck with cut of underneath structure below the angle of mandible Rt. side (6) Incised wound of 3 x 1 cm x bone deep and the back of head just near mastoid bone (7) Incised wound of L shape present on the back of head 3 cm with depth up to scalp (8) Incised wound of 2cm x 2cm x bone deep present on the back of neck, 3cm down to injury no.7 and 2cm apart (9) contusion of 6cm x 4cm on the left cheek (10) Incised wound of 2 x 1-1/2 cm x muscle deep on back of left shoulder."

5. As per opinion of the doctor, death occurred near about 1-1/2 days before conducting postmortem and cause of death was found due to shock and excess bleeding as a result of antemortem injuries.

6. Investigating Officer prepared spot map (Ex.Ka-11) and took into his possession blood stained and plain earth from the place of incident and prepared inquest memo (Ex.Ka-12). He further took into his possession a quilt taken out from the well and prepared its recovery memo (Ex.Ka-13). A blood stained and earthen sickle was also taken into possession from the place of incident and recovery memo (Ex.Ka-14) was prepared.

7. After completing the investigation, Investigating Officer submitted the charge-sheet under Sections 302 and 201 I.P.C. against the accused-appellants, Devendra Singh, Ram Naresh @ Seth and Bhoora, before the Court of C.J.M. Firozabad, who committed accused persons to the Court of Session where Case Crime No.23 of 1990, under Sections 302, 201 I.P.C, Police Station Nagla Khangar, District Firozabad,

was registered as Session Trial No.160 of 1991. It was made over to the Court of Additional Sessions Judge-II, Firozabad for trial, who framed charge against the accused persons under Sections 302 and 201 I.P.C.

8. To prove its case prosecution has produced seven witnesses; P.W.1 Bachan Singh is the informant, P.W.2 Agya Ram and P.W.3 Janak Singh are witness of fact, P.W.4 Harish Chandra Sharma prepared inquest of the dead-body, P.W.5 Prem Singh prepared chik and F.I.R. P.W-6 Vijendra Singh Investigating Officer, P.W.7 Dr. H.M. Agarwal conducted postmortem are the formal witnesses. After prosecution evidence, statements of the accused persons were recorded under Section 313 Cr.P.C., in which, they pleaded that due to enmity the case proceeded against them. After recording statements of accused persons, Vinod Kumar has been examined as C.W.1.

9. Learned Additional Sessions Judge, Firozabad, after hearing learned counsel for the parties and perusal of the record, has passed the impugned judgment and order as disclosed in para 2 of the judgment.

10. Learned counsel for the appellants submits that there is no eyewitness of the incident. Prosecution has produced P.W.1 informant Bachan Singh and P.W.2 Agya Ram as a witness of fact. P.W.1 Bachan Singh has stated that Agya Ram told him after 39 days of the incident that murder of his father was committed by the accused persons whereas P.W.2 Agya Ram has stated that he told Bachan Singh after two months of the incident. Agya Ram was present in the village but his statement was not recorded promptly by the I.O., therefore, his testimony is not believable. P.W.3 Janak Singh has stated that Vinod Singh was Village Pradhan at the time of incident. He had gone to meet Vinod Singh and when he was sitting there, in his presence, accused Devendra Singh, Ram Naresh and Bhoora came and told that they have committed murder of Raghuvir Singh by sickle and tying him in a quilt and dhoti threw the body into a well. According to P.W.2 Agya Ram he saw committing murder of Raghuvir by accused persons. They had threatened him not to disclose to anyone about the incident but he has stated that an information had spread in the village before telling by him about the incident to P.W.1 Bachan Singh. The witness has also stated that the accused persons told to Vinod that since he is Village Pradhan he should save them as police consider his request. They also stated that if their goats had not entered into the field of Raghuvir Singh then this quarrel would not have happened and Raghuvir Singh would not have been murdered. Vinod has been examined as C.W.1 and he has denied knowledge as to who committed the murder of Raghuvir. He also submits that motive of the incident is alleged that goats of the accused persons had entered into the field of the deceased on account of which an altercation took place which was resolved also, thereafter incident was caused but entering of goats in the field is a matter of trivial nature, on the basis of which, causing the incident does not appear probable specially when matter was resolved. Therefore, he submits that impugned judgment and order is not sustainable and is liable to set aside.

11. Per contra, learned A.G.A. submits that as per evidence goats of the accused persons had entered into the field of deceased regarding which an altercation took place thereafter the deceased was

murdered by the accused persons. Prosecution witness P.W.2 Agya Ram and informant P.W.1 Bachan Singh have proved it. Learned Additional Sessions Judge, considering the prosecution evidence, facts and circumstances of the case, has rightly convicted and sentenced the accused persons. No interference is required by this court.

12. According to the prosecution version, the deceased who was sleeping in the intervening night of 19/20-01-1990 in a machan situated in the field was murdered and information was given to this effect that some unknown persons had committed his murder and threw the dead-body into a well by tying his hands and legs. P.W.1 in his cross-examination at page 19 of the paper book has admitted that Agya Ram had told him after 39 days of the incident that Devendra Singh, Ram Naresh and Bhoora committed the murder of Raghuvir Singh, whereas P.W.2 Agya Ram has stated that he told to P.W.1 Bachan Singh after near about two months of the incident. On page 23 of the paper book he has also stated that due to fear he did not tell the informant for two months of the incident. Thus, there is contradiction in the statenment of P.W.1 Bachan Singh and P.W.2 Agya Ram about duration of disclosing information regarding the incident.

13. He has also stated that after 5-6 days of terahi a rumour spread in the village that the accused persons have committed murder of the deceased. He asked Agya Ram about it and Agya Ram consoling told him that there is a rumour in the village that accused appellants had committed murder of the deceased. Agya Ram weepingly told the informant not to disclose the information to anyone. P.W.1 Bachan Singh does not state from whom he heard the rumour about commission of the murder by accused persons after 5-6 days of the terahi. He also does not state that when he heard the rumour he informed to investigating officer. As such the testimony of P.W.1 Bachan Singh does not inspire confidence that P.W.2 Agya Ram told him about the commission of the murder of the deceased by the accused persons. P.W.2 Agya Ram has stated that the incident is at near about 12:00 to 1:00 hours of the night, on that day he was sleeping in his field and his uncle Raghuvir Singh was also sleeping in his field. He had seen in that night the accused appellant. When he flashed the torch he saw that Ram Naresh and Bhoora had pressed his uncle Raghuvir by lathi and Devendra Singh was cutting him with a sickle. Hands and legs of his uncle Raghuvir were tied by his dhoti. He has also stated that he asked the accused persons why they are doing so then the accused persons threatened that if you tell about the incident to anyone then he will also be killed in the same manner and they will also kill his family members. Thereafter, the accused persons threw the dead-body of Raghuvir in the well and put the quilt over him. The accused persons also left the sickle there which was found in the morning. He has also stated that before the incident at about 12:00 hours of the day the accused persons were grazing goats which entered into the field of Raghuvir and Raghuvir had forbidden them whereupon an altercation took place; he intervened in the matter and due to that reason the accused persons committed murder of his uncle Raghuvir. In cross-examination, he has stated that he told the Investigating Officer that he had casually slept in his field in that night. He has also stated that he showed his torch to the Investigating Officer. He has further stated

that before he could tell anything to Bachan Singh a rumour had spread in the village that the accused persons had committed murder of the deceased. According to him he was the only eye witness of the incident, therefore, without his telling anybody no rumour could have spread. Since he is the nephew of the deceased therefore his conduct in keeping mum for two months does not appear natural. He has also stated that since the rumour had spread in the village that is why he told about the incident to Udai Singh and Bachan Singh sons of Raghuvir Singh, in that case, it is also possible that actually he did not see the incident and on the basis of rumour he told P.W.1 Bachan Singh about the murder.

14. He has admitted that 'daroga' has recorded his statement after two months of the incident. Investigating Officer P.W.6 Vijender Singh has also stated that on 20.3.1990 he recorded the statement of Agya Ram Singh, although he has stated that before 20.3.1990 he did not meet Agya Ram but he has stated that after dispatching the dead body he tried much to open the case by reading and involving informer, as per statement of P.W.2 Agya Ram he was residing in the village at the time of incident. If the witness Agya Ram was residing in the village at the time of the incident then recording his statement after two months from the date of incident and the witness not telling about the same to the Investigating Officer assumes importance. The delay in recording the statement of this witness by the Investigating Officer and the witness not telling about the incident to the Investigating Officer also casts a serious doubt about his being an eyewitness of the occurrence which may suggest that the Investigating Officer was deliberately marking time with a view to decide about shape to be given to the case and eyewitnesses to be introduced. It will be profitable to refer the case of **Shahid Khan vs. State of Rajasthan AIR 2016 SCC 1178** in which Hon'ble Supreme Court has held as under :-

"The statements of PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir were recorded after 3 days of the occurrence. No explanation is forthcoming as to why they are not examined for 3 days. It is also not known as to how the police came to know that these witnesses saw the occurrence. The delay in recording the statements casts a serious doubt about their being eye-witnesses to the occurrence. It may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced."

15. P.W.2 Agya Ram has also stated that before the incident at about 12:00 hours the accused persons were grazing goats which entered into the field of deceased Raghuvir Singh and Raghuvir had told the accused not to graze goats in his field whereupon an altercation took place, he intervened and resolved it that is why the accused persons committed murder of Raghuvir. In cross-examination, he has stated that before the incident he did not tell anyone about grazing of the goats. He also did not tell to the daroga about grazing of the goats which indicates that the story of grazing goats by accused persons and entering of their goats into the field of deceased Raghuvir Singh is subsequently developed and first time disclosed before the court which actually did not exist, therefore, the story of grazing goats by the accused persons and entering of their goats into the field of deceased Raghuvir Singh and thereafter taking place of altercation

between them is neither believable nor reliable. Further more, for the sake of argument, if it happened so and the matter was resolved by the witness Agya Ram, then this issue was not of such a grave nature that accused persons would commit murder of deceased Raghuvir Singh particularly when no reliable evidence has been brought on record to draw such an inference.

16. According to P.W.3 Janak Singh accused persons confessed before Vinod Singh Pradhan of the Village that they committed murder of the deceased Raghuvir Singh but C.W.1 Vinod has denied knowlege about the persons who committed the murder of the deceased-Raghuvir. In cross-examination by Additional District Government Counsel, he has specifically stated that he did not state before the Investigation Officer that many days before Devendra, Ram Naresh and Bhoora of his village came to him and said that you are Pradhan of the village and a wrong has been committed by them and save them they will be grateful to him. He has also stated that the accused persons did not tell him that their goats had entered into the field of Raghuvir Singh that is why in the intervening night of 19/20-01-1990 accused persons committed his murder by tying his hands and legs and threw the body into a well. Thus, the statement of P.W.3 Janak Singh and C.W.1 Vinod Kumar are contrary to each other. Therefore, statement of P.W.3 Janak Singh does not inspire confidence.

17. P.W.2 Agya Ram has stated that he had showed the torch to the Investigating Officer by which he had seen the accused persons in the intervening night of the incident but P.W.6 Investigating Officer on page 37 of the paper book has stated that witness Agya Ram neither showed any torch to him nor he prepared any memo. Thus, on the point of showing torch to the Investigating Officer by which witness Agya Ram had seen the accused persons is also not consistent but contrary to each other. Therefore, witnessing of the incident by this witness in the light of torch is also doubtful.

18. Investigating Officer has stated that Agya Ram told him that he casually slept in his field in the night, whereas P.W.2 Agya Ram has stated that he used to sleep in the field, thus, on the point of sleeping in the field of this witness, prosecution evidence is also contradictory. In view of statement of Investigating Officer (P.W.6) his presence at the time of incident further creates doubt.

19. In view of the above discussion, we come to a conclusion that conduct of P.W.2 Agya Ram keeping mum for a period of two months, despite being nephew of deceased, is not natural. Story of grazing goats by accused persons and entering of the goats into the field of deceased and they had an altercation with the deceased also does not inspire confidence.

20. On a conspectus of facts and circumstances of the case and close scrutiny of the evidences available on record, as discussed above, we find that the prosecution has failed to prove its case. Accordingly, the impugned judgment and order is not sustainable.

21. The appeal is, therefore, allowed. The impugned judgment and order mentioned above convicting and sentencing the appellants is set aside. Appellants are acquitted of the charges u/s 302 and 201

IPC. Appellants are on bail. Their bail bonds are discharged. Each appellant shall file personal bond and two sureties in accordance with Section 437(A) Cr.P.C. to the satisfaction of the court concerned.

22. Office is directed to communicate this order to the court concerned forthwith and send back the record

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(2020)03-05ILR A380
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.04.2020

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1164 of 2000
Connected with
Criminal Appeal No. 1503 of 2000

Ram Charan & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Dileep Kumar, Sri Ramesh Sinha, Sri Akhilesh Singh, Sri Shishir Tandon, Sri Shivam Yadav.

Counsel for the Opposite Party:
A.G.A., Sri G.S. Chauhan

A. Criminal law-Indian Penal Code,1860 - Section 149, Section 302, Section 304 Part 1 - Indian Evidence Act- Section 3, Section 27 - Code of Criminal Procedure - Section 154, 155 - A detailed description and sequence of incident constituting the offence is not at all required to be mentioned in the FIR- Section 174- For the purpose of holding the inquest it is neither necessary nor obligatory on the part of the Investigating Officer to investigate into or ascertain who were the persons responsible for the death - Any omission on the part of the investigating officer cannot go against the prosecution - Non recording of disclosure statement and non-examination of public witness as regards to the recovery would be of no consequence - Statement of Police Officer can be relied upon and even form basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record - Affidavits have got no evidentiary value as the affidavits are not included in the definition of "evidence" in S. 3 of the Evidence Act - Seizure memo need not be attested in all cases by any independent witness and the evidence of police officer regarding recovery at the instance of the accused should ordinarily be believed -The reason for a chance witness being present on the spot and his testimony requires close scrutiny-Minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety-The evidence of the injured witness is put at a very higher footing and without any substantial reason the statement of such injured witnesses cannot be disbelieved- Statements of the interested witnesses can be safely relied upon by the court when their statements find corroboration by other evidence - The Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution - It is not the quantity, rather quality of the evidence which is decisive in arriving at the right conclusion-The allegation of exhortation attributed to all the seven accused persons in a form of chorus is highly improbable in the ordinary course - Not possible for all the seven accused persons to utter the same words simultaneously - Exhortation is considered to be a very weak evidence, unless coupled with some overt act, to show involvement in commission of crime- Both the accused gave only one blow and did not repeat the assault further- Nor they chased any other person of

complainant side nor caused injury to them. Their act attracts the offence of culpable homicide not amounting to murder punishable under section 304 Part I instead of the offence of murder punishable under section 302 IPC.

Held- Cr.Pc, 1973- Section 154- FIR is not an encyclopedia- The purpose of FIR is to give information about commission of offence and it is not necessary to give every minute detail.

Criminal law-Code of Criminal Procedure, 1973- Section 174- Inquest Report is not substantive evidence- It is neither necessary nor obligatory on the part of the Investigating Officer to investigate into or ascertain as to who were the persons responsible for the death in the inquest report.

Criminal law-Code of Criminal Procedure, 1973- Section 155- Any omission on the part of the investigating officer cannot go against the prosecution. If the investigating officer has made omissions in the interest of justice, such acts or omission of the investigating officer should not be taken in favour of the accused.

Evidence Law-Indian Evidence Act, 1872- Section 27- Recovery- When the police personnel are the witness of the recovery made upon the disclosure of the accused then the testimony of police personnel should be treated in the same manner as testimony of any other witness. Statement of Police Officer can be relied upon and may even form the basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record and non- recording of statements of independent witnesses would be of no consequence.

Evidence law-Indian Evidence Act, Section 134- It is the quality of evidence and not the quantity that is important. The Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution.

Criminal law-Indian Penal Code- Section 141- Section 149- Unlawful Assembly- Proof of common object is required for conviction with the help of Section 149 IPC. and mere presence will not imply that the accused shared common object and formed unlawful assembly- Three appellants alleged to have exhorted in chorus without doing any covert act, hence it cannot be established that they all constituted an unlawful assembly and shared the common object to commit the offence - Exhortation is considered to be a very week (sic) evidence, unless coupled with some overt act, to show involvement in commission of crime.

Criminal Law- Indian Penal Code, 1860- Section 304 Part II- For the application of Exception 4 to Section 300 IPC, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage". No evidence that the accused persons came prepared with any planning of committing offence -The offence has been committed by axe and spade which are normal agricultural tools and no unfair advantage was taken by the accused during the incident.No repetition of assault after giving one blow, nor they chased any other person of complainant side nor caused injury to them.

Criminal Appeal no. 1164 of 2000 is allowed. The conviction and sentence of accused-appellants for the offence under section 302/149, 147, 323/149 IPC is set aside and they are **acquitted.**

Criminal Appeal no. 1503 of 2000 is partly allowed. The conviction and sentence of accused-appellants for the offence under section 302/149 IPC is converted into that of section 304 Part I IPC and consequently, their sentence of life imprisonment is reduced to 12 years rigorous imprisonment and fifty thousand rupees fine each and in default, two years additional imprisonment.(Para 20, 24, 27, 32,39,

41, 46, 47, 48,52, 59, 72, 73, 77,79, 84, 113, 114, 115, 137) **(E-3)**

List of case cited:-

1. Geejaganda Somaiah, T.N. Vs. St. of Kar., AIR 2007 SC 1355

2. Bodh Raj Vs. St. of J & K, AIR 2002 SC 3164

3. Suresh Chandra Bahri Vs. St. of Bih., AIR 1994 SC 2420

4. Jaskaran Vs. St. of Punj., AIR 1995 SC 2345

5. V.K. Mishra Vs. St. of U.K, (2015) 9 SCC 588

6. Rahul Mishra Vs. St. of U.K, AIR 2015 SC 3043

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35. Ramesh Vs. St. of U.P., 2010 (68) ACC 219 (SC)

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88. Gangadhar Behara Vs. St. of Orissa, 2002 (8) SCC 381

89. State of UP Vs. Dan Singh, 1997 (3) SCC 747

90. Ranbir Yadav Vs. St. of Bih., 1995 (4) SCC 392

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93. Lalji Vs. St. of UP, 1989 (1) SCC 437

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97. Shaji Vs. St. of Ker., 2011 (5) SCC 423

98. Ramachandran & ors. Vs. St. of Ker., 2011 (9) SCC 257

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111. Pappu Vs. St. of MP, (2006) 7 SCC 391

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114. Lavghanbha Devjibhai Vasava Vs. St. of Guj., (2018) 4 SCC 329

115. Kirpal Singh Vs. St., AIR 1951 Punj. & Har. 137

116. Mahesh Vs. St. of MP, (1996) 6 SCC 668

117. Surain Singh Vs. St. of Punj. (2017) 5 SCC 796

118. Govind Singh Vs. St. of Chhattis., AIR 2019 SC 2120

119. Rambir Vs. St. of NCT, Delhi, AIR 2019 SC 2264

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

1. Heard Shri Dileep Kumar, learned Senior Advocate for the accused-appellant, Sri Ajit Ray, learned AGA for the State and Shri G.S. Chauhan, learned counsel for the complainant.

2. These two criminal appeals have been filed by the appellants namely Ram Charan, Ram Singh, Amar Singh, Siyaram, Achchhey Lal and Mahendra against the impugned judgment and order dated 17.5.2000 passed by Sessions Judge, Jhansi in Sessions Trial No.287 of 1996, under Sections 147, 148, 149, 302, 323, 504 IPC, Police Station Todi Fatehpur, District Jhansi, by which the accused appellants have been convicted and sentenced for life imprisonment for the offence under Section 302/149 IPC, for two years RI for the offence under Section 148 IPC to accused-appellants namely Ram Charan, Achchhey Lal, Mahendra and Siyaram, for one year imprisonment to accused-appellants namely Ram Singh and Amar Singh for the offence under Section 147 IPC and six months RI under Section 323/149 IPC to all the accused-appellants. The learned trial court has directed that all the sentences shall run concurrently.

3. Brief facts of this case is that on 31.3.1996, at about 11:00 AM, a criminal incident took place in village Semri, Police Station Todi Fatehpur about which the first information report was lodged on same day at 13:05 PM by Vijay Singh by giving written report to the police. Accordingly, at the time of incident, the informant Vijay Singh, his father Bhairav Yadav, his wife Smt. Sudama Devi, his brother Sripat Smt. Sumitra (wife of Sripat) and Badam Singh of the village had gone to load the log of wheat on their field. His mother was grazing the buffaloes on the mend (divider) of wheat field of the informant. On the adjoining field of accused Achhey Lal of his village, accused Achchhey Lal, Ram Charan, Ram Singh, Amar Singh, Siyaram, Sahab Singh and accused Mahendra Singh were cutting crops. Seeing the mother of the informant grazing the buffaloes, the accused persons with *lathi* (bamboo stick), farsa (spade) and axe in their hands came together on the mend of the field and started abusing saying that how dare she had left the animals to graze in their field, whereupon the parents of the informant said that half of the mend belonged to them and, therefore, their buffaloes would continue grazing. Because of this, all the accused cried out to kill them and not to let them alive and thereupon accused Achchhey Lal hit his father by his axe on his head who cried and fell down. The brother of the informant namely Sripat reached near the mend and he tried to stop them, whereupon accused Ramcharan and Mahendra Singh hit him by their farsa on his head and he also fell down and died. The accused Sahab Singh assaulted his

wife by lathi and she sustained injuries on her back. The complainant side challenged them and persons present in adjoining filed including Bhagwan Das, who was also grazing his animals, came and saw the incident. The father of the informant was seriously injured and when he was being taken to police station on a bullock-cart, on the bank of Patrai river, he also died. The bullock-cart and dead body of the father was left there with Badam Singh. The dead body of his brother was lying in the field. On this written report the offence was registered against the accused persons under Sections 147, 148, 149, 302, 323, 504 IPC and chik FIR was prepared.

4. The incident was seen by the witnesses Badam Singh and Bhagwan Das. Injured Smt. Sudama Devi was sent for medical examination. The case was investigated by police, statements of the witnesses were recorded, inquest report of both the dead bodies was prepared and, along with relevant papers, the dead body was sent for post-mortem. From the place of occurrence, blood stained earth and plain earth was picked up and memo was prepared from the place where deceased Bhairo was assaulted and also from the place where deceased Sripat was assaulted. A search was conducted of the house of the accused persons in order to recover the weapon used in the commission of the offence. Subsequently, accused Achchey Lal, Mahendra and Ram Charan surrendered and they were taken on police remand and in their statements they confessed their guilt and also stated that the axe and farsa by which the crime was committed, they have concealed in the hedges of Simari forest. On the pointing of the accused persons, the axe and farsa were recovered and three recovery memo were prepared separately for each farsa and axe. The axe and farsa were stained by blood and all the recovered items including the clothes of the deceased persons were sent for forensic examination.

5. The Investigating Officer prepared the site map of the place of occurrence and also prepared site map of the place from where the weapon of assault, axe and farsa, were recovered, After completing the investigation, charge sheet was submitted by the Investigating Officer against seven accused persons. The case of accused Saheb Singh was separated, who was sent to Juvenile Justice Board as he was found to be juvenile.

6. The accused persons pleaded not guilty to the charges framed against them under section 147,148,302/149 and 323/149 IPC by the Court and claimed trial.

7. Six witnesses were examined in support of the prosecution case. PW-1 Dr. J.K. Gupta has proved the post-mortem reports as Ext. Ka-1 and Ext. Ka-2. PW-2 Head Constable Sobaran Singh has proved chik FIR Ext. Ka-3, GD report no.14 Ext. Ka-4, GD no.15, Ext. Ka-5, injury letter of Smt. Sudama Devi Ext. Ka-6, GD Report no.26 Ext. Ka-7, GD No.10 Ext. Ka-8, GD report Ext. K-9 and G.D. No. 9 Ext. Ka-10. PW-3 Vijay Singh (eye-witness and informant) has proved written report Ext. Ka-11 and the cloths of both the deceased persons as Material Ext.-1 to Ext.-6. PW-4 Badam Singh is eye-witness and has also proved inquest Ext. Ka-12. PW-5 Sudama Devi is eye-witness. PW-6 Premlal, SO has investigated the case and has proved injury letter of Sudama Devi Ext. Ka-13, Ext. Ka-14 inquest report Ext. Ka-12, Form No.13, photo of dead body, letter to CMO was also prepared by him Ext. Ka-15 to Ext. Ka-17, inquest report of Sripat Ext. Ka-18 and

Form No.13, photo dead body, letter to CMO Ext. Ka-19 to Ext. Ka-21, site map of place of occurrence Ext. Ka-22, memo of blood stained and plain earth Ext. Ka-23 and Ext. Ka-24 blood stained earth and plain earth Material Ext.-7 to Ext.-10, search memo Ext. Ka-25, memo of blood stained axe Ext. Ka-26, recovered axe Material Ext. 11, memo of blood stained farsa Ext. Ka-27, recovered farsa Material Ext.-12, memo of another blood stained farsa Ext. Ka-28, recovered farsa Material Ex.-13, site plan from where the weapons were recovered Ext. Ka-29 to Ext. Ka-3i, GD report Ext. Ka-9 and charge sheet Ext. Ka-32. The statements of the accused persons were recorded under Section 313 Cr.P.C. who did not give any evidence in defence. After hearing the prosecution and defence, learned trial court has passed impugned judgement and has sentenced the accused persons.

8. Aggrieved by the impugned judgement, these two appeals have been filed challenging the same to be illegal on the ground that the conviction and sentence is against the weight of evidence on record, is contrary to law and the sentence awarded is too severe.

9. The learned Senior Advocate Shri Dilip Kumar for the accused-appellant has submitted that the accused persons were falsely implicated. The two deceased persons have been found to have sustained one injury each and seven accused persons have been implicated and all the six persons tried by the learned trial court have been convicted for the offence of murder. Prosecution has examined only related and highly interested witnesses on whom no reliance should have been placed. Not only that the presence of eyewitnesses is doubtful, there is contradiction, improvement and discrepancy in their statement.

10. On the other hand, the learned AGA and the learned counsel of the complainant have submitted that on the basis of evidence on record and finding that the offence of murder was committed by the unlawful assembly constituted by the accused persons, the learned trial court has rightly convicted and sentenced the accused persons.

11. PW-1 Dr. J.K. Gupta conducted post-mortem of both the dead bodies. He has stated that on 1.4.1996 he was posted in CHC, Mau Ranipur as medical officer. The dead body of deceased Bhairo, aged about 65 years, was brought by constable Mahadev Prasad and home-guard Ram Prasad of Police Station Todi Fatehpur in sealed condition along with relevant papers at 11:45 AM and he conducted post-mortem at about 12:00 PM. The deceased was of average height. Rigor mortis was present in the body, eyes were closed and it was greenish on the right side of stomach. Following anti-mortem injuries were found-

(i) Incised wound 10 x 1-1/2 x brain deep over right parietal region of scalp situated antro posteriorly, 8 cm above from right eye brow and 10 cm above from right ear pinna. Margin clean cut. underlying bones found cut. Brain was coming out from head.

Internal Examination

Right parietal bone was found broken from front and back. Frontal and occipital bones were fractured. The brain membrane below the wound was torn. The brain was torn on the right side. The heart was vacant and 100 ml semi digested food

was found in the stomach. In the large and small intestine, faecal matters found. The liver, spleen and kidney were found congested. According to the doctor, the deceased must have died due to coma because of anti-mortem head injuries and must have died one day before. The injury was possible by axe and it was possible that injury must have been caused on 31.3.1996 at about 11:00 AM. The injury was sufficient to caused death.

12. PW-1 has stated that on the same day, at about 1:30 PM, the dead body of deceased Sripat was also brought by constable Ganga Prasad Shukla in sealed condition and post-mortem was conducted by him. In the external examination, it was found that the deceased was of average height, mouth closed, right eye opened whereas left eye was closed. The rigor-mortis was present in the whole body. In the lower side of stomach, it was greenish; semen was coming out. Following ante-mortem injury was found-

(I) One incised wound 18cm x 2cm x brain deep on the left side of scalp starting from the left side of nose root from front to back and 1 cm outside from the middle line, 13 cm above from left ear, brain was coming out from the head, clotted blood around the injury present; the left eye had gone black.

Internal Examination

The parietal left bone and left side of frontal bone cut.; the brain membrane cut; left brain membrane was torn; in both large and small intestine, faecal matters found; the heart was empty; stomach was empty. Doctor has stated that the deceased must have died due to shock because of ante-mortem injury and he must have died one day before. He has also stated that the injury was possible to have been caused on 31.3.1996 at about 11:00 AM. The instant death after sustaining injury was possible.

13. PW-2 Head Constable Sobaran Singh has stated that on 31.3.1996 he was posted as head Muharir in Police Station Todi Fatehpur. The informant Vijay Singh came in the afternoon at 1:05 PM with his injured wife and gave the written report about the incident on the basis of which the offence was registered and chik FIR was prepared, an entry thereof was made in GD of the same day, a carbon copy thereof is on record. He has further stated that injured Smt. Sudama Devi was sent for medical with injury letter written by constable Ravindra Singh before him. A special report was sent at 2:15 PM and entry was made in GD. The witness has stated that on 1.4.1996, constable Ganga Prasad, constable Mahadev and home guard Ram Prasad and Sultan Singh returned with two bundles of clothes with papers and two envelops containing post-mortem report of Bhairo and Sripat and entry in GD to that effect was made on the same day. The witness has also stated that SO Ram Lal, on 2.4.1996, when returned to police station, gave four containers of blood stained and plain earth relating to this offence about which an entry in the GD was made. On 12.4.1996, at 12:20 PM, SO Premlal came to the police station along with three accused persons Achchey Lal, Ram Charan and Mahendra Singh with one axe and two farsa which were sealed and entry thereof was made in GD on the same day. The witness has stated that the recovered articles and clothes of deceased persons were sent to forensic laboratory on 25.4.1996 for chemical examination and entry to that effect was made in GD.

14. PW-3 Vijay Singh (informant) has stated that his ancestral was Natthu and had two sons namely Paragi and Vrishbhan. Paragi had three sons, Bhairo, Pyarelal and Gulab. Deceased Sripat was his real brother. Accused Achchey Lal, Ram Charan and Ram Singh are sons of Vrishbhan. Accused Mahendra is son of Ram Singh and accused Amar Singh, Sahab Singh and Siya Ram are sons of Ram Charan. The witness has stated that it was two years eight months before when he had gone to his field situated in Semri Ahiran for loading the wheat with his wife Smt. Sudama Devi, his brother Sripat, his Bhabhi Saumitra Devi, his mother Hirabai and his father Bhairo. His father was already there. Badam Singh of the village also went with them. They were collecting and loading the wheat on bullock-cart. His mother Hirabai was grazing buffaloes. The accused persons Acchey Lal, Ram Charan, Ram Singh, Mahendra Singh, Amar Singh, Siyaram and Sahab Singh were cutting their wheat crops in their field in their adjoining field. The field of informant and accused was divided by a mend where his mother was grazing buffaloes. The accused Achchey Lal used abusive language against his mother and said why she has left the buffaloes at their mend, his father and mother said that half of the mend belonged to them and, therefore, buffaloes would graze there. It was 11:00 AM at that time and accused Achchey Lal, Ram Singh, Siyaram came with axe and accused Ram Charan and Mahendra came with farsa and accused Amar Singh and Sahab Singh came with lathi and said kill them and not let them alive, whereupon accused Achchey Lal hit on the head of his father by axe who fell on the ground and when his brother Sripat ran towards his father, accused Ram Charan hit him by farsa, which missed. Accused Mahendra, thereafter, hit by farsa on the head of Sripat who fell on the ground and died. The witness has stated that he sent his wife Sudama to save them. She was hit by accused Sahab Singh by lathi. Badam Singh was present there and Bhagwan Das of the village was also present who was grazing his animals. They ran towards them whereupon the accused persons fled away towards forest. The witness has further stated that the blood of Sripat fell on the ground and on his clothes, Similarly blood also poured on the clothes of his father. The clothes of both the deceased persons have been proved by the witness as material Ext.-1 to Ext.-6. He, his wife and Badam Singh when going to police station on bullock-cart carrying his injured father, his father died on the way on the bank of Pathrai river. He got a written report scribed by Badam Singh and after being read over to him, he put his thumb impression on the report and he and his wife leaving the dead body of father there, went to police station and gave the written report to the police. On being asked by the Police Inspector, he told him that the dead body of his father was lying on the bank of Pathrai river. The Police Inspector went with him there.

15. PW-4 Badam Singh is the eye witness and scriber of the written report. He has stated that he was on the field of Bhairo and Sripat three years before when the incident took place. At that time, the crop was being loaded on the bullock-cart. He was taken to the field by Sripat. It was 10-11 AM Vijay Singh, Smt. Sudama, Smt. Sumitra, mother of Sripat, Sripat and his father Bhairo were loading the wheat and mother of Sripat was grazing the buffaloes on the mend of the field of Bhairo and accused Achchey Lal. He knew accused Achchey Lal, Ram Charan, Ram Singh,

Mahendra Singh and Amar Singh (present in Court). The witness has stated that at the time of incident, the accused persons were cutting wheat crops. Using abusive language, they came to the mother of Vijay Singh and said to take away the buffaloes. Accused Achchey Lal and Siyaram were carrying axe whereas accused Mahendra and Ram Charan were carrying farsa and accused Sahab Singh and Amar were carrying lathi in their hand. When this was going on, Bhairo also reached on the mend. Accused Achchey Lal hit Bhairo by his axe on his head who got injured and Ram Charan hit Sripat by pharsa, which missed. Thereafter, accused Mahendra Singh hit Sripat by his farsa on the head of Sripat who died on spot. Accused Sahab Singh hit Sudama by his lathi. Thereafter, accused persons ran away from there. Bhairo was alive and when he was being taken by Vijay Singh and Sudama on bullock-cart to police station Todi Fatehpur, on the bank of Pathrai river, he also died. The witness has stated that Vijay Singh dictated the written report to him and when the report was written he put his thumb impression on it. He stayed there and Vijay Singh and his wife Sudama went to police station and Vijay Singh and Police Inspector came there and the police inspector prepared inquest report on which he also signed, which is Ext. K-12.

16. PW-5 Sudama Devi has stated that the incident took place about three years and three months before at about 11:00 AM when she was collecting the wheat in her field and the same was being loaded on bullock-cart by her, Sripat, Vijay Singh, Sumitra, Bhairo and Badam Singh. Her mother-in-law Hirabai was grazing buffaloes. Accused persons Achchey Lal, Ram Charan, Ram Singh, Sahab Singh, Mahendra Singh and Amar Singh were cutting the crops in their adjoining field. Accused Achchey Lal and Ram Singh came with axe and accused Ram Charan and Mahendra came with pharsa whereas accused Sahab Singh and Amar Singh came with lathi and accused Achchey Lal said to her mother-in-law why she was grazing buffaloes on their mend and why she had left their animals in their field. Her mother-in-law, father-in-law and her husband said that half of the mend belonged to them and her buffaloes would graze there. All the accused persons cried to kill them and not to spare them alive. Accused Achchey Lal hit her father-in-law Bhairao by his axe on the head and he fell on the ground and his elder brother-in-law Sripat when checked him, accused Ram Charan hit by farsa on him but Sripat escaped. Thereafter, accused Mahendra Singh hit by his farsa and caused injury on his head who fell down and died on spot. She has stated that when she reached there, accused Sahab Singh also hit her by lathi and she sustained injury on her back for which she was medically examined.

17. PW-6 SO Premlal has stated that on 31.3.1996 he was posted at police station Todi Fatehpur and in his presence Crime No. 45 of 1996 was registered. He obtained a copy of Chik FIR and GD and copied the same in case diary. He took the statement of head constable Sobaran Singh and informant Vijay Singh. Smt. Sudama Devi was sent with a constable for medical treatment to hospital with injury letter. He went to the bank of Pathrai river with force where the dead body of Bhairo was lying. The inquest witnesses were appointed and inquest report was prepared. The other papers such as Form No.13, photo of dead body, letter to CMO were also prepared by him. The dead body was sealed on spot and was delivered to constable Mahadev and

home guard Ram Prasad for post-mortem. Thereafter, he came to village Semri on the field of informant where the dead body of Sripat was lying on the ground. The inquest report and other papers were prepared. The witness has further stated that he inspected the place of occurrence on the identification of the informant and witnesses and prepared site map. He picked up the blood stained and plain earth from the place of occurrence and prepared the memo thereof in the presence of the witnesses. He has also stated that in respect of deceased Bhairo, the blood stained and plain earth was separately sealed in presence of witnesses and memo was prepared. He recorded the statement of the witnesses of inquest report, the witness of memo and eye witness Badam Singh and Bhagwan Das and indulged in search of accused persons in their house. Subsequently, with the permission of the Court, on 6.4.1996, he recorded the statement of the accused persons. Accused Achchey Lal, Ram Charan and Mahendra confessed and stated that they could get recovered the weapons used for murder. Therefore, they were taken on police custody remand and before the witnesses on 12.4.1996 at 8:00 AM in the morning, on their pointing, from the hedges of Semri forest, the blood stained axe was recovered and was sealed and memo was prepared. On the same day, at 9:00 AM, on the pointing of accused Ram Charan, in the presence of witnesses, the blood stained farsa used for causing death was recovered and memo was prepared. On the same day at 11:00 AM, on the pointing of accused Mahendra, before the witnesses, another blood stained farsa was recovered from the hedges about which the memo was prepared. He has further stated that he prepared the site map from where the weapons were recovered. Thereafter, on 19.6.1999, he recorded the statement of Smt. Sudama. He deposited the weapons used in murder and the accused persons in the police station and entry in the GD was made. The weapons were duly sealed. He has further stated that the recovered articles were sent to Forensic Science Laboratory for medical examination on 26.4.1996. He filed charge sheet on 20.4.1996.

18. The learned Senior Advocate for the accused-appellant has submitted that the FIR has been ante time and it was lodged after legal advice and consultation with the police as in the facts and circumstances of the case, it was not possible to lodge FIR at the time it has been shown to be lodged. In fact, the deceased persons were sleeping on their field in the night and were killed by some unknown persons about which the informant side could know only on the next day. The discharge of semen by Sripat at the time of post-mortem also indicates this fact. In order to falsely implicate the accused persons, a false story was created and FIR was lodged.

19. We find that the incident took place on 31.3.1996 at about 11 AM and FIR has been lodged on the same day at about 13.05 PM. The distance of police station from the place of occurrence is about 7 km. In his cross-examination, the informant has stated that at about 12 in the noon, he, his wife and witness Badam Singh with injured Bhairo started for police station and by the time, they reached to Pathrai river, Bhairo died. Then, PW-4 Badam Singh wrote the written report on the dictation of informant on a plain paper which was brought by the informant from a nearby shop situated at the bus stand and thereafter, he brought pad and put thumb impression. Leaving Badam Singh there

with the dead body, the informant and his wife Sudama went to the police to lodge FIR, which was just 1 km ahead from that place. As such, it cannot be said that it was not possible to reach the Police Station and lodge the report. It has been submitted that after chick FIR being prepared, it was necessary for the police to get the thumb impression of the informant which was not taken. Since the FIR has been registered on the basis of written report and the same has been copied by the chick writer, this omission is insignificant and meaningless. PW-2 HCP Sobaran Singh has stated that the informant with his wife had come to lodge FIR on 31.3.1996 at 1.05 PM and gave a written report on the basis of which he registered offence and prepared chick in his handwriting and signature and made an entry thereof in the GD. He has also stated that a special report was sent on the same day at about 2.15 PM through CP Manfool Singh and the entry thereof was made in the GD. As such, we do not find any delay in lodging FIR nor there is any reason to accept the argument of defence that the FIR was ante time.

20. It has been pointed out that certain facts which have been stated by informant in his statement such as, the assault of accused got missed; deceased Bhairo met on the way etc are not mentioned in the FIR. we do not find it at all necessary that all the facts are required to be mentioned in the FIR. The purpose of FIR is to give information about commission of offence and it is not necessary to give every minute detail. In **Jarnail Singh v State of Punjab, 2009 (6) Supreme 526, Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 537 and Ramji Singh v State of UP, 2019 (4) Crimes 585 (SC)**, it has been held that the FIR is not the encyclopedia of all the facts relating to crime. The only requirement is that at the time of lodging FIR, the informant should state all those facts which normally strike to mind and help in assessing the gravity of the crime or identity of the culprit briefly. In our view, a detail description and sequence of incident constituting the offence is not at all required to be mentioned in the FIR. Since the chick FIR was scribed soon after the receipt of the written statement, therefore, neither the time mentioned nor the nature of improvement indicated above is a substantive improvement with deliberation in order to add falsity. Moreover, the alleged improvement does not cause any adverse impact on the defence and as such, in view of the law laid down in **Golla Pullanna Vs. State of AP, AIR 1996 SC 2727**, it cannot be given any importance.

21. The inquest report of the dead body of Bhairo was prepared on 31.3.1996 by SO Prem Lal who reached to Patharai river at 2.15 PM and completed inquest at 3.45 PM by appointing five witnesses as panch namely, Badama Singh, Raghuveer Singh, Lalloo, Shobha Ram and Veer Singh. The dead body was lying on bullock-cart and Badam Singh, some people of the village of deceased and of around were present there. The dead body was inspected. The deceased was of average hight, slim and aged about 65 years. On the right side of head, blood clotted incised wound was found. In the opinion of witnesses and SO, the death must have occurred because of head injury. The officer prepared other papers necessary for sending the dead body for post-mortem, sealed the dead body and sent for post-mortem.

22. On the same day, at 4.15 PM, SO Prem Lal reached to the field where the

incident took place and conducted inquest of dead body of Sripat which was completed at 5.45 and for which witnesses as panch were appointed namely, Ramswaroop, Lala Ram, Raghuveer Singh, Naipal Singh and Vijay Singh (informant & eyewitness). The dead body was lying on the place of occurrence. Family members and people of locality were present. The deceased was of average hight and strong built and of about 35 years in age. On inspection, a contusion on the left eye and blood clotted incised wound from the root of nose to the mid of scalp was found and the SO and the witnesses were of the view that death was resulted because of the head injury. The dead body was sealed, necessary papers were prepared and dead body was sent for post-mortem.

23. The submission of the learned counsel for the accused-appellants is that on the inquest report of Bhairo, there is over writing on the first page on '15.45 PM' and it can be easily read that earlier it was 14.45 PM and similarly 30.3.1996 has been over written as 31.3.1996. It shows that at the time of inquest, FIR was not in existence as it was not possible for police to reach at the place within 30 minutes from the time of FIR as SO Premlal has himself stated that it took 10 to 15 minutes in copying FIR and making entry in GD and that much of time was also consumed in taking statement of informant and head constable. It has been also pointed out that in none of the inquest report, weapon used in the commission of the offence has been mentioned for the reason that it was not known at that time what weapon was used. It also shows that FIR was not in existence till then.

24. On both the points PW-6 SO Prem Lal has been put question during cross-examination and he has given convincing reply. He has stated that it was a writing error and the same was corrected by him. He, however, could not reply to the question why he did not put initial after correction. But, from the perusal of the inquest report of Bhairo, and considering that the completion of inquest on the first page has been written to be 15.45 PM and there is no over writing on it, we find that the said over writing is simply a correction and on that basis, it is too imaginary to say that the FIR was not in existence. So far as the next limb of argument is concerned, it is settled law that the purpose of inquest is not to incorporate the minute details about the weapons used or other details. The purpose of preparing an inquest report is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating in what manner, or by what weapon or instrument, if any, such wounds appear to have been inflicted. In other words, for the purpose of holding the inquest it is neither necessary nor obligatory on the part of the Investigating Officer to investigate into or ascertain who were the persons responsible for the death.

25. In **George v State of Kerala, AIR 1998 SC 1376 2007,** referring the judgement in **Podda Narayana v State of AP, AIR 1975 SC 1252,** the Supreme Court held that the object of inquest proceedings is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. The question regarding the details how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings. Such omissions in the inquest report are not sufficient to put the prosecution out of Court.

26. Similarly, in **Radha Mohan Singh alias Lal Saheb v State of UP, 2006 (54) ACC 862 (SC),** it has been held that

the investigation for the purpose of inquest is limited in scope and is confined to ascertainment of apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by animal, and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. Details of overt acts need not be recorded in inquest report. Question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who were the witnesses of the assault is foreign to the ambit and scope of proceedings u/s 174 CrPC. There is no requirement in law to mention details of FIR, names of accused or the names of eye-witnesses or the gist of their statements in inquest report, nor is the said report required to be signed by any eye witness.

27. Further, in **Brahma Swaroop v State of UP, AIR 2011 SC 280,** the Court has reiterated that inquest report is not substantive evidence. But it may be utilized for contradicting witnesses of inquest. Any omission to mention crime number, names of accused penal provisions under which offences have been committed are not fatal to prosecution case. Such omissions do not lead to inference that FIR is ante-timed and evidence of eyewitnesses cannot be discarded if their names do not figure in inquest report. The whole purpose of preparing an inquest report is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the diseased and stating as in what manner or by what weapon or instrument such wounds appear to have been inflicted. For the purpose of holding the inquest it is neither necessary nor obligatory on the part of the IO to investigate into or ascertain who were the persons responsible for the death. The object is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and if so what its apparent cause was. The question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the inquest report. Omissions in the inquest report are not sufficient to put the prosecution out of court. The basic purpose of holding inquest is to report regarding the apparent cause of death whether it is suicidal, homicidal or accidental. It is therefore not necessary to enter all the details of the overt acts in the inquest report. Evidence of eyewitnesses cannot be discarded if their names do not figure in the inquest report. In the case in hand, in both the inquest reports, we find that the inquest proceeding has been drawn before 5 witnesses and injuries found on the dead bodies have been precisely mentioned and it has been also mentioned that death of deceased persons is homicidal due to ante-mortem injury. It has been also mentioned where the dead bodies were found. The corpus was sealed separately, handed over to the police personnels along with necessary letters and papers for post-mortem. We find that non-mentioning of weapon used for the commission of offence is no such omission on the basis of which the inquest report may become tainted and can be discarded and it

28. It has been also submitted that the fact of scribing the FIR by Badam Singh on the dictation of Vijay Singh informant was neither necessary nor probable in the circumstance that Badam Singh himself was the eye witness of the incident who could scribe the report by himself. There was no need to scribe the FIR on the

dictation of Vijay Singh informant. It has been further pointed out that the written report on the basis of which the FIR was registered, has no sign of the script paper being folded and it goes to show that the FIR was an ante time document. The thumb impression of the informant is in different ink and according to his statement, he went to the bus stand and got the ink pad and put his thumb impression on the script, which was later on handed over to the police. This further rules out his presence at the Police Station to lodge FIR and he is not wholly reliable witnesses. All these reasons advanced by the learned counsel are just speculations. The informant is admittedly an illiterate person and with the help of Badam Singh he got the written report prepared and because he had to lodge FIR as his father and brother died in the incident, he ensured that the same should be scribed by Badam Singh who happened to be semi-literate. It is most common that FIR is lodged by those who are worst effected by crime. The informant was fully acquainted with all the accused persons and he was present there watching the whole sequence of crime and there is nothing unusual if the written report was scribed by Badam Singh on his dictation. Regarding no sign of fold on the paper on which written report was scribed, the witness has explained that the paper was not tightly folded. That the ink of report and signature was not same has been also convincingly explained by the witness. Moreover, these things are not serious enough to create any doubt or lead to any inference of ante timing of FIR. The informant has stated that he started from place of occurrence at about 12 in the noon. It took about half an hour in reaching to Patarai river which is 4 km away and from there police station is about 1 km where he reached at 1 pm. Meanwhile, written report was prepared at Patarai river in 5 to 10 minutes for which paper was brought from a shop situated on bus stand. The submission of the learned counsel is that all these things could not be possible within such small period and as such the FIR was ante timed. Though, it does not appear to be impossible to lodge the FIR on stipulated time, even then, it may be pertinently mentioned that in matter of timing, a very technical approach is not required to be adopted, particularly when the witness is illiterate and he has stated about time on the basis of his own assessment and it has not been shown or asked by the defence that he was wearing a watch and has stated about time after having verified in watch. It is why during his cross-examination, PW-4 Badam Singh has stated that they moved from the place of occurrence to Police Station with injured Bhairo on bullock-cart between 11-12 am. It was his assessment of time and such marginal difference in the statement is required to be appreciated keeping in view that such error in making assessment of timing is always possible, particularly when the witnesses are illiterate villagers. Even if for the sake of argument, it is assumed that the FIR was ante-time, there is nothing on record to show that it is false or in any way caused prejudice or resulted in injustice to the accused persons.

29. The time of occurrence has been also tried to be discredited on the basis of medical evidence. A suggestion has been given from the side of defence that both the deceased persons were sleeping in their field for the security of their crops and some unknown persons killed them in the night. Learned counsel for the appellants further pointed out towards the discrepancy in the post-mortem report and eye witness account and has submitted that in both the post-mortem reports, small and large intestine of both the deceased have been found

containing faecal matters and 100 grams of semi digested food in the stomach of deceased Bhairon, whereas, the eye witness account is to the affect that they had not taken their food in the morning while going to the field on the fateful day. Further submission is that PW-3 Vijay Singh has clearly stated that all the persons leaving the house for the field did not take food and they had taken their food in the preceding night only. He has further clarified this by saying that they left the house after easing and washing of their hand and face etc. He has also stated that his father had also taken food in the preceding night and as he has stated that he got his father on the way, the inference is that he had also not taken food on the date of incident. This fact, however gets falsified by the medical evidence as the stomach and intestine of both the deceased contained semi digested food. The said fact of not taking any meals/breakfast in the morning has come in response to the question put to the witness in cross-examination. The deceased and others set out to field in the early morning at about 6 AM and it was but natural that they did not eat any thing in the morning. The incident took place at about 11 AM. No question has been put to the witness by defence that they did not eat anything during these 5 hours. It is not expected in village life that people working in the field, would continue working till noon with empty stomach and they often take a break to have something by way of lunch/breakfast. This possibility further finds support from the post-mortem report. The opportunity was there with the defence to clarify about this fact, but, the defence has failed to utilize this opportunity.

30. So far as the timing of death is concerned, it has been further pointed out that in the post-mortem report of Sripat, the doctor found him discharging semen and this fact has also come in the statement of doctor as PW-1. The submission of learned counsel for the appellants is that this fact creates doubt to draw otherwise inference regarding the time of death of Sripat. The defence has suggested the fact witness that deceased Sripat had illicit relation with his uncle's wife and a panchayat was also called in respect of it. We find that no question has been put by defence to the doctor to clarify this fact why it was so. There may be several biological reasons or even some sex related ailment for it and the defence should have clarified it from the doctor. In absence of any such cross-examination on this point, no importance can be attached to this argument. The doctor who conducted post-mortem has clearly stated that the death of the two deceased persons was possible a day before from the time of post-mortem and their injury was possible at 11 AM. During his cross-examination, he has stated that a difference of 6 hours in either side is possible in the time of death and the injury to both the deceased was possible to have been caused at the same time. He has stated that it was not possible that the injuries were caused as early as 4 AM and the possibility is minimum that the injury was caused 8 hours before from the alleged time of occurrence. Meaning thereby, the doctor has ruled out any possibility of the death being caused in midnight or between 2 to 4 in the night. Moreover, all the three eye-witnesses examined by the prosecution have stated that the incident took place at about 11 AM in the morning. Nothing has come in their statement which can create any doubt about it. Thus, the time of occurrence has been proved by the eye-witnesses and the same appears to be correct in view of medical evidence.

31. Defence has not specifically disputed the place of occurrence, except denying the incident. Some omission has been pointed out in the site map prepared

by IO submitting that it has not been shown where the deceased persons were standing and from where the witnesses saw the incident and whether the incident took place on the adjoining mend or in the field of the accused persons. In our view, it is not significant as the field of both the sides are adjoining divided by mend. The supreme court in **Jagdish vs State of UP, 1996 (33) ACC 495**, has laid down that the IO is expected to show in the map what he has observed on spot. Other details based on saying of some persons are not needed to be mentioned as per legal requirement. This view has been further affirmed by this court in **State of UP vs Lakhan Singh, 2014 (86) ACC 82 (All) (DB)**. During investigation, PW-6 IO prepared site-map in the presence of informant and other witnesses. The incident took place allegedly on the mend of fields of both sides. It has been pointed out that there is anomaly with regards to the width of the mend in the evidence of fact witnesses. It has been also pointed out that the dead body of Sripat was found in the field of the accused side. Admittedly, the fields of both the sides are adjacent divided by mend and the dead body of Sripat was found in the field of accused side close to mend and therefore, it cannot create doubt as to place of occurrence. On the other hand, where the dead body was found and blood stained earth was lifted is close to mend, may be in the field of accused side. All the fact witnesses have stated that the incident took place on the mend. In the written report Ext. Ka-1, it has been stated that the incident took place on the mend of the field. PW-3 Vijay Singh has more specifically stated that the murder was committed on the mend of the adjoining fields of both sides. The IO has also marked the place of occurrence in the site-map at the same place. Other witnesses PW-4 Badam Singh and PW-5 Sudama Devi have also proved the place of occurrence in their statements. That apart, the officer who has prepared inquest report has found the dead body of Sripat at the same place. Blood-stained earth was lifted from the same place and sealed and recovery memos were prepared which have been produced in evidence and proved by the prosecution witnesses. Hence, the place of occurrence has been established by prosecution.

32. PW-3 has been cross-examined by the defence and the main attack of the defence has been on the post-mortem report, nature of injuries, timing of death and the discrepancies between the medical evidence and ocular testimony. It has also been submitted during arguments that initially, it was stated by PW-3 that when they set out from their house to their field in the morning, his father was with them. Subsequently, during cross-examination, PW-3 tried to improve by stating that his father met him on the way in the lane. He has admitted that he has stated this fact for the first time before the court. Even if it is so, it hardly makes any difference. The fact remains the same that all of them reached to their field together and at the time of incident, they all were present on spot. The plea that this fact was not mentioned in the FIR nor in the statement given to IO, is also not important as it is not necessary to mention every detail in report. In the statement under section 161, the witness states about the incident and responds to any additional question asked by the IO. If no question was asked by IO on the point, there was no occasion for the witness to state this fact. Even IO is not supposed to clarify everything and take statement on all those points the defence is likely to put to the witness. In **Rahul Mishra v State of**

Uttarakhand, AIR 2015 SC 3043 and V.K. Mishra v State of Uttarakhand, (2015) 9 SCC 588, it has been laid down that the investigating officer is not obliged to anticipate all possible defences and investigate from that angle. In any case, any omission on the part of the investigating officer cannot go against the prosecution. Interest of justice demands that such acts or omission of the investigating officer should not be taken in favour of the accused.

33. The learned Senior Advocate has also argued that the recovery of alleged weapons used in commission of the offence by SO in presence of witnesses Jagat Ram and Jaihind; one axe on the pointing of accused Achchhey Lal; one spade on the pointing of accused Ram Charan and one spade on the pointing of accused Mahendra is false and fabricated. Both the public witnesses of recovery were not examined and the spade recovered on the pointing of accused Ram Charan has been shown to be blood stained, whereas, admitted case of prosecution in view of the statements of three eye-witnesses is that no injury was sustained by deceased Sripat by his assault. Only police witnesses have been examined to prove recovery. There is no disclosure statement recorded and proved by prosecution. On the point of recovery of three weapons used for commission of crime, it has been submitted that an affidavit was filed by accused Achchhey Lal, Ram Charan and Mahendra opposing the police custody remand, stating that they never confessed or disclosed their intention to get weapon recovered. Moreover, the confessional statements of these accused persons have not been reduced in writing nor proved, which was necessary in view of the judgement in **Jaskaran Vs. State of Punjab, AIR 1995 SC 2345.** We now proceed to consider the arguments one by one on these points.

34. PW-6 IO has proved the recovery and has stated that the three accused persons confessed the offence and on their pointing the weapons used for the commission of the offence were recovered. The recovery was made before two public witnesses, but they have not been examined. Therefore, the first question is that in all cases, whether the public witnesses are required to be examined. The law with regards to admissibility and evidentiary value of discovery of material fact and incriminatory articles under section 27 of the Evidence Act has been variously explained and reiterated by the Supreme Court. In **Suresh Chandra Bahri Vs. State of Bihar, AIR 1994 SC 2420,** where the accused had made confessional disclosure statement under section 27 of the Evidence Act to the police officer during investigation and on the basis thereof, incriminatory articles were found and seized and the evidence showed that the articles belonged to the deceased, it has been held by the Supreme Court that the disclosure statement can be said to be true and also worthy of credence. Non recording of disclosure statement and non-examination of public witness as regards to the said recovery would be of no consequence.

35. It has been held in **Bodh Raj v State of J & K, AIR 2002 SC 3164** that section 27 of the Indian Evidence Act is like an exception to Sections 25 to 26 of the Evidence Act and a confessional statement made in police custody leading to discovery of fact has been made admissible in evidence against the accused. The prohibition on admissibility of confessional statement reflects the fear of the

Legislature that a person under police influence might be induced to confess because of undue pressure. The statement which is admissible under Section 27 is the one which is the information leading to discovery. The information might be confessional in nature but if it results in discovery of a fact, it becomes a reliable information. But the information permitted to be admitted in evidence is confined to that portion of the information which 'distinctly relates to the fact thereby discovered.

36. In **Geejaganda Somaiah, T.N. v State of Karnataka, AIR 2007 SC 1355**, it has been laid down that what is important is the information provided by the accused, which leads to the discovery of the fact, which is connected with the particular crime, provided that the accused is in custody. It is of no consequence that the information amounts to a confession which will not be allowed to be proved by the prosecution. But if a relevant fact is discovered in consequence of such information it furnishes assurance regarding the truth of such information. It is such information as relates to the fact thereby discovered is declared to be relevant and is allowed to be proved by the prosecution.

37. In **Sandeep v State of UP, (2012) 6 SCC 107 and Mukesh v State for NCT of Delhi & Others, AIR 2017 SC 2161**, it was further laid down that if anything or weapons etc. are recovered at the instance of the accused only in the presence of police party and there is no public witness to such recovery or recovery memo, the testimony of the police personnel proving the recovery and the recovery memo cannot be disbelieved merely because there was no witness to the recovery proceedings or recovery memo from the public particularly when no witness from public could be found by the police party despite their efforts at the time of recovery. Seizure memo need not be attested by any independent witness and the evidence of police officer regarding recovery at the instance of the accused should ordinarily be believed. The ground realities cannot be lost sight of that even in normal circumstances, members of public are very reluctant to accompany a police party which is going to arrest a criminal or is embarking upon search of some premises.

38. In **Navneethakrishnan v State, AIR 2018 SC 2027,** the SC observed-

"The exception postulated under section 27 of the Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance under the exception postulated by exception postulated by section 27 aforesaid, is limited "..... as relates distinctly to the fact thereby discovered.... ." The rationale behind section 27 of the Evidence Act is, that the facts in question should have remained unknown but for the disclosure of the same by the accused. The discovery of facts itself, therefore, substantiates the truth of the confessional statement. And since it is truth that a court must endeavour to search, section 27 aforesaid has been incorporated as an exception to the mandate contained in sections 25 and 26 of the Evidence Act."

39. It has been submitted by the learned counsel for the accused-appellants that the three public witnesses namely, Jagat Ram, Rahees and Jaihind have not been examined by the prosecution. The learned trial court has relied upon the police witness proving the recovery. The

Supreme Court in **Nathu Singh v State of MP, 1974 Cri. L J 11,** has held that testimony of a police witness cannot be discarded for the reason that he is a police witness as it has not been shown that the police had some enmity with accused. Further judgements such as **Pramod Kumar Vs. State (GNCT) of Delhi, AIR 2013 SC 3344 and Govindaraju alias Govinda Vs. State of Shri Ramapuram P.S., AIR 2012 SC 1292** also affirm this view in which it has been held that the testimony of police personnel should be treated in the same manner as testimony of any other witness. There is no principle of law that without corroboration by independent witnesses, the testimony of police personnel cannot be relied upon. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good reasons. As a rule it cannot be stated that Police Officer can or cannot be sole eye witness in criminal case. Statement of Police Officer can be relied upon and even form basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record. Experience shows that local people, in order to avoid enmity and bad relation are often reluctant in giving evidence in criminal cases. In the instant case, we find that except giving suggestion of false and planted recovery of weapons, the defence has not cross-examined the witness on the point of recovery so as to discredit the recovery of weapons.

40. We find that there is no error or perversity in the approach of the learned trial court. This instant case is based on direct evidence and the eyewitnesses saw the accused using spade and axe for causing deadly assault and the recovery has been made on the pointing of accused persons. So far as the affidavit of accused persons is concerned which was given by them opposing the application for police remand during investigation denying such disclosure is insignificant in view of the judgement in **Ayaaubkhan v State of Maharashtra, AIR 2013 SC 58,** where it has been held that affidavits have got no evidentiary value as the affidavits are not included in the definition of "evidence" in S. 3 of the Evidence Act.

41. Moreover, we are of the view that seizure memo need not be attested in all cases by any independent witness and the evidence of police officer regarding recovery at the instance of the accused should ordinarily be believed. The ground realities cannot be lost sight of that even in normal circumstances, members of public are very reluctant to accompany a police party which is going to arrest a criminal or is embarking upon search of some premises. There is no such rule that the police as witness of recovery cannot be believed. We get added strength to take this view on the basis of the judgement of the Supreme Court discussed above.

42. It is pertinent to mention that the recovered weapons stained with blood were sent for chemical examination along with 6 blood stained dresses the deceased were wearing at the time of incident with blood stained and plain earth (total 11 items). The forensic report is on record which is Ext. Ka-33 and on all items, human blood has been found. It links the recovered weapons with the offence and renders additional support to the prosecution version making it most probable that the weapon so recovered on the basis of disclosure statement and pointing of the accused persons were used to commit the offence.

43. So far as the argument with regards to the presence of blood stains on the third weapon is concerned, since all the weapons have been recovered from the same place, this possibility cannot be ruled out that stains might have been possible by coming into contact with each other. Spades and axes are not that kind of weapons which require distinct individual identification. The prosecution version is that all the three weapons were used in commission of the offence and by two which were used by accused Achchhey Lal and Mahendra Singh, the deceased persons sustained injury and died.

44. It has also been submitted that from the very beginning the prosecution came with the story that the accused Achchey Lal gave blow by axe on Bhairon and thereafter, the accused Ram Charan and Mahendra gave blow of spade on the head of Sripat. This fact has also been mentioned in the FIR. PW-3 informant and two other fact witnesses PW-4 and PW-5 also stated to the Investigating Officer in their statements under Section 161 Cr.P.C. that accused Achchey Lal hit Bhairo by his axe and accused Ram Charan and Mahendra gave one blow each by their spade on the head of Sripat. The post-mortem report of the deceased Sripat, which has been duly proved by the doctor, clearly indicates that Sripat sustained single incised wound and this fact has been further corroborated by PW-1 in his testimony.

45. The submission of learned counsel for the appellant is that the testimony of eye witness is falsified by the medical evidence as all the three eye witnesses have made improvement by stating before the trial Court that the blow of accused Ram Charan got missed or Sripat saved himself by that blow and accused Mahendra gave him the fatal blow on his head causing his death on spot. Therefore, the submission is that, keeping in view the anomaly and improvement in the eye witnesses account on this point, their testimony is liable to be discarded and their presence on the spot becomes doubtful at the time of incident. They cannot be treated as wholly reliable witnesses and they cannot be relied to hold the appellants guilty. On close scrutiny of the evidence, we are of the firm view that it does not appear to be a vital improvement, particularly when it is of no gain to prosecution as it only creates doubt with regard to participation and involvement of accused Ram Charan. But on that basis alone, it cannot be said that the whole prosecution case becomes unreliable. The courts have to discharge onerous obligation of justice dispensation by arriving at the truth and in the process the court has to separate grain from chaff and appraise in each case as to what extent the evidence is acceptable.

46. In India, doctrine of falsus in uno, falsus in omnibus does not apply and the approach of the court should be to bring out the correct facts by marshalling the evidence and ignore which is incorrect. In S**ucha Singh v State of Punjab, (2003) 7 SCC 643, State of Maharashtra v Tulshiram Bhanudas Kamble, AIR 2007 SC 3042, Janardan Singh v State of Bihar, (2009) 16 SCC 269, Ramesh Harijan v State of UP, (2012) 5 SCC 777, Babu v State of TN, (2013) 8 SCC 60 and State of Karnataka v Suvarnamma, (2015) 1 SCC 323**, it has been held:

"Maxim "falsus in uno, falsus in omnibus' is not applicable in India. It is merely a rule of caution. Thus even if a major portion of evidence is found to be

deficient, in case residue is sufficient to prove the guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. The court has to separate grain from chaff and appraise in each case as to what extent the evidence is acceptable. If separation cannot be done, the evidence has to be rejected in toto. A witness may be speaking untruth in some respect and it has to be appraised in each case asto what extent the evidence is worthy of acceptance and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. Falsity of particular material witness on a material particular would not ruin it from the beginning to end. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain untruth or at any rate exaggeration, embroideries or embellishment."

47. The learned counsel has questioned the presence of all the three fact witnesses at the place of occurrence at the time of incident. In respect of PW-3 informant Vijay Singh, it has been mentioned that sending his wife instead of going himself for rescue is also unnatural. It looks improbable that when two deceased persons were assaulted, instead of going himself, PW-3 Vijay Singh asked his wife to go to save. Had he been present there, he would have himself rushed to save the deceased persons. This also makes the presence of PW-3 at the time of incident improbable. No blood stains have been found on the clothes of PW-3 although he is said to hold his injured father Bhairo and put him on bullock-cart whose head injury was bleeding. It has come in the evidence of witnesses that the wound was covered tightly by cloth (towel) and therefore, if dress of PW-1 was not found blood stained, there is nothing unnatural in it. Again, his not going to save and sending his wife is also natural. In absence of any cross-examination why he did so as he could state some reason, we find that he must have been guided by the idea that the accused might not assault on a lady, particularly of own family. In **Sucha Singh Vs. State of Punjab, (2003) 7 SCC 643,** the Supreme Court has explained that where eye witnesses did not come to the rescue of the deceased, it has been held that such reaction, conduct and behavior of the witnesses cannot be a ground to discard his evidence when they are unarmed and the accused are armed with deadly weapons. Two senior members of family were already given deadly assault by accused side and therefore, the conduct of the witness cannot be seen with suspicion.

48. It has been further submitted that PW-4 Badam Singh is not of his family nor he has any field of his own near the field where offence was committed and he can be said to be only a chance witness on whom reliance cannot be placed. As laid down in **Kallu Vs. State of Haryana, AIR 2012 SC 3212, Ramesh Vs. State of U.P., 2010 (68) ACC 219 (SC) and Jarnail Singh Vs. State of Punjab, 2009 (67) ACC 668 (SC)**, it is not the rule of law that chance witness cannot be believed. The reason for a chance witness being present on the spot and his testimony requires close scrutiny and if the same is otherwise found reliable, his testimony cannot be discarded merely on the ground of his being a chance witness. Evidence of chance witness requires very cautious and close scrutiny. It has been stated by PW-4 that at the time of

occurrence, he was there to render help on request to informant side in collecting and loading of crops. From his statement, it is clear that he was very much acquainted with the accused persons and the deceased side being related by common ancestor. Therefore, it cannot be said that he was chance witness. It was day time and therefore, his presence at the time of occurrence on spot appears to be natural. He has narrated the whole incident giving full support to the prosecution version. So far as the law in respect of appreciation of evidence of chance witness is concerned, even if it is assumed that he was a chance witness, though he was certainly not, the evidence given by him is required to be scrutinized carefully. The testimony of PW-4 appears to be trustworthy and despite a lengthy cross-examination by the defence, nothing has come out, on the basis of which his testimony can be discredited.

49. Certain discrepancy, improvement and contradiction have been pointed out in the statement of PW-3 to discredit him and his presence. Learned counsel has submitted that the conduct of informant in not taking the dead body of his father Bhairon to the police station and leaving the same at the bank of Pathrai river, appears to be unnecessary and highly improbable. PW-3 has further stated that he accompanied the IO to the bank of Pathrai river where the inquest report was prepared. It appears strange that despite his presence, informant was not made a witness to the inquest report. This shows that he was not present when the inquest report was prepared. It finds support from the fact that the inquest of deceased Sripat was prepared subsequently and to that inquest, the informant has been a witness. This goes to show that the informant reached on spot later on and he was made witness of inquest report of Sripat only. On the contrary, he has stated that he was also a witness to the inquest of Bhairo. He has also stated that whatever was written at Patarai river, he put his thumb impression. This appears to be strange as PW-3 is not a witness of inquest of the dead body of Bhairo. He has been witness to the inquest of the dead body of Sripat. No question has been put in respect of inquest of the dead body of Sripat to which he has been witness. The witness was not called upon to see the inquest report of Bhairo nor he has been contradicted that the same does not bear his thumb impression. Notably, the fact of putting thumb impression has come in his statement prior to his statement that he was witness to inquest. He has not specifically stated that he put thumb impression on inquest report. Since, he was a witness to the inquest of the dead body of Sripat and the inquest proceeding took soon after, this possibility cannot be ruled out that he was misled and stated in the confusion of the inquest report of Sripat. The argument that his not being witness is indicative of the fact that he was not present at Pathrai river. There is no rule that the informant must be a witness of inquest proceeding and a lot depends upon the attending situation. Since, Badam Singh could not reach when inquest of dead body of Sripat was being conducted, the informant was made a witness thereto. There is further contradiction in the version of the witness as he has stated that after the preparation of inquest report of the body of the deceased Bhairon, he went back to police station, whereas, PW-6 SO Prem Pal has clearly stated that after leaving the Police Station along with other constables, he first conducted inquest of dead body of Bhairon at the bank of Pathrai river and, thereafter, he visited the place of occurrence where the dead body of the

deceased Sripat was lying and the inquest report was prepared there. He has not stated that from Pathrai river, he came back to the police station after completing the inquest report of the dead body of Bhairon as stated by PW-3. In our considered view, the statement of the informant as attacked by the defence, is not significant and on that basis, the complete testimony of the witness cannot be discarded.

50. Certain contradictions, discrepancies and improvements have been mentioned in the statements of fact witnesses. It has been pointed out that contrary to FIR version, it has been developed during evidence that Bhairo was sleeping on the field in the night and he joined the others for field on the way while returning from there in the morning. Witnesses have given varying statement on width of mend where the incident took place to show that the deceased side was not in the field of accused side. It has been also pointed out that the witnesses developed the theory of the assault by accused Ram Charan got missed in view of single injury to deceased Sripat which was found in the medical evidence and in such situation, it becomes doubtful whose blow hit Sripat. Again no blood on grass kept on bullock-cart to carry injured Bhairo was found, nor any blood stains were found on the clothes of PW-1 who happened to handle injured Bhairo whose injury was on head and bleeding to put him on the bullock-cart. There is also discrepancy in ocular account of PW-1 on the point of going to Pathrai river and returning back to Police Station with IO after preparation of inquest report, as PW-6 IO has stated that from there he straight way went to the place of occurrence.

51. On facts, we find that the contradiction, discrepancy or improvement mentioned above are not in respect of time, place, date and manner of the commission of offence. It needs to be mentioned that where own father and real brother is victim of deadly assault and the eyewitnesses were son and his wife and other witness is also related with both side, in such a situation, the witnesses are not supposed to be perfectionist to give the exact account of the incident and narrate every aspect related thereto in a uniform way. It needs to be mentioned that the contradiction and discrepancy have occurred in the statements of fact witnesses in their cross-examination. The witnesses are more or less illiterate and rustics and there is no surprise if there is little deviation and variation in their evidence. In fact, the same is indicative of their truthfulness. It has been remarked in **State of UP v Krishna Master, AIR 2010 SC 3071** that where a rustic witness was subjected to grueling cross examination for many days, inconsistencies are bound to occur in his evidence and they should not be blown out of proportion. In **State of UP v Chhoteylal, AIR 2011 SC 697 and Dimple Gupta (minor) v Rajiv Gupta, AIR 2008 SC 239**, it has been held that It is impossible for an illiterate villager or rustic lady to state with precision the chain of events as such witnesses do not have sense of accuracy of time etc. Expecting hyper technical calculation regarding dates and time of events from illiterate/rustic/villager witnesses is an insult to justice-oriented judicial system and detached from the realities of life. In the case of rustic lady eye witnesses, court should keep in mind her rural background and the scenario in which the incident had happened and should not appreciate her evidence from rational angle and discredit her otherwise truthful version on technical grounds.

52. Some sort of contradiction, improvement and embellishment is bound to occur in the statement of fact witnesses. As laid down in **State of UP v Naresh; 2011 (75) ACC 215) (SC**), in all criminal cases, normal discrepancies are bound to

occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

53. In **Gosu Jayarami Reddy v State of Andhra Pradesh; (2011) 3 SCC(Cri) 630,** it was observed that Courts need to be realistic in their expectation from the witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorized by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased and on what part of the body, there is some mix-up or confusion. Further, in **Parsu Ram Pandey v State of Bihar AIR 2004 SC 5068, Shivappa v State of Karnataka; AIR 2682, Ramchandaran v State of Kerala AIR 2011 SC 3581**, it was held that minor discrepancies or some improvements would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on which they give their depositions in Court. In **Mukesh v State for NCT of Delhi, AIR 2017 SC 2161 and Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 53,** it was reiterated that minor contradictions in the testimonies of the prosecution witness are bound to be there and in fact they go to support the truthfulness of the witnesses. In view of the above, we are of the view that there is nothing in the deposition of the eye-witnesses on the basis of which their evidence can be discarded. We do not find any material contradiction discrepancy or improvement in the statement of the witness and there is consistency so far as narration of the criminal incident.

54. It has been also submitted that PW-3 and PW-4 did not sustain any injury in the incident. PW-5 Sudama Devi has been said to be an injured witness, but, no visible injury has been found on her body in her medical examination. From the evidence on record, it is clear that deceased Sripat intervened during hot conversation and he was done away by the accused side. Before him, deceased Bhairo was given serious blow and he died subsequently. PW-3 sent his wife and she was also assaulted by another accused. In such situation, if PW-3 and PW-4 did not dare to intervene, it is no surprise and appears to be natural. It needs not to be over emphasized why the two witness did not sustain injury.

55. It has been submitted by the learned Senior Advocate for the accused appellants that witness Badam Singh is close relative of Vijay Singh as the grand mother of informant and his grand mother were the real sisters. Their intimacy is also established by the fact that the informant called him to load log of wheat crops lying in his filed. The house of Badam Singh as stated by him is far away from the house of Vijay Singh. Badam Singh himself had his own agricultural land of about 16 and half acres and he has admitted that he went to the field of Vijay Singh for the first time on

the date of incident. His statement on several points is contradictory. He cannot be relied and his testimony is liable to be discarded.

56. We find on record that PW-4 Badam Singh has stated that he also comes from the family of deceased and related to both side by a common ancestor. He has denied the suggestion given to him during cross-examination that he was not present there and did not see the incident. The witness has not been challenged from the side of defence on the point of his presence at the time of incident nor on the point of his being called for help in the agricultural work. He is related to both the side and this fact is not disputed between the parties. Therefore, it is no strange if the informant side called him for help. He has narrated the whole sequence of incident. Therefore, we find that the presence of the witness is natural. He has given vivid description of the incident in which the accused persons caused injury to the deceased persons. He has also stated that he scribed the written report on the dictation of Vijay Singh who after hearing the same, put his thumb impression. He has further stated that when Bhairo died at Patharai river, informant left the dead body with him and went to lodge FIR. There is consistency in his statement and he has been rightly relied upon by the learned trial court.

57. It has also been argued that PW-5 Smt. Sudama Devi is not an injured witness. No visible injury has been found in her medical report and the prosecution has not examined the doctor, who conducted her medical to establish that any injury was found on her back. On the contrary, the doctor has written that there was only complaint of pain and no visible injury was found on her back. At the time of lodging of FIR and also when the IO visited the spot, she was present and she described the incident to the IO. As such, in absence of any injury on her body, she does not remain a wholly reliable witness. The learned counsel to the accused-appellant has also submitted that the presence of PW-5 is highly doubtful as she has been alleged to be an eye-witness who also has sustained injury in the incident. It has been pointed out that from the perusal of medical report of Smt. Sudama PW-5, who was examined on 31.3.1996 at 4:00 pm, it appears that no visible injury on her back has been mentioned.

58. The prosecution version has been that accused Sahab Singh gave a lathi blow and she sustained injury on her back. PW-5 has stated that she sustained one blow of lathi. From the perusal of the impugned judgement, it is apparent that the learned trial court has avoided giving any concrete finding as to the injury sustained by Sudama Devi and the involvement of accused Sahab Singh, since he was found to be juvenile and his case was separated to be decided by Juvenile Justice Board. The question before us is whether PW-5 Sudama Devi is an injured witness and her statement should be given weight and appreciated accordingly or she should be considered to be a simple eye-witness?

59. We find on record that Sudama Devi went with informant to Police Station to lodge FIR and from there she was sent with a constable to hospital with injury letter (Ext. Ka-6) for treatment and medical examination. As stated by PW-2 HCP Sobaran Singh, in the injury letter no visible injury has been mentioned and she had herself stated contusion and complaint of pain on the back on the right scapula which has been entered in the GD report.

Although, no visible contusion was found by the doctor, yet in the medical report, complaint of pain has been mentioned. It has been suggested to PW-2 that Sudama Devi did not come to Police Station at the time of lodging of FIR and the FIR was ante timed. PW-6 IO has been also put question on this point and he has stated that her injury was not inspected and on the basis of her saying, the same was mentioned. He has also denied the suggestion that a fake injury letter was prepared and she had no injury nor she came to Police Station and the FIR was ante timed. We do not find any force in this suggestion as the GD shows that she reached the Police Station at the time of lodging of FIR which cannot be discarded on mere suggestion of the defence. Moreover, it has been stated by PW-4 Badam Singh that leaving him with the dead body at Pathrai river, she went with informant to Police Station and this fact has been further affirmed by her and informant in their on oath statement. It has been pointed out that during her cross-examination, she has stated that accused Sahab Singh hit her from the front, whereas, her injury has been alleged to be on her back which falsifies the version on this point. For two reasons, we do not find this argument acceptable. The defence should have asked this to the witness who could have explained it in a better way. In **Mahavir Singh v State of Haryana, (2014) 6 SCC 716,** it has been laid down that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be questioned. Secondly, a criminal assault is not a static act and a lot depends upon the response of the person assaulted who naturally, to escape, turns or moves. Therefore, the impact of assault on the body a lot depends upon the repercussion and body movement at the relevant time. So far as non examination of the doctor is concerned, it would hardly effect as the charge has been framed for the offence under section 323 IPC for causing simple hurt and for constituting that offence, it is not always necessary to require corroboration by medical report. Assuming for the sake of argument that Sudama Devi was not injured, nevertheless, her statement is acceptable like an eye-witness and there is nothing on record to show that she was not present at the scene of occurrence. Her presence with the entire family is probable and natural at the place of occurrence. PW-5 Sudama Devi has also corroborated the prosecution version on the point of date and time of occurrence. She is an injured witness and her presence during the incident is established because of the injury, she sustained. It is settled principle of law that the evidence of the injured witness is put at a very higher footing and without any substantial reason the statement of such injured witnesses cannot be disbelieved. As held in **State of Haryana v Krishan, AIR 2017 SC 3125, Mukesh v State for NCT of Delhi, AIR 2017 SC 2161, Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 537** and **Jarnail Singh v State of Punjab, 2009 (6) Supreme 526,** deposition of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies.

60. The learned counsel to the accused-appellant has challenged the credibility of fact witnesses on the basis of their being related witness and lack of any motive for the commission of offence. He has submitted that no independent witness

has been examined and all the three fact witnesses are relatives and highly interested witnesses and on their evidence no reliance could be placed by the learned trial court. It is admitted fact that PW-3 informant Vijay Singh is son of deceased Bhairo and brother of deceased Sripat, PW-5 Sudama Devi is his wife and PW-4 Badam Singh is related to both side through common ancestor. The law in respect of the testimony of related witnesses has been time and again reiterated by the Supreme Court that the testimony of related witnesses cannot be discarded merely on the basis of relationship. The only requirement is that the testimony of such witness should be scrutinized cautiously and carefully. In **Dalip Singh v State of Punjab (1954) SCR 145**, while rejecting the argument that witnesses who are close-relatives of the victim should not be relied upon, the Court held as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

61. In **Masalti v State of UP AIR 1965 SC 202**, the Supreme Court observed:

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice."

62. The Supreme Court has also taken the view that related witness does not necessarily mean or is equivalent to an interested witness. A witness may be called interested only when he or she derives some benefit from the result of litigation; a decree in a civil case, or in seeing a person punished in a criminal trial. In **Darya Singh v State of Punjab, AIR 1965 SC 328, followed by State of UP v Kishanpal (2008) 16 SCC 73**, the Court held as under:

"On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

63. Again, in **Appa v State of Gujarat, AIR 1988 SC 698,** the Court has observed:

"Experience reminds us that civilized people are generally insensitive when crime is committed even in their presence. They withdraw from both, victim and vigilant. They keep themselves away

from the Court. They take crime as a civil dispute. This kind of apathy of general public is indeed unfortunate but it is everywhere whether in village life or town and city. One cannot ignore this handicap. Evidence of witnesses has to be appreciated keeping in view such ground realities. Therefore, the Court instead of doubting the prosecution case where no independent witness has been examined must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any suggested by the accused."

64. Similar view has been expressed in **State of AP v S. Rayappa (2006) 4 SCC 512,** where the court observed that it is now almost a fashion that public is reluctant to appear and depose before the court especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court stated the principle as follows:

" ....by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

65. Further, in **Pulicherla Nagaraju @ Nagaraja Reddy v State of AP (2007) 1 SCC (Cri) 500**, the Supreme Court has held as under:

"In this case, we find that the trial court had rejected the evidence of PW1 and PW2 merely because they were interested witnesses being the brother and father of the deceased. But it is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise, found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted."

66. Similarly, in **Satbir Singh v State of UP, (2009) 13 SCC 790**, the Court has held as under:-

"It is now a well-settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon....."

67. In **M.C. Ali v State of Kerala AIR 2010 SC 1639, Himanshu v State (NCT of Delhis, (2011) 2 SCC 36, and Bhajan Singh v State of Haryana, (2011) 7 SCC 421,** it was laid down that evidence of a related witness can be relied upon provided it is trustworthy. Again, in Jayabalan v U.T. of Pondicherry, 2010(68)

ACC 308 (SC), the Supreme Court has made following observation:

"We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

68. **Dharnidhar v State of UP, (2010) 7 SCC 759** referred the above observation of **Jaya Balan (supra)** and held that there is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. Similar view has been taken in **Ram Bharosey v State of UP AIR 2010 SC 917**, where the Court stated that a close relative of the deceased does not become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice.

69. Again, in **Balraje @ Trimbak v State of Maharashtra, (2010) 6 SCC 673,** it has been held that when the eye-witnesses are stated to be interested and inimically deposed against the accused, it would not be proper to conclude that they would shield the real culprit and rope in innocent person. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyse the evidence of related witnesses and those witnesses who are inimical towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

70. Subsequently, in **Jalpat Rai v State of Haryana AIR 2011 SC 2719 and Waman v State of Maharashtra AIR 2011 SC 3327,** it was observed that the over-insistence on witnesses having no relation with the victims often results in criminal justice going away. The testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. This view has been reiterated in **Shyam Babu v State of UP, AIR 2012 SC 3311, Dhari & Others v State of UP, AIR 2013 SC 308 and Bhagwan Jagannath Markad (supra).** Recently, in Ganapathi v State of Tamilnadu, AIR 2018 SC 1635, the Court found no force in the argument that the conviction based on the evidence of family members in a murder trial is not sustainable. In **Rupinder Singh Sandhu v State of Punjab, (2018) 16 SCC 475**, it has been reiterated by the Supreme Court that relationship by itself will not render the witness untrustworthy. The Supreme Court laid down as below:

"Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false

*implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. ..... A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a g*rudg*e along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."*

71. Recently, in **Shio Shanker Dubey v State of Bihar AIR 2019 SC 2275,** the Supreme Court has reiterated the law as under:

"..... a close relative cannot be characterized as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

72. Thus, in view of aforementioned decisions of the Supreme Court, it is settled position of law that the statements of the interested witnesses can be safely relied upon by the court in support of the prosecution story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons who are closely related to the deceased and inimical with the accused. When their statements find corroboration by other evidence, expert evidence and the circumstances of the case clearly depict complete chain of evidence demonstrating the guilt of the accused, there is no reason as to why the statement of such interested witnesses cannot be relied upon by the Court. It would be hard to believe that the close relatives shall spare the real culprit and shall implicate innocent persons falsely having no enmity and who are close relatives also. There is no rule to the effect that the evidence of related or partisan witness is not acceptable. Association or relation does not render the evidence false and partisanship is no ground to reject the testimony given on oath. It is more so because PW-4 Badam Singh is related to both sides and it has been nowhere suggested by defence that he had bitter relation with accused side to give false evidence against them. All the three witnesses were present on spot at the time of occurrence and they have proved the prosecution case. On due scrutiny of their testimonies, we find that there is spontaneity in their evidence and they have proved the incident in a trustworthy way.

73. It has been also argued that no independent witness has been examined whereas, in the FIR itself, Bhagwan Das of same village was grazing his animals and he checked the accused persons and tried to save the deceased side. The wife of Bhairo who was grazing buffaloes because of which the whole incident took place, has

not been also examined. So far as non-examination of the independent witness and other witness is concerned, the option lies with the prosecution to examine as many witness as is required to be examined to prove the charge. **In Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 537 and Mukesh v State of NCT of Delhi, AIR 2017 SC 2161,** it has been held that if a witness examined in the court is otherwise found reliable and trustworthy, the fact sought to be proved by that witness need not be further proved through other witnesses though there may be other witnesses available who could have been examined but were not examined. Non-examination of independent witness is not a mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that the Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution. Moreover, it is not the quantity, rather quality of the evidence which is decisive in arriving at the right conclusion.

74. The next submission is about motive and it has been argued that the accused persons did not have motive or adequate motive sufficient to cause the death of own relatives. There is lack of any previous enmity between two sides or any quarrel in the near past. It is admitted between the parties that both the sides including witness Badam Singh are connected and related by two branches Pragi and Brisbhan who were sons of one Nathu. Accused persons are descendants of Brisbhan whereas, complaint/deceased side are descendants of Pragi through daughter Ramabai. Witness Badam Singh is connected through another daughter of Pragi whose name was Sita and this relationship is clear in view of the testimony of PW-3 and PW-4 and they have also stated that the relationship of both side was normal without any previous enmity. The defence case has been that some unknown person killed the deceased and the accused persons have been falsely implicated. It has been already discussed earlier that the defence theory that the witnesses did not see the criminal incident as they were not present there, is not convincing. It is a case of broad day light murder and the three eye-witnesses were none other but relatives of deceased persons and well acquainted with both sides. All the three witnesses were present in the field for collecting and loading the wheat log on bullock-cart. For the same reason, witness Badam was also present who was called by informant side to help in collecting and loading the wheat log on bullock-cart. Thus, the prosecution case is based on direct evidence and the settled law is that motive goes to the back seat in such cases.

75. In a number of decisions, like **Abu Thakir v State AIR 2010 SC 2119, State of UP v Nawab Singh AIR 2010 SC 3638, Bipin Kumar Mondal v State of West Bengal 2005 SCC (Criminal) 33, Shivraj Bapuray Jadhav v State of Karnataka (2003) 6 SCC 392, Thaman Kumar v State of Union Territory of Chandigarh (2003) 6 SCC 380 and State of HP v Jeet Singh, (1999) 4 SCC 370,** it has been repeatedly held by the Supreme Court that motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence by a particular person. In a case of direct evidence the element of motive does not

play such an important role so as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubt raised in this regard. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused.

76. We find that the Supreme Court has reiterated the aforesaid view in various decisions, such as **Gopi Ram v St. Of UP, 2006 (55) ACC 673 SC, R.R. Reddy v State of AP, AIR 2006 SC 1656, Sucha Singh v State of Punjab; AIR 2003 SC 1471, State of Rajasthan v Arjun Singh AIR 2011 SC 3380 and Varun Chaudhry v State of Rajasthan AIR 2011 SC 72. Recently, in Saddik v State of Gujarat, (2016) 10 SCC 663**, it has been held that the prosecution case could not be denied on the ground of alleged absence or insufficiency of motive. Motive is insignificant in cases of direct evidence of eyewitnesses. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable, truthful and acceptable evidence is available on record sufficient to establish the guilty of accused persons.

77. We are of the view that when there is sufficient direct evidence regarding the commission of offence, the question of motive is insignificant. Motive is a double edged weapon and the key question for consideration in cases based on direct evidence remains whether the prosecution has convincingly and satisfactorily established the guilt of all or any of the accused beyond reasonable doubt by adducing reliable and cogent evidence. As such, the proof of the existence of a motive is not necessary for a conviction for any offence. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance.

78. It has been pointed out in the course of argument that the statement of PW-5 Sudama was not recorded by IO on the date of incident or soon after, the disclosure statement of accused persons was not reduced in writing, the injury letter of Sudama Devi was prepared without inspecting the injury, there is no mention in CD by what means the dead bodies were sent for post-mortem and the statement of Badam Singh was not recorded at Patharai river even though he was present there. In our view, the aforesaid omission is neither material nor substantial nor they anyway caused prejudice to the accused persons. Maximum, they relate to lapse in investigation and that too is not significant nor they render any advantage to the defence. In **Khem Ram v State of Himachal Pradesh, (2018) 1 SCC 202, State of Karnataka v Suvarnamma, (2015) 1 SCC 323 Hema v State, 2013 (81) ACC 1 (SC)** and **Leela Ram v State of Haryana, (1999) 9 SCC 52510**, it has been laid down that any irregularity or deficiency in investigation by IO need not necessarily lead to rejection of the case of prosecution when it is otherwise proved. The only requirement is use of extra caution in evaluation of evidence. A defective investigation cannot be fatal to prosecution where ocular testimony is found credible and cogent. It can also be pointed out that defect in investigation, if any, cannot give any advantage to the defence unless such defect goes to the very

root of the prosecution version. In **Rupinder Singh Sandhu vs State of Punjab, (2018) 16 SCC 475,** it has been remarked by the supreme court that even if there is lapse in investigation, the same cannot be used to give advantage to accused person in cases where prosecution has led credible evidence, as it is difficult to determine that the investigative defect occurred due to general inefficiency of system or deliberated to shield the accused. In our considered view, the defect pointed out on behalf of the defence appears to be very minor and insignificant in nature and no force can be attached to that part of the argument.

79. It has also been argued that if the prosecution case is believed, in that case also it is established that there was a sudden quarrel between both sides as Heera Bai and Bhairon were insisting to continue their cattle grazing in the filed of accused. Only a single blow was given by accused Achchhey Lal to Bhairon and to Sripat by accused Mahendra. There is no repetition of blow. The blow of accused Ram Charan missed and his involvement is doubtful as the testimony of witnesses is contradictory to the FIR version and is a result of improvement made by them during trial. The other accused persons namely Amar Singh, Siyaram and Ram Singh did not participate in the incident of assault by making any overt act. The allegation of exhortation has been attributed to all the seven accused persons in a form of chorus *(maar do salo ko bachne na paye)* is highly improbable in the ordinary course. It is not possible for all the seven accused persons to utter the same words simultaneously and, therefore, the role of exhortation attributed to all the accused-appellants cannot be believed. The formation of unlawful assembly is not proved and fact of common object is highly doubtful as the presence of four accused persons were shown on the spot without any overt act and, therefore, their conviction is not sustainable under law.

80. It is clear from the statement of the fact witnesses and medical evidence that two persons have died in the criminal incident by sustaining one injury each. Bhairo was killed by the injury caused by accused Achchhey Lal by his axe, whereas, deceased Sripat was killed by injury caused by accused Mahendra by his spade. It has also come in evidence that accused Ram Charan also assaulted Sripat by his spade but the same got missed. At this stage, we find it necessary to briefly discuss the law with regards to vicarious criminal liability provided under section 149 IPC.

81. Section 149 IPC reads as follows:

*"**Section 149 IPC**:- Every member of unlawful assembly guilty of offence committed in prosecution of common object.--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."*

82. The essential ingredients of Section 149 IPC is required to be identified keeping in view section 141 IPC. The ingredients are (I) there must be an unlawful assembly of five or more persons, (II) the assembly must have common object to commit crime as provided under section 141 IPC, (III) the offence must have been committed by all or any of the member of

such unlawful assembly, (IV) such offence must have been committed in prosecution of the common object of that assembly, or (V) the offence must be such as the member of that assembly knew it to be likely to be committed. The prosecution is required to prove all the ingredients for applicability of Section 149.

83. It is noteworthy that section 34 IPC also deals with vicarious liability and two or more persons committing offence with common intention to commit same can be held liable with the help of section 34. Explaining the difference between common object with common intention, the Supreme Court, in **Chittarmal v State of Rajasthan, AIR 2003 SC** 796, expressed the following view:

"It is well settled that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction between common intention and common object is that common intention denotes action in concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre concert. Though there is a substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the fact of each case whether the charge under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does not involve a common intention, then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all."

84. Before holding a person guilty of an offence with the help of section 149 IPC, a definite conclusion is required to be arrived at on the basis of evidence on record that the offence was committed by an unlawful assembly to which the accused-appellants were members and the offence was committed for the prosecution of common object of such unlawful assembly. In **Masalti v State of UP, AIR 1965 SC 202**, it was observed as follows:

"what has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 I.P.C. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful

assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly."

85. In **Tarlok Singh v State of Punjab, AIR 1974 SC 1797,** the Supreme Court on appreciation of evidence on record held that the prosecution could not establish that except one accused namely Tarlok Singh, other accused have at any time entertain an intention to commit murder and they cannot, therefore, be held liable under Sections 307/149 IPC. It was found that statement of prosecution witness was an omnibus statement. The firing appears to have been sudden and the other accused could not have acted in concert in furtherance of that design, or could not have known that accused would fire.

86. In **Musa Khan vs. State of Maharashtra 1977 (1) SCC 733,** this Court observed:

".....Thus a court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages."

87. In **Lalji v State of UP, 1989 (1) SCC 437,** the Sopreme Court held:

"Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deducted from the facts and circumstances of each case."

88. In **Allauddin Mian vs. State of Bihar, 1989 (3) SCC 5,** the Court remarked as under:-

".....Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed."

89. The Supreme Court made it clear that since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish

members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. The Court said:

"There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same."

90. It was further laid down:

"It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC."

91. In **Sherey v State of UP,1991 Supp (2) SCC 437**, the Court held:

"But when there is a general allegation against a large number of persons the Court naturally hesitates to convict all of them on such vague evidence. Therefore we have to find some reasonable circumstance which lends assurance. From that point of view it is safe only to convict the above mentioned nine accused whose presence is not only consistently mentioned from the stage of FIR but also to whom overt acts are attributed."

92. The Supreme Court in **Ranbir Yadav v State of Bihar, 1995 (4) SCC 392** highlighted that where there is party or group rivalry, there is a tendency to include the innocent with the guilty and it is extremely difficult for the court to guard against such a danger. It was pointed out that the only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the court.

93. In **State of UP v Dan Singh, 1997 (3) SCC 747**, it was laid down that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. The court said:

"While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicarious criminal liability under section149. "

94. The above position of law was further elaborated and affirmed in subsequent decisions such as **Gangadhar Behara v State of Orissa, 2002 (8) SCC 381 and State of Maharashtra v Kashirao, AIR 2003 SC 3901.** In later, it was observed:

"It cannot be laid down as a general proposition of law that unless an

overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141."

It was observed:

"The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly."

95. Explaining the difference between section 34 and 149 IPC, the Court pointed out that 'common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The Court observed:

"The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident."

96. The Court also remarked that it is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. The Court, therefore, opined:

"It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful

intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co instanti."

It was further remarked:

"Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section."

97. Laying down that the purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. Referring **Chikkarange Gowda v State of Mysore, AIR 1956 SC 731,** the Supreme Court said:

"An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object."

98. It was further held that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act? While overt act and active participation may indicate common intention of the person perpetrating the crime under Section 34

IPC, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149. It was held that no hard and fast rule of universal application can be invoked. In the facts of a case, the essential ingredients of Section 149, however, have to be amply established.

99. Similar view was expressed in **Rajendra Shantaram Todankar vs. State of Maharashtra (2003) 2 SCC 257,** and the Court once again explained Section 149 and held as under:

"A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 -- either clause -- is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act."

100. In **Bhagwan Singh v State of MP, AIR 2002 SC 1836 and Dani Singh v State of Bihar 2005 SCC (Cri.) 127**, it has been laid down that a person can be convicted for his vicariously if he is found to be a member of the unlawful assembly sharing the common object in spite of the fact whether he had actually participated in the commission of the offence or not. In **Bharosi v State of MP, AIR 2002 SC 3299,** it was said that only one accused caused fatal blow the other accused could not be intended to kill the deceased and Section 149 cannot be invoked. In **Nagarjit Ahir vs. State of Bihar 2005 (10 SCC 369**, this Court applied rule of caution and in the facts and circumstances of the case held that it may be safe to convict only those persons against whom overt act is alleged with the aid of Section 149, IPC lest some innocent spectators may get involved. In **Maranadu vs. State 2008 (16) SCC 529)**, the Court for determination of `common object' of unlawful assembly stated the legal position thus:

".....For determination of the common object of the unlawful assembly , the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be

translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instanti."

101. It was then held:

"It is well-known that for determination of common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly before and at the time of attack is of relevant consideration. At a particular stage of the incident, what is object of the unlawful assembly is a question of fact and that has to be determined keeping in view the nature of the assembly, the arms carried by the members and the behaviour of the members at or near the scene of incident."

102. Considering the above, it was found in the facts of that case that nineteen persons were accused of coming to the scene of occurrence armed with deadly weapons sharing the common object of causing grievous hurt to the victim party. On a closer scrutiny of evidence, while applying the rule of caution, it was held by the Apex Court that only those accused persons would be convicted under Section 302 readwith Section 149 IPC whose presence as members of the party of assailants is consistently mentioned and their overt acts in chasing and assaulting deceased was clearly proved. Giving benefit of doubt to the remaining, they were acquitted of the offence under Section 302 read with Section 149 IPC, since evidence against them in chasing and assaulting the deceased was not consistent.

103. In **Pandurang Chandrakant Mhatre v State of Maharashtra, 2009 (10) SCC 773,** the Supreme Court held that the legal position laid down in Masalti (supra) admits of no doubt and has been followed time and again. However, where a large number of persons are alleged to have participated in the crime and they are sought to be brought to book with the aid of Section 149 IPC, the Court has to apply rule of caution taking into consideration particular facts situation to convict only those accused whose presence was clearly established and overt acts were proved. In **Raj Nath v State of UP, 2009 (1) Supreme 370,** the SC observed as follows:

"Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 141, if it can be held that tge offence was such as the members knew was likely to be committed and this is what is required in the second part of the section."

104. In **Bhupendra Singh v State of UP, AIR 2009 SC 3265,** it was said that

the word 'knew' used in second part of section 149 IPC implies something more than a mere possibility and it also does not mean 'might have been known.' Positive knowledge of the common object is necessary. The emphasis is on common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of section 149.

105. In **Mohammed Ankoos v Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, 2010 (1) SCC 94**, seventy seven accused persons were charged to the effect that they were members of the unlawful assembly and in prosecution of the common object of such assembly, to commit the murder of five persons, committed the offence of rioting by pouring kerosene and thereby committed an offence punishable under Section 148 IPC. All the accused were charged of committing murder by intentionally causing death and thereby committed an offence punishable under Section 302 IPC. In this case, the trial court found that neither the offence under Section 148 IPC nor under Section 302 IPC was established against the accused beyond reasonable doubt. The High Court though affirmed the findings of the trial court about the acquittal of the appellants under Section 148 IPC but convicted them for the offence punishable under Section 302 read with Section 149 IPC. The Supreme Court took the view that Section 149 IPC creates constructive liability and a person who is a member of the unlawful assembly is made guilty of the offence committed by another, although he may have had no intention to commit that offence and had done no overt act, except his presence in the assembly and sharing the common object of that assembly. But, if it is found the accused has been acquitted under Section 148 IPC, the recourse to Section 149 IPC cannot be taken and it is difficult to sustain conviction with the help of Section 149 IPC.

106. In **Kuldip Yadav v State of Bihar, AIR 2011 SC 1736**, it was held that Section 149 makes it clear that before convicting the accused with the aid of this provision, the court must give clear finding regarding nature of common object and that the object was unlawful. In absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove "common object". The Court must give clear finding regarding nature of common object and that the object was unlawful. Merely because the accused persons were armed in absence of any overt act would not be sufficient to prove common object. It is noteworthy that it was held in **Raj Nath v State of UP, AIR 2009 SC 1422** also that in absence overt act, mere presence will not be sufficient to hold anyone guilty by applying section 149.

107. In a subsequent decision in **Shaji v State of Kerala, 2011 (5) SCC 423,** considering the above rulings, it was held that in order to attract Section 149 IPC, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. This

view was further affirmed in **Ramachandran and others vs. State of Kerala, 2011 (9) SCC 257.**

108. In **State of Maharashtra v Ramlal Devappa Rathod, (2015) 15 SCC 77**, the Court reiterated that section 149 makes both the categories of persons, those who committed the offence as also those who were members of the same assembly liable for the offence under section 149 IPC, if other requirements of the section are satisfied. Therefore, *'if an offence is committed by any person of unlawful assembly, which the members of that assembly knew to be likely to be committed, every member of that assembly is guilty of the offence.'* Thus, the law is clear that membership of unlawful assembly is sufficient to hold such members vicariously liable.

109. In **Vijay Pandurang Thakre v State of Maharashtra, AIR 2017 SC 897,** the Supreme Court laying emphasis that it is on the prosecution to prove constitution of unlawful assembly by the accused persons, made following observation:

"The expression 'in prosecution of the common object' occurring in this Section postulates that the act must be one which have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. This expression is to be strictly construed as equivalent to in order to attain common object. It must be immediately connected with common object by virtue of nature object. In the instant case, even the evidence is not laid on this aspect. As pointed out above, the courts below were influenced by the fact that one of the injuries on the person of Ashok was on his head which became the cause of death and from this, common object is inferred."

110. In **Vinubhai Ranchhodbhai Patel v Rajivbhai Dudabhai Patel, AIR 2018 SC 2472**, the Supreme Court has discussed in detail the law of vicarious liability under section 149 IPC. The Court said:

" For mulcting liability on the members of unlawful assembly under section 149, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence by the members of the assembly is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his death by gunshot injuries, the fact that one or two of the members of the assembly did not in fact fire their weapons does not mean that they did not have the knowledge of the fact that the offence of murder is likely to be committed."

The supreme court further said:

"The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of the overt acts committed by such individual members of the assembly, in our opinion is impermissible."

111. In **State of MP v Killu @ Kailash, 2020 (1) Crimes 47 (SC)**, five accused persons entered into the house of complainant side in the night, each separately armed with deadly weapon, two with sharp cutting weapon, one having ballam and two having lathi. The death of deceased was caused due to two injuries of

sharp cutting weapon. There was no injury caused by lathi and ballam. The Supreme Court said that this would not absolve the other accused from the criminal liability who did not cause any injury. The Court remarked:

"For the application of the principles of vicarious liability under section 149 IPC what is material to establish is that the persons concerned were members of an unlawful assembly, the common object of which was to commit a particular crime. The fact that five persons were separately armed and had entered the house of the deceased during night time is clearly indicative that each one of them was a member of that unlawful assembly, the object of which was to commit the crime.... ."

112. Further, in **State of UP v Ravindra @ Babloo, 2020 (1) Crimes 57 (SC)**, on similar facts based on mob attack, the Supreme Court laid down as follows:

"It cannot be laid down as a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. ... . The "common object" of an assembly is to be ascertained from the acts and language of the members comprising it, and from consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by members of the assembly. What the common object of the unlawful assembly is at a particular stage of incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident."

113. On the basis of above discussion, we find that, in order to fasten criminal liability with the help of section 149 IPC, the courts are required to take into consideration the facts and circumstances of each individual case. Where there is no doubt with regards to constitution of unlawful assembly and an offence is committed by it in prosecution of common object of the assembly, every member is liable for the offence irrespective of any role played or not. For instance, five or more persons came prepared forming unlawful assembly, armed or unarmed, entered into the premises of victim and committed offence. Another case may be of mob attack where it is not possible to even determine or identify the role of individual accused. Then, there may be a situation where the assembly may not be unlawful at the very inception and it becomes instantly and subsequently unlawful. In such situation, evidence as to knowledge of unlawful object and some overt act towards accomplishment, in addition to proof of unlawful assembly, is decisive for determination of guilt with the help of section 149. Proof of common object is required for conviction with the help of Section 149 IPC. The word 'knew' used in the section means that there should be positive knowledge about the common object. Mere presence in an unlawful assembly cannot render a person liable for an offence committed by that assembly unless there was a common object. The common object has to be definitely found and cannot be a matter of conjuncture or inference. Mere presence in assembly is not sufficient unless coupled with some overt act signifying sharing the common object. The meaning of prosecution of common object is attainment of common object; and 'object' means purpose or design and in order to make it common, it must be shared by all. Joining together with common object to commit the crime and knowledge

that others are going to commit the crime is to be proved and established by the prosecution.

114. In view of the aforesaid discussion in respect of vicarious criminal liability, it has to be seen what evidence is on record on the basis of which it can be determined whether the accused appellants constituted an unlawful assembly to commit crime in prosecution of common object of the unlawful assembly and committed murder of the two deceased persons and inflicted simple hurt on the person of Smt. Sudama Devi. From the perusal of FIR and statements of the fact witnesses, it is apparent that both the sides were engaged in cutting and loading crops in their adjoining fields. There was no dispute or quarrel taking place earlier or before the incident and their relationship was normal. Both the sides are related to each other by common ancestor. It is also apparent that the accused side had not come prepared with deadly weapons in the field and they had axe, spade and sickles which are agricultural tools unless used as weapon. Carrying lathi (bamboo stick) is part of village life while involved in agricultural activities. Therefore, the presence of the accused-appellants on the field cannot be termed as unlawful assembly. The mother of the informant was grazing buffaloes on the mend of the fields of both sides and this gave rise to verbal quarrel as the accused persons objected on grazing the animal in their side. Accused persons were in seven in number and similar was the strength of the informant side. All the accused persons have been assigned the role of exhortation to kill. Needless to point out that exhortation is considered to be a very week evidence, unless coupled with some overt act, to show involvement in commission of crime.

115. Out of seven accused persons, accused Ram Singh and Amar Singh have been assigned lathi, accused Siyaram with axe and their role is only of exhortation. There is no injury of lathi to the deceased or anybody else except Sudama Devi and the evidence is that she was given a lathi blow on her back by accused Sahab Singh. Accused Siyaram also did nothing. Thus, nothing was done by accused Ram Singh, Amar Singh and Siyaram which can establish that they all constituted an unlawful assembly and shared the common object to commit crime. They did not chaise or checked anyone, nor they assisted the other accused towards commission of crime. It was an open place and they were there for cutting crops. There was no premeditated and pre-designed act. They belonged to the same family and their being together will not necessarily lead to a conclusion that they formed unlawful assembly together to commit crime. This finds further support from the fact that the deceased persons have sustained one injury each and none of these three have caused that injury. This also leads to definite conclusion that they could not know or realize that any such assault was likely to be caused to deceased persons by other accused. Hence, it is not proved that they constituted unlawful assembly and when the offence was committed, any such unlawful assembly was in existence.

116. We find added support to take the above view on the basis of judgement in **Nagarjit Ahir v State of Bihar, (2005) 10 SCC 369**, where it was held that it may be safe to convict only those persons against whom overt act is alleged, lest some innocent spectator may get involved. In **Bunnilal v State of Bihar, AIR 2006 SC 2531** where only one single blow by one accused which resulted in the death of

victim and intention of other accused to cause death was not proved nor any blow was found of the weapons other accused persons were having and there was no proof of knowledge that murder is likely to be committed, it was held that such accused persons cannot be held vicariously guilty for the offence of murder. In Siyaram v State of MP, (2009) 2 Crimes 166, it has been held that mere presence in an unlawful assembly cannot render a person liable unless the common object of the assembly is proved and conviction with the help of section 149 IPC would not be sustainable without such proof. In **Vishnu v State of Rajasthan (2009) 10 SCC 773,** the Supreme Court cautioned the courts to ascertain whether every member of an unlawful assembly knew the offence likely to be committed in prosecution of the common object in order to convict by applying section 149 IPC. The court should guard against danger of convicting innocent persons and for that purpose scrutinize record carefully and if doubt arises, should give benefit thereof to the accused. In **Pandurang Chandrkant Mahatre v State of Maharashtra, (2009) 10 SCC 773,** the Supreme Court held that where a large number of persons are alleged to have participated in commission of the crime and are sought to be convicted under section 149 IPC, the court needs to consider all the fact situation and convict only those accused whose presence was clearly established and overt act was proved. In **Debashish v State of WB (2010) 9 SCC 111**, it was reiterated that mere presence of the persons at the scene of offence, itself would not be enough for conviction unless it is established that each one of them was part of the unlawful assembly and committed the offence in prosecution of the common object of that assembly. It has been held in **Vijay Pandurang Thakre (supra)** that mere presence will not imply that the accused shared common object and formed unlawful assembly. Even if unlawful assembly is presumed, it is necessary to prove that the alleged crime was the common object. The learned trial court has failed to appreciate these facts and the approach adopted by him in holding these three accused persons guilty with the help of section 149 was not correct and reasonable. As such, the impugned conviction and sentence of accused Ram Singh, Amar Singh and Siyaram for the aforesaid offences is patently perverse and not sustainable under law.

117. The discussion aforesaid goes to establish that the prosecution version of constitution of unlawful assembly by accused persons does not stand and therefore, the criminal liability of remaining accused persons has to be determined keeping in view their individual role in the commission of offence. As per prosecution evidence, deceased Bhairo was assaulted by accused Achhey Lal by his axe who died of that injury while taking to Police Station within an hour. The FIR shows that it was alleged that accused Ram Charan and Mahendra hit Sripat by spade who sustained injury and died on spot. The medical evidence shows that deceased Sripat sustained one injury ranging from face to head. In the evidence, the prosecution witnesses have stated that the assault of accused Ram Charan got missed whereupon, accused Mahendra gave the fatal blow by his spade. The learned Senior Advocate has submitted it to be a huge improvement by the eye-witnesses finding one injury in the post-mortem report to the deceased Sripat. We find that positive evidence has been adduced that deceased Sripat sustained the injury caused by

accused Mahendra Singh. A close scrutiny of the statement of PW-3 informant shows that he has not stated this fact to the IO even, nor any of the fact witnesses have stated as such. On the contrary, they have stated to IO that Ram Charan and Mahendra Singh, both hit Sripat by their spade. This improvement has been made only during trial that assault of accused Ram Charan got missed. In **Alamgir v State of NCT, Delhi, (2003) 1 SCC 21,** it has been laid down that if a relevant fact is not mentioned in the statement of the witness recorded u/s 161 CrPC but the same has been stated by the witness before the court as prosecution witness, then that would not be a ground for rejecting the evidence if his evidence is otherwise credit worthy and acceptable. Omission on the part of the police officer would not take away nature and character of the evidence. There is no doubt about the legal principle that the statement given to IO under section 161 CrPC can be used to contradict the testimony, but ultimately, what is stated before the court on oath during trial prevails. Now the question is what would be impact of this improvement? Certainly, this is a material contradiction, discrepancy and improvement with regards to the role of accused Ram Charan and it creates doubt about his involvement in the crime. Virtually, the fact witnesses have themselves absolved accused Ram Charan from any criminal liability in the incident. As such, accused Ram Charan should have been given benefit of doubt by the learned trial court and to that extent, the impugned judgement is not sustainable under law.

118. Now coming to the case of accused-appellant Achchhey lal who gave the fatal blow to deceased Bhairo and accused Mahendra Singh who caused injury to Sripat who instantly died out of that injury. Three eye-witnesses have stated that they caused injury and the same is supported by medical evidence. There is consistency in the statements of the witnesses and nothing has come out so as to disbelieve or discard their testimony. Their presence is natural at the time of incident and they are trustworthy. The axe and spade used for the commission of offence have been recovered on their pointing and in forensic examination, human blood has been found on them. Both the accused persons gave fatal blow which resulted in death of the two deceased persons. So far as contradiction, discrepancies and improvement in the statement of witnesses is concerned, they need not be over-emphasized in view of settled law that normal contradictions appearing in the testimony of a witness do not destroy or weaken the credibility of a case but material contradictions do so. In **Sucha Singh v State of Punjab, (2003) 7 SCC 643** there are minor inconsistencies in the statements of witnesses and FIR in regard to number of blows inflicted and failure to state who injured whom, would by itself not make the testimony of the witnesses unreliable. This, on the contrary, shows that the witnesses were not tutored and they gave no parrot like stereotyped evidence. In **Maqsoodan v State of UP, (1983) 1 SCC 218** where the witnesses give consistent version of the incident, it has been held by the Supreme Court that the consistent testimony of the witnesses should be held credible.

119. It is also clear that the FIR was lodged without any delay. The injuries found on the body of the deceased persons namely Bhairo and Sripat find support from the medical evidence and from the post-mortem report by which the date and time of causing the injuries is very much

corroborated. Medical evidence clearly indicates that because of head injury both must have died immediately. The impact of the injury was such that brain was coming out from the head and it shows that the blow was such that it could in all probability cause instant death of the deceased persons. The place of occurrence has been fully established. There is no substantial contradiction or discrepancies in the evidence of the prosecution and some of the minor contradiction and discrepancies which have been discussed above does not effect the reliability of the witnesses and that also shows that they are not tutored. Thus, the witnesses examined by prosecution are natural, credible and trustworthy, so as to prove guilt beyond shadow of doubt against accused Achchhey Lal and Mahendra Singh.

120. The learned Senior Advocate for the accused-appellants has submitted that the case is covered by section 304 IPC simpliciter as per definition of culpable homicide and also, the facts of the case attract Explanation IV of section 300 IPC. As such, the conviction and sentence of accused persons for the offence under section 302 is illegal and the offence, if any is covered maximum under section 304 Part I IPC. Supporting his argument, the learned Senior Counsel has pointed out that only single injury has been caused in causing death and none of the appellants repeated the blow. There was no enmity nor any premeditation between two sides and they are related by common ancestor. Moreover, there was verbal altercation on account of buffaloes grazing in the field and upon the heat of sudden quarrel, the incident took place.

121. It has also been submitted that even against assailant Achchey Lal and Mahendra, an offence under Section 302 IPC is not made out as it is case of single blow in a sudden quarrel after being provoked by Heera Bai who was being backed in the quarrel by Bhairon and Sripat at the time of incident. The place of occurrence is situated in the field, which belonged to accused-appellants where the cattle of complainant side were grazing and it was objected from the side of accused persons. On which they insisted and claimed right to graze their cattle there. If considered the over all facts and circumstances, the offence under Section 304 part 2 IPC can only be attracted and in no case an offence under Section 302 IPC could be made out.

122. The learned Senior Advocate has referred the judgement in Criminal Appeal No. 5887 of 2010 **(Haider Ali and others v State of UP)**, decided on 6.5.2019 where a Division Bench of this Court citing a numbers of judgement of the Supreme Court, converted the conviction under Section 302 IPC into Section 304 part 2 IPC giving advantage of Exception 4 of Section 300 IPC. The submission of the learned counsel to the accused-appellants is that in such situation where no role and act has been assigned, conviction of other accused persons is arbitrary and illegal. It has also been argued that the admitted fact is that the field of both sides is adjoining and both the sides were involved in agricultural activities in their respective fields. Only mother of the informant was grazing buffaloes on the mend upon which the incident allegedly took place. There was no previous enmity and the accused persons cannot be said to have come prepared to commit offence. The incident took place suddenly and there was no occasion for the accused persons to constitute unlawful assembly with the common object to commit the offence.

123. Section 299 IPC defines culpable homicide and section 300 of the Indian

Penal Code defines murder and culpable homicide not amounting to murder as below:

"299. Culpable homicide *- Whoever causes death by doing an act with intention of causing death, or with the intention of causing such bodily injury as islikely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

"300. Murder.--*Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--*

2ndly. - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

3rdly. - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

4thly. - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1.--When culpable homicide is not murder.--Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:--

First. - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly. - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. - That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Exception 2.--Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.--Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.--Culpable homicide is not murder if it is committed without

premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Exception 5.--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

124. Several times, the courts in India have outlined the distinction between the two offences and the thrust of the distinction has been based on the the degree of probability of the consequence of the criminal act. Where death is the most probable result and is caused with intention to cause death, the offence is murder, and where it is probable result, it is culpable homicide. The murder may become culpable homicide not amounting to murder if circumstances exist to bring the murder within any of the five exceptions to section 300 IPC. Academically, the distinction appears to be easy, but, when comes to factual matrix and is required to be determined on the basis of objective assessment of fact and evidence, the task is hard and a lot depends upon the sixth sense of the presiding judge who has been asked to give a decision.

125. In **State of AP vs Rayavarapu Punnayya, AIR 1977 SC 45,** the Supreme Court made following observation:

" .... whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of section 300, Penal Code is reached. This is the stage at which the court should determine whether the facts proved by the prosecution brings the case within the ambit of any of the four clauses of the definition of "murder"contained in section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder" punishable under the first or the second part of section 304, depending, respectively,on whether the second or the third clause of section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in section 300, the offence would still be "culpable homicide not amounting to murder," punishable under the first part of section 304, Penal Code."

It was further observed:

"In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree".

This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree."

126. The above observation has been referred in subsequent decisions and the same holds the field as a guideline in order to appreciate and understand the distinguishing features of the offence of 'murder,' 'culpable homicide' and 'culpable homicide not amounting to murder.' In every murder there is culpable homicide and on existence of certain facts as mentioned in five exceptions to section 300 IPC, a murder may become culpable homicide not amounting to murder, and the difference between the two is the degree of probability and certainty. Where death is the likely result, it is culpable homicide and where it is most obvious result, the offence is murder and if such murder is covered by any of the exceptions to section 300, the same is punishable under section 304 and not under section 302 of the Indian Penal Code.

127. In **Pappu vs State of MP, (2006) 7 SCC 391,** the Supreme Court exhaustively dealt with the parameters of Exception 4 to section 300 and held that the same can be invoked if death is caused 1. without premeditation; 2. in a sudden fight; 3. without the offender having taken undue advantage or acting in a cruel or unusual manner; and 4. the fight must have been with the person killed. It was remarked,

"It cannot be laid down as a rule of universal application that whenever one blow is given, section 302 ipc is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body on which it was given and several such relevant factors."

128. In **Jagriti Devi vs State of HP, (2009) 14 SCC 771**, it was held that the expression 'intention' and 'knowledge' postulate the existence of a positive mental attitude. It was further held that when and if there is intent and knowledge, then the same would be a case under first part of section 304 and if it is only a case of knowledge and not intention to cause death by bodily injury, then the same would be a case of second part of section 304.

129. In **Chenda alias Chanda Ram vs State of Chhatisgarh, (2013) 12 SCC 10,** pointing out that 'culpability depends on the knowledge, motive and the manner of the act of the accused,' the Supreme Court referring to **Rayavarapu Punnayya (supra**), converted the conviction of accused from section 302 IPC to section 304 IPC taking into consideration the following circumstances:

*"There is no evidence or previous enmity. The incident has taken place on the spur of the moment. There is no evidence regarding the intention behind the fatal consequence of the blow. There was only one blow. The accused is young. There was no premeditation. The evolution of the incident would show that it was in the midst of a sudden fight. There is no criminal background or adverse history of the appellant. It was a trivial quarrel among the villagers on account of a simple issue. The fatal blow was in the course of a scuffle between two persons. There has been no other act of cruelty or unusual conduct on the part of the appellant. The deceased was involved in the scuffle in the presence of hi*s wife and he had been

actually been called upon by her to the spot.... ."

130. In **Lavghanbha Devjibhai Vasava vs State of Gujarat, (2018) 4 SCC 329,** the Supreme Court summarized the parameters to be taken into consideration while deciding the question as to whether a case falls under section 302 or section 304 IPC as follows:

"(a) the circumstance in which the incident took place; (b) the nature of weapon used; (c) whether the weapon was carried or taken from spot; (d) whether the assault was aimed on vital part of body; (e) the amount of the force used; (f) whether the deceased participated in the sudden fight; (g) whether there was any previous enmity; (h) whether there was any sudden provocation; (I) whether the attack was in the heat of passion; and (whether the person inflicting injury took any undue advantage or acted in the cruel or unusual manner.)"

131. On the basis of above discussion, to put it in simple terms, as outlined in **Rayavarapu Punnayya (supra),** it is clear that the Indian Penal Code recognizes three degrees of culpable homicide namely, (1) culpable homicide of the first degree, a gravest form of culpable homicide which is defined under section 300 as murder, (2) culpable homicide of the second degree, a lower or lessor form of homicide not amounting to murder as defined in section 299, punishable under the first part of section 304 and (3) culpable homicide of the third degree, a lowest type of culpable homicide, punishable under the second part of section 304.

132. The above classification is based on factors such as the degree of intention, surrounding circumstances in which death was caused, weapon used, influence of apprehension from severe beating from which the accused wanted to escape, causing injury exceeding the right of private defence, presence of premeditation and the like. A person has a right to defend himself and his own person and for that purpose he can use and cause injury as much as it is necessary. But if he exceeds his right and causes more injury than necessary and if death of such person results, the same is culpable homicide not amounting to murder.

133. *Exception 4* to Section 300 of the IPC applies in the absence of any premeditation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. The question which arises for consideration of this Court is as to whether the act of accused-appellants would fall within the definition of 'murder' or it would be 'culpable homicide not amounting to murder'. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. Where there is no previous deliberation or determination to fight and a fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each

fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

134. It has been also argued by the learned Senior Advocate that there appears to be no premeditation on the part of accused. Death has not been caused in unusual or cruel manner. There appears to be no enmity nor any criminal back ground of the accused. In our view, the following observation of the judgement in **Kirpal Singh vs State, AIR 1951 Punjab & Haryana 137** is significant:

"To constitute a premeditated killing, it is necessary that the accused should have reflected with a view to determine whether he would kill or not; and that he should have determined to kill as the result of that reflection; that is to say, the killing should be a premeditated killing upon consideration and not a sudden killing under the sudden excitement and under impulse of passion upon provocation given at the time or so recently before as not to allow time for reflection. Such premeditation may be established by direct or circumstantial evidence, such as previous threats, expression of ill feelings, acts of preparation to kill; such as procuring a deadly weapon or selecting a dangerous weapon in preference to one less dangerous, and by the manner in which the killing was committed. For example, repeated shots, blows or other acts of violence are sufficient evidence of premeditation. Premeditation is not proved from the mere fact of a killing by the use of a deadly weapon but must be shown by the manner of the killing and the circumstances, under which it was done or from the other facts in evidence."

135. We find that the above proposition of law holds authority to determine the criminal liability for the offence of murder, culpable homicide and culpable homicide not amounting to murder. Several factors are to be taken into consideration keeping in view the facts and surrounding circumstances of each individual case. Thus, in **Mahesh v State of MP, (1996) 6 SCC 668**, where on account of cattle grazing in the field of accused by the victim side and accused objecting to it resulting in a sudden fight in terms of verbal altercation and may be exchange of abuse and hot words between both the sides, the accused gave one blow of spade causing death of the deceased, the Supreme Court modified the conviction from section 302 IPC to section 304 IPC. The Court made following observation:

*".... we find that when appellant arrived along with the cattle at the field there was no premeditation for the assault. At the spot, there was altercation between the parties and in the sudden fight, after the deceased objected to the grazing of the cattle, when possibly hot words or even abuses were exchanged between the parties, the appellant gave a single blow with the pharsa on the head of the deceased. ..... thus, placed as the appellant and the deceased were at the time of occurrence, it appears to us that the appellant assaulted the deceased in that sudden fight and after giving him one blow took to his heals. He did not cause any other injury to the deceased and therefore it cannot be said that he acted in any cruel or unusual manner. Admittedly, he did not assault PW-2 or PW-6 who were also present along with the deceased..... . this fortifies our belief that the assault on the deceased was made during a sudden quarrel without any premeditation. In this fact situat*ion, we are of the opinion that Exception-4 to section 300 IPC is clearly attracted... ."

136. In **Surain Singh v State of Punjab (2017) 5 SCC 796**, there was dispute between both the sides on the point of irrigation. On the fateful day, the criminal incident took place resulting in death of two persons by giving several blows by a small kripan. The Supreme Court converted the conviction from section 302 IPC to section 304 IPC giving benefit of Exception-4 to section 300 IPC.

137. Now coming to the facts of this case, we find that accused Achchhey Lal gave one blow to deceased Bhairo and Mahendra Singh gave one blow to Sripat by his pharsa which resulted in death of both the deceased. Admittedly, the quarrel struck because the mother of the informant was grazing buffaloes at the time of incident on the mend of the fields of both the sides. From the side of accused persons it was objected saying why she left cattle towards their field. In the statement, PW-3 informant has stated that his mother was grazing four animals. The informant has stated that the mend between the fields of both sides was four feet wide which is apparently incorrect as the mend is normally about one to two feet maximum and this fact stands supported by the statement of PW-4 Badam Singh who has stated the mend to be one or one and half feet wide. This possibility cannot be ruled out that some of the animals might have entered in the field of accused side as the animal are not supposed to be that disciplined to restrict themselves on the mend nor it was possible for the mother of informant to alone keep the four animals on the mend. This gave rise to verbal quarrel as the accused side was objecting and the complainant side was insisting to let the cattle graze. Naturally, there was verbal altercation, exchange of hot words and possibly exchange of abuses between both sides. The accused persons were working in their fields. There is no evidence of any earlier dispute or enmity between both the sides nor there is any evidence that the accused persons came prepared in the field with any planning of committing offence. On the contrary, both sides are close relatives with normal relation and with no previous dispute. The offence has been committed by axe and spade which are normal agricultural tools. Therefore, it can also not be said that they took any unfair advantage during the incident. Both the accused gave only one blow and did not repeat the assault further, nor they chased any other person of complainant side nor caused injury to them. They did not even stay there after giving blow and ran away to forest, although, there was not much resistance or challenge from the side of

complainant. Of course, death resulted of two persons by single blow given by both the accused almost instantly and the blow was so powerful that brain came out from the head, but, as discussed earlier, the nature of injury is not decisive of culpability and requisite intention and knowledge to cause death is significant and the same has to be determined keeping in view the preparation made, weapon used, nature of relationship between both sides whether normal or inimical and surrounding circumstances. In **Surain Singh (supra)** several blows were given by kripan causing death of two persons and there was enmity and litigation on the point of irrigation and in **Mahesh (supra)** death was caused in sudden verbal quarrel between both sides, and the Supreme Court converted the conviction from section 302 to section 304 IPC. In **Govind singh vs State of Chhattisgarh, AIR 2019 SC 2120 and Rambir vs State of NCT, Delhi, AIR 2019 SC 2264**, where the appellant was convicted for the offence under section 302 IPC, the Supreme Court, finding that there was no premeditation on the part of the accused and the incident took place in sudden quarrel, modified the offence into that of section 304 IPC and reduced the sentence accordingly. We find on facts and on the basis of above discussion and analysis of the judgement of the Supreme Court on the point, that the case of accused Achchhey Lal and Mahendra Singh is on much better footing to conclude that their act attracts the offence of culpable homicide not amounting to murder punishable under section 304 Part I instead of the offence of murder punishable under section 302 IPC.

138. On the basis of above discussion, we are of the view that the conviction and sentence of accused-appellants Ram Singh, Amar Singh and Siyaram is illegal and not sustainable and they are entitled to be acquitted, whereas, accused-appellant Ram Charan is entitled to be acquitted according him benefit of doubt. The charges against accused-appellants Achchhey Lal and Mahendra Singh for the offence under section 148, 323/149 IPC have not been proved beyond shadow of doubt and they deserve to be acquitted for the said charge. The conviction of accused-appellants Achchhey Lal and Mahendra Singh is liable to be converted from section 302 IPC to section 304 Part I IPC and consequently, their sentence of life imprisonment is liable to be modified to 12 years rigorous imprisonment and fifty thousand rupees fine each and in default, two years additional imprisonment. Out of the amount of fine so deposited, 80% is directed to be paid to the informant/ heir of deceased persons.

139. **Criminal Appeal no. 1164 of 2000 is allowed**. The conviction and sentence of accused-appellants **Siyaram, Ram Singh,** and **Amar Singh** for the offence under section 302/149, 147, 323/149 IPC and accused-appellant **Ram Charan** for the offence under section 302/149, 148, 323/149 IPC is set aside and they are **acquitted.**

140. **Criminal Appeal no. 1503 of 2000 is partly allowed.** The conviction and sentence of accused-appellants **Achchhey Lal** and **Mahendra Singh** for the offence under section 148, 323/149 is set aside and they are acquitted for the said charge. The conviction of Accused-appellants **Achchhey Lal** and **Mahendra Singh** for the offence under section 302/149 IPC is converted into that of section 304 Part I IPC and consequently, their sentence of life imprisonment is reduced to 12 years

rigorous imprisonment and fifty thousand rupees fine each and in default, two years additional imprisonment. Out of the amount of fine so deposited, 80% is directed to be paid to the informant/ heir of deceased persons.

141. Accused-appellants Achchhey Lal and Mahendra Singh are directed to surrender before the learned trial court forthwith where from they will be sent to jail to undergo the sentence.

142. Lower court record be transmitted back to the court below with a copy of this judgement to the court below for information and compliance.

(2020)03-05ILR A436
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.03.2020

BEFORE
THE HON'BLE ANANT KUMAR, J.

Criminal Appeal No. 1197 of 2013

Aashu Pandit @ Aashu Bajpai @ Aash Narayan Sharma ...Appellant
Versus
Union of India ...Respondent

Counsel for the Appellant:
Anil Kumar Pandey, A.P. Mishra, Ayodhya Prasad Mishra, Manish Bajpai, Manish Tiwari

Counsel for the Respondent:
I.B. Singh, Digvijay Nath Singh, Dipak Seth

A. Criminal Law-NDPS Act- Section 67- Except the statement of the co-accused there is no other material on record against the appellant to show his complicity in the crime -Statement of co-accused persons recorded under Section 67 NDPS Act cannot be relied upon as the appellant was not afforded any opportunity of cross examination to these two co-accused persons

Conviction of an accused is unsustainable solely upon the confession of the co-accused recorded under section 67 of the NDPS Act and without affording the opportunity of cross-examining those co-accused.(Para 25,26)

Criminal Appeal allowed (E-3)

List of case cited:-

1. Surinder Kumar Khanna Vs. Intelligence Officer, Dir. of Rev. Intelligence. 2018 (3) JIC 820 (SC) (relied)

2. Kashmira Singh Vs. St. of M.P, (1952) SCR 526

3. Bhuboni Sahu Vs. The King, (1949) 76 Indian Appeal 147 at 155

4. Hari Charan Kurmi & Jogia Hajam Vs. St. of Bih. (1964) 6 SCR 623 at 631-633

5. Mohammed Farsrin Vs. State, (2019) 3 SCC (Cri) 684 : (2019) 8 SCC 811

6. Ram Singh Vs. Central Bureau of Narcotics, (2011) 11 SCC 347

7. Kanhaiyalal Vs. U.O.I., 2008 (4) SCC 668

8. Madan Lal & anr. Vs. St. of H.P., (2003) 7 SCC 465

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

1. This criminal appeal under Section 374 (2) of Cr.P.C. has been filed against the judgment and order dated 12.07.2013, passed by the learned Additional District & Sessions Judge, Court No.8, Lucknow in Criminal Case No. 281A of 2006 (Union of India Vs. Aashu Pandit @ Aashu Bajpai @ Aash Narayan Sharma) by which the appellant has been convicted for the offence under Section 8(C)/20(B)(II) of

NDPS Act, 1985 and sentenced to undergo 14 Years' R.I. with a fine of Rs.2.00 Lakhs, with default stipulation.

2. Brief facts relevant for disposal of the present criminal appeal are that on behalf of Union of India through Radha Raman Singh, Investigating Officer, Directorate of Revenue Intelligence, Lucknow Regional Unit, 3/71 Vivek Khand, Gomti Nagar, Lucknow had filed a written complaint before the Court of Sessions Judge, Lucknow under Section 8C/20(b) (ii) (C)/29/25 of of NDPS Act, 1985 with the assertion that complainant was an intelligence officer in the Directorate of Revenue Intelligence, posted at Regional Unit, Lucknow and was competent to file this complaint. On the basis of a specific intelligence that Hashish (Charas) is being transported from Nepal by Truck bearing Registration No.UP78/AT 3680 the Deputy Director, Directorate of Revenue Intelligence, Lucknow had sent a team with the direction to intercept the said truck, contraband goods and accused persons. As per the intelligence, it was informed that the said Charas was kept in secret cavity in the back of the driver's cabin of the truck. On getting this information two public witnesses Shri Amrajeet and Shri Rakesh Sharma were called by the DRI officials at Capt. Manoj Pandey Chauraha near Gomti Nagar Police Station, Lucknow at 4.45 A.M. on 28.05.2006. They were told about the information and were requested to accompany the team to witness the proposed action of interception, search of the truck and recovery of the contraband to which both witnesses had agreed and they accompanied the raiding team. The raiding party along with the public witnesses proceeded towards Gosainganj, Lucknow and waited for the said truck near Gosainganj Tiraha, Kanpur bypass at Gosainganj. At about 6.00 A.M. on 28.05.2006 the said truck No. UP87-AT 3680 was seen coming from Haidergarh. It was signalled to stop by the officers.

3. When the said truck stopped the DRI officials introduced themselves to the driver and cleaner and told the purpose of interception of the said truck. It was disclosed to them that search would be done as per requirement of NDPS Act, 1985. On the spot the driver who was driving the truck disclosed his name and address as opposite party no.1 Rajesh Kumar Mishra, S/o late Shri Arjun Mishra, R/o Village Ganeshpur, P.O.- Dhhakhwa Bazar, Police Station Sikriganj, District Gorakhpur and the cleaner as Shri Raju Dube, S/o Shri Rajesh Dube, R/o Village Rooppur, Post office, Police Station and District Kannauj (truck Khalasi).

4. At first the driver and the Khalasi were hesitant but later on they disclosed that Charas was kept in the secret cavity made on the back of the driver's cabin. The said driver and Khalasi were given a right to be searched themselves as well as the truck before the nearest Magistrate or the Gazetted Officer in compliance of Section 50 of NDPS Act, 1985. Both the persons consented in writing before the intercepting party. For safety and security and on the consent of the driver and khalasi intercepting team took the truck along with both the public witnesses to DRI office at 2/31, Vishal Khand, Gomti Nagar, Lucknow and the search of the truck was made in the presence of the intercepting party and witnesses and 720 rectangular shaped bars of Charas (each bar of 250 gms.) were recovered at the instance of driver and khalasi from the secret cavity specifically fabricated on the back of the

driver's cabin, which on weighing was found to be 180 Kgs. and after mixing the recoveries, four mixed samples of approximately 25 gms each were obtained from the recovered Charas for testing purpose. The four respective samples were sealed and sent for chemical examination and the remaining Charas was sealed in 09 packets, duly signed by the accused, public witnesses and the member of the intercepting party.

5. Statement of accused namely Raju Dubey was written on the dictation of the accused before Shri Atul Kumar Srivastava, Intelligence Officer, DRI, Lucknow Regional Unit, Lucknow and the statement of accused Rajesh Kumar Mishra, Driver was written himself before Shri Ravindra Kumar Tiwari, Intelligence Officer, DRI, Lucknow Regional Unit, Lucknow.

6. Shri Rajesh Kumar Mishra, driver, in his statement dated 28.05.2006 accepted the crime mentioned in the Panchayat Nama/recovery memo dated 28.05.2006. He also revealed that he came in contact of present appellant at a Dhaba in Nankari (Kanpur) for about one month ago. On the first meeting appellant revealed that he had a truck which contained secret cavity and asked me to drive said truck which contains illegal goods in the secret cavity for which he was to be paid Rs.7000/-. On 27.05.2006 present appellant called Rajesh Mishra at Dhaba situated at Basi (District Sidharth Nagar) near petrol pump. On the said place appellant met Rajesh Kumar Mishra and handed over him the said truck and introduced him to Raju Dubey (Khalasi) at the said truck. Appellant revealed that the Charas was kept in the secret cavity as stated above. They were directed to drive the said truck to Kanpur where the appellant shall meet them and would instruct them regarding further plan.

7. Khalasi also gave almost similar statement on 28.05.2006 and stated that said Rajesh Mishra and Raju Dubey reached Basi on 27.05.2006 in the morning where the appellant was present with another driver Pappu. Ashu Pandit (present appellant) along with other driver headed to Nepal with the said truck and came back at Basi in the evening of that day after loading Charas in the secret cavity and handed over the truck to the opposite party no.1 & 2 and present appellant instructed them to drive the said truck up to Nankari where he would contact them again. But during the said transaction the truck was intercepted, as stated above.

8. During the course of investigation residence of the present appellant was searched but nothing incriminating was recovered from his residence. Various summons were issued to him but he did not appear before the Court and he was not found at the given address.

9. After filing of the complaint since whereabouts of the present appellant was not known the appellant was declared absconder by the trial court vide its order dated 18.02.2008 and the trial of other accused persons Rajesh Kumar Mishra and Raju Dubey proceeded. It is informed that in a separate trial they have already been convicted by the trial court. However, from the perusal of the record of this case which proceeded separately it is evident that later on it was revealed that present appellant is languishing in jail in Kanpur in some other case. So, the accused was summoned

through B warrant from Kanpur jail and trial of the present appellant separately proceeded. During the trial the appellant denied all the allegations made against him in the complaint and he stated that he had no concern or relation with the opposite parties Nos. 1 & 2 Rajesh Kumar Mishra and Raju Dubey. He never met them and he even stated that the said truck UP 78 AT 3680 also does not belong to him. During the course of investigation it was found that the said truck was registered in the name of one Shri Amit Kumar, S/o Hari Narain, 1/17 Barsaitpur, Kalyanpur, Kanpur. When the summons were issued in the name of the said Amit Kumar on 27.06.2006 said summons were returned back with the endorsement that on the said address he was not found. Again Investigating Officer contacted previous owner of the truck Vijay Narain Sharma who had sold the said truck to Amit Kumar. Shri Vijay Narain Sharma disclosed that he came in contact with Amit through a broker at RTO officer when in the RTO office said broker in the name of Pandey was contacted no such person was found. As per market value the 180 Kg. Was found value of Rs.54.00 Lakhs and the value of the truck was Rs.4.00 Lakhs.

10. On behalf of prosecution, four witnesses PW 1 Ravindra Kumar Tiwari, PW 2 Atul Kumar Srivastava, PW 3 Rajesh Khanna, PW 4 Radha Raman Singh were examined and to prove the guilt of the appellant Exhibits Ka 1 to Ka 26 were produced.

11. After completion of the prosecution witnesses statement of accused was recorded under Section 313 Cr.P.C. wherein he was referred to the evidence recorded against him during the trial to which he denied and stated that he is innocent. He has got no concern either with the said truck or with the other two accused named above. No recovery has been taken place from his possession, nor from his house any incriminating material has been recovered. He has been falsely implicated in this case. Accused was given a chance to adduce in his defence but no such evidence has been given.

12. After completion of the evidence from both the sides, the trial court heard the parties and the appellant was convicted as stated above. Hence this appeal.

13. I have heard learned counsel for the appellant as well as learned counsel for Union of India (Directorate of Revenue Intelligence).

14. The argument of learned counsel for the appellant is that according to the prosecution case itself it is an admitted case that the appellant was not arrested on the spot and there is no confessional statement or other statement of the appellant either before the arrest or after his arrest before any authority recorded under Section 67 of NDPS Act. Prosecution Witness PW 4 has also admitted in his deposition before the trial court that present appellant has been made accused merely on the basis of confessional statement of co-accused persons Rajesh Kumar Mishra and Raju Dubey. Prosecution in effort to prove either exclusive possession or the contraband article nor the prosecution could prove even the conscious possession of the appellant regarding the truck or the contraband contained therein through any direct or indirect evidence beyond any reasonable doubt. The trial court has wrongly passed the conviction order against the appellant without any evidence or material on record against the appellant. The prosecution also could not prove the

link evidence either regarding the ownership of the truck in question or the ownership of the recovered contraband article against the appellant either during investigation or during trial. It is also stated that after recovery dated 28.05.2006 the appellant's house was also searched but no incriminating article was found from his house. The mode and manner of recording statement of arrested co-accused persons namely Rajesh Kumar Mishra and Raju Dubey under Section 67 of NDPS Act clearly indicates that both were recorded after taking them into custody by DRI officials. Therefore the same is also hit by Article 20 (3) of the Constitution of India and such statement is neither admissible against the appellant, nor it may be read against any other person.

15. It is also argued that it is a settled proposition of law that the confessional statement of any other accused persons cannot be made basis and foundation for launching criminal prosecution against any person and also would not be sufficient for awarding conviction until and unless the same is not corroborated by any independent evidence and material whereas in the present case, there is no connecting evidence in commission of crime against the appellant either collected by the Investigating Officer during investigation or produced during trial.

16. To substantiate the argument, learned counsel for the appellant has placed reliance upon a case law ***2018 (3) JIC 820 (SC) : Surinder Kumar Khanna Vs. Intelligence Officer, Directorate of Revenue Intelligence.*** The brief facts of the said case are similar to the present case and according to the case of ***Surinder Kumar Khanna (supra)*** on a specific information that narcotic drugs were going to be transported in a truck No. PB 02 AJ 7288, the officers of the Directorate of Revenue Intelligence (for short "DRI") laid picket at a toll barrier and when said Indica Car of white color was intercepted, in the said car two persons, Raj Kumar @ Raju and one Surinder Pal Singh were found. The vehicle was being driven by one Raj Kumar @ Raju whereas Surinder Pal Singh was sitting next to him. When search of the vehicle was made, four packets wrapped with yellowish adhesive tapes were found concealed in the door of Dickey of the car. The gross weight of those four packets was 4.300 Kg. Those four packets were taken into possession. Two representative samples of 5 Gms. each were taken out as per rules. Statements of both the suspects were recorded. From their statements, it transpired that four packets of heroin had been taken from one Mr. Goldy and those bags were to be delivered to a person of African origin near PGI Chandigarh. A complaint under the relevant sections of NDPS Act was lodged against said Raj Kumar @ Raju and Surinder Pal Singh. During investigation involvement of the appellant Surinder Kumar Khanna was said to have been made out. After the appellant was arrested, a supplementary complaint was presented against him and the matter was taken up with the main complaint. The trial court convicted the appellant along with other two accused persons Surinder Kumar Khanna, Raj Kumar @ Raju and Surinder Pal Singh. When the matter came up before the Hon'ble High Court in appeal, the High Court took a view that :-

"5. As regards the appellant, it was observed by the High Court that he was specifically named by co-accused Raj Kumar @ Raju and Surinder Pal Singh in their statements. Apart from such statements nothing was produced on record

to indicate the involvement of the appellant. The High Court however found that the case against the appellant was made out. It was observed:

"Offence of abetment under Section 29 of NDPS Act stood established against accused Surinder Kumar Khanna, showing that he was involved in drug trafficking. He was specifically named by accused Raj Kumar @ Raju and Surinder Pal Singh in their statements. Such statements of accused Raj Kumar @ Raju and Surinder Pal Singh recorded under Section 67 of the NDPS Act are admissible in evidence and are not hit by Section 25 of the Evidence Act because the officers of DRI, who had apprehended Raj Kumar @ Raju and Surinder Pal Singh, traveling in an Indica car and effecting recovery from them do not come within the definition of police officers."

The High Court thus affirmed the order of conviction as recorded against the appellant but reduced the sentence to rigorous imprisonment for a period of 10 years and to pay fine of Rs.1 lakh, in default whereof to undergo further rigorous imprisonment for 1½ years. Similar orders of sentence were passed in respect of other co-accused namely Raj Kumar @ Raju and Surinder Pal Singh."

17. The said conviction was challenged before the Hon'ble Apex Court. The Hon'ble Apex Court after taking into consideration the earlier pronouncements of Apex Court found that the issue whether statement recorded under Section 67 of NDPS Act can be construed as a confessional statement even if the officer who recorded such statement was not to be treated as a police officer, has now been referred to a larger bench : -

"10. Even if we are to proceed on the premise that such statement under Section 67 of the NDPS Act may amount to confession, in our view, certain additional features must be established before such a confessional statement could be relied upon against a co-accused. It is noteworthy that unlike Section 15 of Terrorist and Disruptive Activities Act, 1987 [Similarly Section 18 of Maharashtra Control of Organized Crime Act, 1999] which specifically makes confession of a co-accused admissible against other accused in certain eventualities; there is no such similar or identical provision in the NDPS Act making such confession admissible against a co-accused. The matter therefore has to be seen in the light of the law laid down by this Court as regard general application of a confession of a co-accused as against other accused.

11. In ***Kashmira Singh v. State of Madhya Pradesh, (1952) SCR 526,*** this Court relied upon the decision of the Privy Council in ***Bhuboni Sahu v. the King, (1949) 76 Indian Appeal 147 at 155*** and laid down as under :

"Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises, how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in Bhuboni Sahu v. The King "It does not indeed come within the definition of" 'evidence' contained in section 3 of the Evidence Act, It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination." Their Lordships also point out that it is "obviously evidence of a very

weak type..... It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities."

They stated in addition that such a confession cannot be made tile foundation of a conviction and can only be used in "support of other evidence." In view of these remarks it would be pointless to cover the same ground, but we feel it is necessary to expound this further as misapprehension still exists. The question is, in what way can it be used in support of other evidence? Can it be used to fill in missing gaps? Can it be used to corroborate an accomplice or, as in the present case, a witness who, though not an accomplice, is placed in the same category regarding credibility because the judge refuses to believe him except in so far as he is corroborated ? .....

12. The law laid down in Kashmira Singh (supra) was approved by a Constitution Bench of this Court in Hari Charan Kurmi and Jogia Hajam v. State of Bihar, (1964) 6 SCR 623 at 631-633 wherein it was observed :

"As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. As was observed by Sir Lawrence Jenkins in ***Emperor v. Lalit Mohan Chuckerburty*** *a confession can only be used to "lend assurance to other evidence against a co-accused". In re Periyaswami Moopan Reilly. J., observed that the provision of Section 30 goes not further than this: "where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence". In Bhuboni Sahu v. King the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board, observed that "a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved the case; it can be put into the scale and weighed with the other evidence". It would be noticed that as a result of the provisions contained in Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the court is evidence; circumstances which are considered by the court as well as*

probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in Section 30. The same view has been expressed by this Court in Kashmira Singh v. State of Madhya Pradesh where the decision of the Privy Council in Bhuboni Sahu case has been cited with approval."

14. In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused. The appellant is therefore entitled to be acquitted of the charges leveled against him. We, therefore, accept this appeal, set aside the orders of conviction and sentence and acquit the appellant. The appellant shall be released forthwith unless his custody is required in connection with any other offence."

18. The Hon'ble Apex Court also taken into account the law propounded by the Hon'ble Apex Court in the case of ***Kashmira Singh Vs. State of Madhya Pradesh (supra)*** which was approved by the Constitution Bench in ***Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar (1964) 6 SCR 623 at 631-633.*** On these assertion, learned counsel for the appellant has argued that the Hon'ble Apex Court in the case of ***Surinder Kumar Khanna (supra)*** has held that the statement of co-accused recorded under Section 67 of NDPS Act cannot be made basis for conviction against other co-accused persons.

19. Another case law cited by learned counsel for the appellant is ***(2019) 3 SCC (Cri) 684 : (2019) 8 SCC 811 Mohammed Farsrin v. State.*** In this case also almost similar view has been taken.

20. Encountering the arguments advanced by learned counsel for the appellant, learned counsel for the Union of India (DRI) Shri Deepak Seth has submitted that from the facts enumerated in this case, it is evident that 180 Kg. of charas was recovered from the said truck of which Rajesh Kumar Mishra was driver and Raju Dubey was cleaner is not disputed and both of them have been convicted for 10 Years' R.I. with a fine of Rs.1.00 Lakh each. It is stated by learned counsel for the DRI that from the statement of driver Rajesh Kumar Mishra and Raju Dubey recorded under Section 67 of NDPS Act, complicity of the present appellant is fully proved and this statement was proved

before the trial court as Ext. Ka-4 and Ext. Ka-10, so these statements could be read against the appellant and he could very well be convicted merely on the basis of these two statements. It is also stated that statement of Rajesh Kumar Mishra and Raju Dubey are not confessional statement for the reason that a confession cannot be made from any other person. Infact it is a piece of evidence and if it is corroborated with any other evidence, it is admissible as evidence. If there is proof before the Court that confession made by these two persons is voluntary, truthful, reliable and beyond reproach, then it is an effective piece of evidence to establish the guilty.

21. It is also stated that so far as the possession of the contraband is concerned, the word "possession" has not been defined under the provisions of NDPS Act. The expression "possession" is a polymorphyous term. It does not mean only the physical possession. The word "conscious" means awareness brought on fact. In the present case the appellant Ashu Pandit was well aware of the entire fact and was having actual control over the truck as well as the contraband concealed in the same and, therefore, was infact in conscious possession of the same. At the time of trial of present appellant, neither co-accused Rajesh Kumar Mishra, nor Raju Dubey were accused in the case as their trial was over and they were in jail after conviction. Neither any evidence was led by the appellant in support of his case nor he ever tied to call Rajesh Kumar Mishra or Raju Dubey for cross examining them. So, their statement recorded under Section 67 of NDPS Act remain unrebutted.

22. To substantiate the argument, learned counsel for the DRI has relied upon a case law ***(2011) 11 SCC 347*** : ***Ram Singh Vs. Central Bureau of Narcotics.*** *In the said case law before the Apex Court following question fall for determination :*

"8. In view of the rival submissions questions which fall for determination in this appeal are as follows :

(i) Whether the confessions made before the officers of the Central Bureau of Narcotics are admissible in evidence;

(ii) Whether the confessions made were voluntary in nature and if so without corroboration, can it form the basis for conviction; and

(iii) Whether the appellant can be said to be in possession of the opium or selling the same."

23. While considering these question Hon'ble Apex Court has, after taking into consideration the earlier pronouncements, held as under : -

13. This Court had the occasion to consider this question further in the case of ***Kanhaiyalal vs. Union of India, 2008 (4) SCC 668,*** *wherein it has been held as follows :*

"44. In addition to the above, in ***Raj Kumar Karwal v. Union of India*** *this Court held that officers of the Department of Revenue Intelligence who have been vested with powers of an officer in charge of a police station under Section 53 of the NDPS Act, 1985, are not "police officers" within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was also held that power conferred on officers under the NDPS Act in relation to arrest, search and seizure were similar to powers vested on*

officers under the Customs Act. Nothing new has been submitted which can persuade us to take a different view.

45. Considering the provisions of Section 67 of the NDPS Act and the views expressed by this Court in Raj Kumar Karwal case with which we agree, that an officer vested with the powers of an officer in charge of a police station under Section 53 of the above Act is not a "police officer" within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the NDPS Act to be used as a confession against the person making it and excludes it from the operation of Section 24 to 27 of the Evidence Act."

14. From what has been observed above, the officers vested with the powers of investigation under the Act are not police officers and, therefore, the confessions recorded by such officers are admissible in evidence. Therefore, the question posed at the outset is answered in the affirmative and it is held that officers of the Central Bureau of Narcotics are not police officers within the meaning of Sections 25 and 26 of the Evidence Act and, hence, confessions made before them are admissible in evidence. In view of aforesaid there is no escape from the conclusion that the confessions made by the appellant before PW 6, Jagdish Mawal and PW 8, Mahaveer Singh are admissible in evidence and cannot be thrown out of consideration.

15. Now we proceed to consider the second question set out at the outset and in order to answer that we deem it appropriate to reproduce Section 24 of the Indian Evidence Act which reads as follows:

"24.Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

From the plain reading of the aforesaid provision it is evident that a confession made by an accused is rendered irrelevant in criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise with reference to the charge against the accused.

16. A confession, if it is voluntary, truthful, reliable and beyond reproach is an efficacious piece of evidence to establish the guilt of the accused. However, before solely acting on confession, as a rule of prudence, the Court requires some corroboration but as an abstract proposition of law it cannot be said that a conviction cannot be maintained solely on the basis of the confession made under Section 67 of the Act.

17. Bearing in mind the principles aforesaid, now, we proceed to consider the facts of the present case. Appellant's first confession was recorded by PW 6, Jagdish Mawal on 19th July, 1997 and he was produced before the Court on 20th July, 1997 and he made no grievance in regard to the confession recorded. Another confession was recorded

on 20th July, 1997 and, thereafter, he was produced before the Special Judge on 21st July, 1997 and a copy of the police diary was handed over to him. This obviously would had contained the confessions made by him. No complaint about the same was made then also. Thereafter appellant was produced before the Court several times but he never retracted his confession. The appellant retracted the confession made by him for the first time in his statement under Section 313 of the Code of Criminal Procedure. In our opinion, when an accused is made aware of the confession made by him and he does not make complaint within a reasonable time, same shall be a relevant factor to adjudge as to whether the confession was voluntary or not. Here in the present case appellant was produced before the Court on several dates and at no stage he made any complaint before the Special Judge of any torture or harassment in recording the confession. It is only when his statement was recorded under Section 313 of the Code of Criminal Procedure that he retracted and denied making such a confession and went to the extent of saying that his signatures were obtained on blank pages. In the facts and circumstances of the case we are of the opinion that the confessional statements made by the appellant were voluntary in nature and could form the basis for conviction. The view which we have taken above finds support from the judgment of this Court in the case of ***M. Prabhulal v. Assistant Director, Directorte of Revenue Intelligence****, 2003 (8) SCC 449, in which it has been held as follows:*

"It has been established that the Customs Office was about 20 km from the place where the truck and the car were apprehended. Having regard to the large quantity of the heroin, the said vehicles with Accused 2, 3 and 6 were brought to the Customs Office. Further, Accused 1 and 2 did not know Tamil. A Hindi-knowing officer had to be arranged. There was, under the circumstances no delay in recording the statements of the appellants. Further, it is also to be borne in mind that the appellants did not make any complaint before the Magistrate before whom they were produced complaining of any torture or harassment. It is only when their statements were recorded by the trial Judge under Section 313 of the Code of Criminal Procedure that a vague stand about the torture was taken. Under these circumstances, the confessional statements cannot be held to be involuntary. The statements were voluntarily made and can, thus, be made the basis of the appellants' conviction."

20. Same view has been reiterated by this Court in the case of Kanhaiyalal (supra) in which it has been observed as follows :

"Since it has been held by this Court that an officer for the purposes of Section 67 of the NDPS Act read with Section 42 thereof, is not a police officer, the bar under Section 24 and 27 of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant."

The second question posed at the outset is thus answered accordingly.

21. Now we proceed to consider the last question, i.e, whether the appellant can be held guilty for being in possession or involved in selling the opium so as to

attract the mischief of Section 8/18 of the Act.

22. In sum and substance the confession of the appellant is that he was working in the hotel for the last two months and brought the opium from the house of the hotel-owner to the hotel, where it was being sold in tablets to the truck-drivers. In the confession appellant has not stated or for that matter none of the witnesses have deposed that he was involved in selling the opium-tablets. Therefore, the appellant cannot be held guilty for selling opium.

23. Whether in the state of evidence appellant can be held guilty for possessing the opium only on the ground that he brought the opium from the house of the owner to the hotel is another question which requires adjudication.

24. It is trite that to hold a person guilty, possession has to be conscious. Control over the goods is one of the tests to ascertain conscious possession so also the title. Once an article is found in possession of an accused it could be presumed that he was in conscious possession. Possession is a polymorphous term which carries different meaning in different context and circumstances and, therefore, it is difficult to lay down a completely logical and precise definition uniformly applicable to all situations with reference to all the statutes. A servant of a hotel, in our opinion, cannot be said to be in possession of contraband belonging to his master unless it is proved that it was left in his custody over which he had absolute control.

25. Applying the aforesaid principle when we consider the facts of the present case it is difficult to hold that opium was in possession of the appellant. There is no evidence on record to suggest that the appellant was in occupation of the room from where opium was recovered. Further the evidence clearly points out that title to the opium vested in the owners of the hotel. The confession given by the appellant was only that he was servant of the owners of the hotel from where the opium was recovered. In the face of the state of evidence it is difficult to hold that the appellant was in conscious possession of the opium. Section 18 of the Act prescribes punishment for possession and that possession, in our opinion, has to be conscious. In the facts of the present case it is difficult to hold that the appellant was in possession of the opium and, therefore, his conviction and sentence cannot be sustained."

24. Another case law relied by learned counsel for the DRI is ***(2003) 7 SCC 465 : Madan Lal and another V. State of H.P.,*** *in this case law the Hon'ble Apex Court while interpreting the word "possession" has held as under : -*

"22. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformally applicable to all situations in the context of all statutes.

23. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in Gunwantlal v. The State of M.P. (AIR 1972 SC 1756) possession in a given case need not be physical possession but can be constructive, having power and control

over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

25. The word 'possession' means the legal right to possession (See Health v. Drown (1972) (2) All ER 561 (HL). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness (1976 (1) All ER 844 (QBD).

26. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."

25. After hearing the learned counsel for the parties and perusing the case laws cited from the respective sides, I am of the view that the facts of the case of ***Surinder Kumar Khanna (supra)*** are akin to the present case. In the present case the appellant was neither arrested on the spot, nor any incriminating article was recovered from his house when a search was made. Even the prosecution wholly failed to establish that the said truck was in any way connected with the appellant or the same was at any time in real or constructive possession/control of the appellant. The prosecution failed to establish the ownership of the truck and no evidence was there pertaining to any connection of the said vehicle with the appellant. So, from the entire material on record, it is evident that except the statement of these two co-accused persons Rajesh Kumar Mishra and Raju Dubey, there is no other material on record against the appellant to show his complicity in the crime. The submission of the learned counsel for the opposite party that the appellant should have summoned co-accused Rajesh Kumar Mishra and Raju Dubey for cross examination does not suit to the reasoning, as it was for the prosecution to establish its case against the appellant beyond all reasonable doubts. So, if the prosecution was relying upon the statement of these two co-accused persons Rajesh Kumar Mishra and Raju Dubey, they should have been produced before the Court and should have afforded an opportunity of cross examination to the appellant.

26. To my view, it would not be safe to rely upon the statement of these two persons recorded under Section 67 NDPS Act as the appellant was not afforded any opportunity of cross examination to these two co-accused persons. So, I fully agree with the case of Surinder Kumar Khanna (supra) and to my view it would not be safe to uphold the conviction of the appellant only on basis of statements of co-accused Rajesh Kumar Mishra and Raju Dubey recorded under Section 67 of NDPS Act. To my view the learned trial court has wrongly convicted the appellant as stated above. There was no cogent and reliable evidence against the appellant. So, to my view the judgment of the trial court suffers from manifest error of law and fact, which deserved to be set aside.

27. Accordingly, the conviction recorded by the trial court by means of judgment and order dated 12.07.2013, passed by the learned Additional District & Sessions Judge, Court No.8, Lucknow in Criminal Case No.281A of 2006 (Union of

India Vs. Aashu Pandit @ Aashu Bajpai @ Aash Narayan Sharma) is set aside. Appeal is allowed. Appellant is acquitted of all the charges leveled against him.

28. Appellant is in jail. Let he be set free at once, if not wanted in any other case.

29. Let a copy of the judgment along with the lower court record be transmitted to the trial court concerned for compliance and necessary action.

(2020)03-05ILR A449
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.02.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

CRIMINAL APPEAL No. 1313 of 1996
And
CRIMINAL APPEAL No. 1315 of 1996
And
CRIMINAL APPEAL No. 1316 of 1996

Ram Naresh ...Appellant
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Pradeep Kumar Mishra (A.C.) Sri A. Ghosh

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

Criminal law- Indian Penal Code - Section 302/34 IPC - Arms Act, 1959 - Section 25 (i)(c) - Appeal against conviction.

Held :- Testimony of related witnesses- Cannot be rejected only on the basis of relationship with deceased. (Para 23)

Interested witnesses – Statement can be relied upon in support of prosecution story. (Para 35)

Minor Contradiction / Inconsistency In Evidence –
Does not affect the core of the prosecution case. (Para 37)

Motive – Becomes insignificant in case of availability of the eye-witnesses. (Para 46)

Defective Investigation- Cannot be fatal to prosecution where ocular testimony is found credible and cogent. (Para 62)

Appeal rejected. (E-2)

List of Cases Cited:-

1. Dalip Singh Vs. St. of Punj. (1954) SCR 145,

2. Masalti Vs. St. of UP AIR 1965 SC 202

3. Darya Singh Vs. St. of Punjab, AIR 1965 SC 328,

4. St. of UP Vs. Kishanpal, (2008) 16 SCC 73,

5. Appa Vs. St. of Gujarat, AIR 1988 SC 698,

6. St. of AP Vs. S. Rayappa (2006) 4 SCC 512,

7. Pulicherla Nagaraju @ Nagaraja Reddy Vs. St. of AP (2007) 1 SCC (Cri) 500

8. Satbir Singh Vs. St. of UP, (2009) 13 SCC 790,

9. M.C. Ali Vs. St. of Kerala AIR 2010 SC 1639,

10. Himanshu Vs. St. (NCT of Delhis, (2011) 2 SCC 36,

11. Bhajan Singh & ors. Vs. St. of Har.; (2011) 7 SCC 421,

12. Jayabalan Vs. U.T. of Pondicherry, 2010(68) ACC 308 (SC),

13. Dharnidhar Vs. St. of UP, (2010) 7 SCC 759,

14. Ram Bharosey Vs. St. of UP AIR 2010 SC 917,

15. Balraje @ Trimbak Vs. St. of Mah., (2010) 6 SCC 673,

16. Jalpat Rai Vs. St. of Har. AIR 2011 SC 2719,

17. Waman Vs. St. of Mah. AIR 2011 SC 3327,

18. Shyam Babu Vs. St. of UP, AIR 2012 SC 3311,

19. Dhari & ors. Vs. St. of UP, AIR 2013 SC 308,

20. Ganapathi Vs. St. of T.N., AIR 2018 SC 1635,

21. Rupinder Singh Sandhu Vs. St. of Punj., (2018) 16 SCC 475,

22. Shio Shanker Dubey Vs. St.of Bihar AIR 2019 SC 2275,

23. St. of UP Vs. Naresh; 2011 (75) ACC 215) (SC),

24. Gosu Jayarami Reddy & anr. Vs. St. of A.P. (2011) 3 SCC(Cri) 630,

25. Parsu Ram Pandey Vs. St. of Bihar AIR 2004 SC 5068,

26. Shivappa Vs. St. of Karn.; AIR 2682,

27. Ramchandaran Vs. St. of Kerala AIR 2011 SC 3581,

28. Mukesh Vs. St. for NCT of Delhi, AIR 2017 SC 2161

29. Bhagwan Jagannath Markad Vs. St. of Mah., (2016) 10 SCC 53,

30. Jarnail Singh Vs. St. of Punj., 2009 (6) Supreme 526, Bhagwan

31. Jagannath Markad Vs. St. of Maha., (2016) 10 SCC 537,

32. Ramji Singh Vs. St. of UP, 2019 (4) Crimes 585 (SC),

33. Munir Ahmad Vs. St. of Raj., AIR 1989 SC 705,

34. Rachapalli Abbulu Vs. St. of AP, AIR 2002 SC 1805,

35. Smt. Sudha Devi Vs. M.P. Narayanan, AIR 1988 SC 1381,

36. Ayaaubkhan Vs St. of Mah., AIR 2013 SC 58,

37. Abu Thakir Vs St. AIR 2010 SC 2119,

38. St. of UP Vs Nawab Singh AIR 2010 SC 3638,

39. Bipin Kumar Mondal Vs St. of W.B. 2005 SCC (Criminal) 33,

40. Shivraj Bapuray Jadhav Vs St. of Karn. (2003) 6 SCC 392,

41. Thaman Kumar Vs St. of U.T. of Chandigarh (2003), 6 SCC 380,

42. St. of HP Vs. Jeet Singh; (1999) 4 SCC 370,

43. Gopi Ram Vs. St. Of UP, 2006 (55) ACC 673 SC,

44. R.R. Reddy Vs. St. of AP, AIR 2006 SC 1656,

45. Sucha Singh Vs. St. of Punj.; AIR 2003 SC 1471,

46. St. of Raj. Vs. Arjun Singh AIR 2011 SC 3380,

47. Varun Chaudhry Vs. St. of Raj. AIR 2011 SC 72.

48. Saddik Vs. St. of Guj., (2016) 10 SCC 663,

49. Suresh Chandra Bahri Vs. St. of Bihar, AIR 1994 SC 2420,

50. Bodh Raj Vs. St. of J & K, AIR 2002 SC 3164,

51. Geejaganda Somaiah, T.N. Vs. St. of Karn. AIR 2007 SC 1355,

52. Sandeep Vs. St. of UP, (2012) 6 SCC 107

53. Mukesh Vs. St. for NCT of Delhi & ors., AIR 2017 SC 2161,

54. Navneethakrishnan Vs. St. , AIR 2018 SC 2027

55. Nathu Singh Vs. St. of MP, 1974 Cri. L J 11,

56. Pramod Kumar Vs. St. (GNCT) of Delhi, AIR 2013 SC 3344,

57. Govindaraju @ Govinda Vs. St. of Shri Ramapuram P.S., AIR 2012 SC 1292,

58. Ayaaubkhan Vs. St. of Mah., AIR 2013 SC 58,

59. C. Muniappan Vs. St. of TN, 2010 (6) SCJ 822,

60. Hema Vs. St., 2013 (81) ACC 1 (SC),

61. St. of Karn. Vs. Suvarnamma, (2015) 1 SCC 323,

62. Khem Ram Vs. St. of H.P., (2018) 1 SCC 202,

63. Rahul Mishra Vs. St. of Uttarakhand, AIR 2015 SC 3043,

64. V.K. Mishra Vs. St. of Uttarakhand, (2015) 9 SCC 588

65. Dhanaj Singh Vs. St. of Punj., (2004) 3 SCC 654,

66. Sheo Shankar Singh Vs. St. of Jharkhand, 2011 CrLJ 2139(SC),

67. Maqbool Vs. St. of A.P., AIR 2011 SC 184,

68. Maqbool Vs. St. of A.P., AIR 2011 SC 184,

69. St. of Punj. Vs. Hakam Singh, 2005(7) SCC 408

70. Dhanaj Singh Vs. St. of Punj., (2004) 3 SCC 654,

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. &
Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Shri Pradeep Kumar Mishra, learned Amicus Curiae for the accused-appellant Ram Naresh in Criminal Appeal nos. 1313 & 1315 of 1996, Shri Vinod Kumar Srivastava, learned counsel for the accused-appellant Kamal in the connected Criminal Appeal No. 1316 of 1996 and Shri L.D. Rajbhar & Shri Prem Shankar Mishra, learned AGA for the State respondent and perused record.

2. These three Criminal Appeals have been filed by accused-appellants namely Ram Naresh and Kamal against the impugned judgment and order dated 18.6.1996 passed by the Session Judge, Farrukhabad in ST No. 474 of 1993 and 475 of 1993, arising out of Case Crime No.118 & 138 of 1993, Police Station Rajepur, District Farrukhabad, by which accused Ram Naresh and Kamal have been convicted and sentenced under Section 302/34 IPC for life imprisonment and for the offence under Section 25 (i)(c) Arms Act for a term of one year RI each. It has been further directed that both the sentences shall run concurrently.

3. Brief prosecution version is that the incident took place on 3.8.1993 at 1:30 PM village Salempur when the informant Smt. Sudha Devi, her mother Beti Devi and brother Ram Lakhan were going from village through footpath (pagdandi) to village Salempur for taking medicine from doctor. The moment they reached to the footpath of the field of Antu, the accused persons namely Ram Naresh (her elder brother) and Kamal, hidden behind the hedges of mooj, came out having country made pistol in their hands and to the

mother who was going ahead to her, the accused Ram Naresh said that today he would not spare her alive as she was the reason for family dispute and she would not let him get his share in the property. Thereafter, in order to kill her mother, he fired on her. The fire hit her mother and the informant and her brother became apprehensive and in order to save their lives ran back shouting to save her mother and her mother ran towards Salimpur. Her mother had sustained injuries by fire and she could not run ahead and fell down. Accused Ram Naresh and Kamal went closer to her mother and by their country made pistol again fired on her mother, who died on spot in the field of Antu. The informant any how concealing herself with her brother went to the police station and gave a written report on the basis of which an offence under Section 302 IPC was registered against both the accused persons. The police went to the place of occurrence and took over the possession of the dead body, prepared inquest report and other papers, sealed the dead body and delivered to the police personnel for post-mortem. The statements of the witnesses were recorded by the Investigating Officer on the same day. From the spot, two empty cartridges and one live cartridge were found near the dead body and the same were taken into possession and sealed. Samples of blood stained and plain earth was also collected from the spot and that was also sealed. A pair of slipper of the deceased Beti Devi and one empty cartridge and one live cartridge was also found there at some distance from the dead body, which were taken in possession and sealed. The memo thereof was prepared in the presence of the witnesses. Subsequently, the accused persons surrendered before court and were taken on police remand as they made confessional statements and stated that they have concealed the country made pistol by which they committed the offences which they have concealed in the courtyard of the accused Ram Naresh. By digging a pit on their instance, the said country made pistol was recovered for which they could not show licence and, therefore, on the basis of recovery of illegal country made pistol, an FIR was lodged under Section 25 Arms Act. The site plan for both the offences was prepared during the investigation, thereafter, finding sufficient evidence against the accused persons, charge sheet was submitted against them under the aforesaid sections.

4. The learned trial court framed charges against the accused persons separately under Section 302 IPC and Section 25 of the Arms Act and in the alternative, also framed charge for the offence under Section 302 read with Section 34 IPC. The accused persons denied the charges and claimed trial.

5. In support, the prosecution examined eight witnesses. The statements of the accused persons were recorded under Section 313 Cr.P.C. and they put forward the case of denial saying that the witnesses had given false statements because of enmity and property disputes. The defence has examined DW-1 Sri Ravindra Kumar, Advocate and DW-2 Krishan Pal.

6. The learned trial court after hearing the prosecution and defence, convicted and sentenced both the accused persons by the impugned judgment.

7. Aggrieved by the conviction and sentence, the accused persons have filed this appeal challenging the impugned judgement being against weight of

evidence on record, is bad in the eyes of law and awarded sentence is too severe. Therefore, the impugned order is liable to be set aside and the accused persons are entitled for acquittal.

8. The learned counsel for the appellant-accused has submitted that both the fact witnesses examined by the prosecution are related being daughter and son of the deceased and as such they are highly interested witnesses. No independent witness has been examined. There are material contradiction, improvement and discrepancy in the evidence of fact witnesses. The defence evidence has not been given due weight. There is no such motive alleged for the offence. The recovery of weapon allegedly used for commission of offence is tainted and planted and the same cannot be relied upon.

9. The learned AGA has submitted that the case is based on direct evidence supported by recovery of weapon and and medical evidence and the learned trial court has rightly held the accused persons guilty and has awarded adequate sentence.

10. In the light of rival arguments of parties, let us see the evidence on record on the basis of which the learned trial court has passed the impugned judgement. PW-1 A.K. Kulshrestha, ASI is the formal witness, who has proved chik FIR Ext. Ka-1, GD report No.26 of 6:05 PM Ext. Ka-2, inquest report Ext. Ka-3 and other papers necessary for sending the dead body for post-mortem from Ext. Ka-4 to Ext. Ka-8. The witness also stated that he recorded the statement of informant, recovered two empty cartridges and one live cartridge near the dead body and sealed the same. He also picked up blood stained and plain earth, slippers of the deceased and one empty cartridge and one live cartridge from the place where the slipper was found. All these articles were sealed and memo was prepared before the witnesses which are Ext. Ka-9 to Ext. Ka-12. He has further stated that on 4.8.1993, he made attempt to search the accused persons and recorded the statement of Ram Lakhan and on the pointing of the informant, the site map of the place of occurrence was also prepared, which is Ext. Ka-13. The accused persons surrendered before the Court on 12.8.1993 and they were taken on police remand on 29.8.1993 and on their instance the country made pistol was recovered, which was used in the murder of deceased and which was concealed in the house of accused Ram Naresh, who after digging the place in the house got the country made pistol recovered and gave the same to the police. Their statements have been proved as Ext. Ka-14 and Ext. Ka-15, the country made pistol was sealed on spot and on that basis, recovery memo was prepared, which is Ext. Ka-16 and site plan of recovery was prepared, which is Ext. Ka-18. Prior to it, the witness entered his departure from the police station on GD report no.15 at 10:20 AM on 29.8.1993, copy thereof has been attached and filed by the witness, which is Ext. Ka-17. On the basis of recovery, FIR was lodged for the offence under Section 25 Arms Act, chik FIR and GD report is Ext. Ka-19 and Ext. Ka-20. The witness has also proved the empty cartridge and live cartridge, which were recovered from the spot as material Ext.-1 to Ext.-5. The recovered country made pistol is material Ext.-6 and material Ext.-7. The case under Section 25

Arms Act was investigated by SI Jaipal Singh, who recorded the statement of the witnesses.

11. PW-2 Constable Kamlesh Babu has stated that accused persons Ram Naresh and Kamal, present in the Court, had confessed that they committed murder of Beti Devi and the country made pistol by which she was killed is in the house of accused Ram Naresh and he can get the same recovered. This witness has proved the recovery of country made pistol at the instance of accused persons.

12. PW-3 Smt Sudha Devi (informant and eye witness) has stated that her mother Beti Devi was killed about one year 10 months ago by the accused persons Kamal and Ram Naresh. Three years before her murder, the witness had become widow and she was living with her parents. With her mother, her brothers Ram Pratap, Ram Lakhan were also living. Accused Ram Naresh is her real brother but he used to live separately in the same house. Her father was a teacher and he died on 24.10.1989. She had no share in his property. But she had her share in the money deposited in the fund and she had given affidavit that her share be also given to her mother. The accused Ram Naresh was always angry with her mother as the money and the account was in her control. On the date of incident, she was going to Salempur with her brother and mother. When they reached to the footpath (pagdandi), the accused persons who were hidden in the hedges of mooj (sarpat) came out and said to her mother that they would not let her alive and they fired on her mother which hit her mother who ran towards Salimpur and she and her younger brother Ram Lakhan ran backwards. Her mother could not run much far. The accused persons went close to her mother and fired from close range on her. She sustained injuries and died on the spot. Thereafter, the accused persons ran away from there. She lodged the first information report by giving a written report which she got scribed by Shamsher Singh, which is Ext. Ka-21. On the place of incident, empty cartridge was lying close to her mother's dead body and other was lying at some distance from the dead body and one live cartridge was also found from the place from where the slippers of her mother were recovered.

13. PW-4 SI Ram Naresh Pandey has stated that he was posted at police station Rajepur on 29.8.1993 and on that day the accused persons were taken on police remand and they took the police and witnesses to the house of accused Ram Naresh and got the country made pistol recovered which was used for the commission of offence. The memo was prepared on which he also signed.

14. PW-5 Ram Lakhan Singh (eyewitness) has stated that his father was a teacher who died. His elder sister Sudha Devi is widow and after death of her husband, she used to live with his mother in their house. Accused Ram Naresh also lived with them, who is real brother but he got separated himself from the family from the time of his father. After death of his father, his mother inherited the property. Accused Ram Naresh had instituted a case against his mother regarding the property of his father, which was pending at the time of the murder. About one year and 10 months ago, his mother was killed at 1:30 PM and at that time he, his sister Sudha Devi and his mother were going to Salempur for taking medicine. When they reached to the footpath (pagdandi) of

Salempur, the accused persons Ram Naresh and Kamal came out from the hedges of mooj. Ram Naresh said that he would not spare the mother alive as she was the sole reason for the family dispute. Thereafter, he fired on his mother, which hit her on pelvis (kulha). On being injured, she ran away leaving her slippers there. Thereafter, she fell on the ground and both the accused Ram Naresh and Kamal went close to her and both fired on her. Consequently, his mother died on spot. They shouted and on their shout 2-3 persons reached there and later on people from the side of their house also came. His sister went to Rajepur and got FIR scribed by one Shamsher and gave the same to the police station. The accused Kamal is samdhi (father-in-law of son) of accused Ram Naresh.

15. PW-6 SI Kripal Singh took over the investigation when most part of the investigation was completed and filed charge sheet, which is Ext. Ka-22.

16. PW-7 Dr. S.B. Singh has stated that on 4.8.1993, he was posted in District Hospital, Farrukhabad and in the evening, at 3:00 PM, conducted the post-mortem of Smt. Beti Devi, who was brought to the hospital by constable Chote Lal and constable Nawab Singh of PS Rajepur. The deceased was aged about 70 years and she had died one day before. Eyes were closed and mouth was partly opened, rigor mortis had passed from the upper limbs and was present in lower limbs. There was a little swelling on the stomach and the lower part of the stomach was greenish, dried blood, dust, mud and piece of grass were found on the chest and head. On examination, following ante mortem injuries were found on the body of the deceased-

(I) Firearm entry wound 3.5 cm x 2.5 cm x cranial cavity deep left mastoid region, just behind left ear. Margins inverted, lacerated, ecchymosed, mostoid; blackening and tattooing present around the wound in an area of 12 cm x 10.00 cm.

(II) Multiple pellets wound of entry 12 in number, dorso- medial aspect of right forearm in the area of 13.0 cm x 9.0 cm measuring 0.5 cm x 0.3 cm to 0.3 cm x 0.2 cm skin and muscle deep.

(III) Multiple pellet wounds of entry 20 in number, posterior lateral aspect of right buttock in area of 18.0 cm x 14.0 cm measuring from 1.0 cm x 0.3 cm to 0.3 cm x 0.2 cm, muscle to skin deep.

17. In the internal examination, left parietal bone and occipital bone were found broken, brain-lacerated, base of scalp was also broken, spinal cord not opened, heart empty, stomach contained 200 gm semi digested foot. The doctor has proved the post-mortem report as Ext. Ka-23 and has stated that the deceased must have died because of shock and haemorrhage, which must have resulted due to ante mortem injuries. From the body of the deceased, one wad, two ticklies and 26 pellets from scalp, 5 pellets from right arm from the skin and 7 small pellets from right buttock were recovered, which were sealed. One blouse, one sari, one peti-coat, one rudrakhsh mala of deceased were sealed and handed over to the constable. The doctor has also stated that the deceased must have died on 3.8.1993 at 1:30 PM and the injuries caused by firearms found on her body were sufficient to cause death.

18. PW-8 SI Jaipal Singh Yadav prepared inquest report and other papers necessary for sending the dead body for post-mortem. A live cartridge, empty cartridge and slippers, blood stained and

plain earth, two empty cartridges and one live cartridge were taken into custody and memos were prepared on the dictation of SO. On all the memos, SO signed. The witness has further stated that in relation to the offence under Section 25 Arms Act, he recorded the statement of SO A.K. Kulsheshtra and statements of accused persons and other witnesses, prepared site plan of place of recovery, which is Ext. Ka-24 and Ext. Ka-25 and after getting sanction for prosecution, charge sheet was submitted against both the accused persons for the offence under Section 25 of the Arms Act, which is Ext. Ka-28 and Ext. Ka-29. The sanction order is Ext. Ka-26 and Ext. Ka-27.

19. The defence has examined DW-1 Sri Ravindra Kumar, Advocate who stated that he is a practising lawyer and he knew Ram Lakhan who came to him for preparing an affidavit, which was got prepared and sworn by oath Commissioner after reading over to Ram Lakhan on which he put his signature. In the cross-examination, he has stated that he has been lawyer of Ram Lakhan and he does not know Ram Prakash and Chhavi Nath. He has denied that he prepared false affidavit for him.

20. DW-2 Krishan Pal has also been examined by defence, who has stated that he knew the accused persons. He also knew the deceased Beti Devi, who belonged to his village. She had three sons and two daughters and the eldest son is Ram Naresh (accused), thereafter, Ram Pratap and then youngest one Ram Lakhan, who is the witness in this case. Daughters are Sudha Devi (witness & informant) and Suman. Suman has been married with his nephew. Three years before, Beti Devi was killed in the noon at 12:00 PM. He was sitting on his door towards road side and some boys rushed crying that the mother of Ram Naresh has been killed by someone. The dead body of Beti Devi was found in the field of Antu. He tried to trace out the sons of Beti Devi, but the two sons had gone to Fatehgarh. They were informed by him. Sudha Devi, Ram Pratap, Ram Lakhan and Shamsher came there after 3:00 PM. The chaukidar was sent to lodge report about the incident to the police station. After sometimes, the SO came there. Inquest report was prepared on which he is also a witness.

21. From the perusal of the evidence on record, it appears that PW-3 Sudha Devi and PW-5 Ramlakhan both are daughter and son of the deceased. PW-3 started living with her mother after death of her husband and at the time of incident, both were accompanying the deceased and were going to Salempur to a doctor for taking medicine for the deceased. In the fact and circumstances, their being together and presence at the time of incident is natural. Both have stated that the accused persons fired on deceased by their country made pistol, injured her and caused her death. Defence has examined DW-2 to show that they were not with the deceased and someone killed the deceased at about 12 PM in the noon and he heard some boys were crying that she had been killed and her body was found in the field of Antu. Her sons had gone to Fatehpur and after 3 PM, Sudha and her brothers reached there. Apparently, DW-2 is not eyewitness nor he has been able to state about or identify any of the boys he heard crying. It is also established that the dead body was found in the field of Antu which supports the case of prosecution to the extent that the incident took place somewhere around the field of Antu. Before the IO, he gave statement that in the afternoon the news spread that Beti

Devi has been killed by Ram Naresh and Kamal, but when controverted by prosecution, he has denied this. Remaining statement given under section 161 has been admitted by him which includes the recovery of slipper of deceased and cartridges from the spot. He has stated that he sent the Village Chaukidar to Police Station to lodge FIR. If it was so, the Village Chaukidar was the right person to prove this fact. But, he has not been examined by the defence. On the other side, it has been proved by the informant that she lodged the FIR by giving written report in the Police Station. In absence of any cogent and clinching evidence, the version of DW-2, to the extent it contradicts prosecution version, cannot be believed. Clearly, he has made improvement to shift the time of incident from 1.30 PM to around 12 PM. Moreover, the difference he has tried to create in the timing is just of one hour and 15 to 30 minutes which is not relevant in view of the ocular testimony supported by medical evidence establishing the time of incident alleged by prosecution.

22. The learned counsel to the accused-appellant has challenged the credibility of fact witnesses on the basis of their being related witness, certain contradiction and improvement and lack of any motive for the commission of offence. He has submitted that no independent witness has been examined and both the fact witnesses are relatives and highly interested witnesses and on their evidence no reliance could be placed by the learned trial court. It is admitted fact that both the fact witnesses are brother and sister and the deceased has been their mother. But, it can hardly make a difference as the prosecution case is that at the time of incident, there was none on the place of occurrence except these witness who were accompanying their mother and they were going to the doctor in relation to the ailment of the deceased.

23. The law in respect of the testimony of related witnesses has been time and again reiterated by the Supreme Court that the testimony of related witnesses cannot be discarded merely on the basis of relationship. The only requirement is that the testimony of such witness should be scrutinized cautiously and carefully. In **Dalip Singh v State of Punjab (1954) SCR 145**, while rejecting the argument that witnesses who are close-relatives of the victim should not be relied upon, the Court held as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

24. In **Masalti v State of UP AIR 1965 SC 202**, the Supreme Court observed:

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice."

25. The Supreme Court has also taken the view that related witness does not necessarily mean or is equivalent to an interested witness. A witness may be called interested only when he or she derives some benefit from the result of litigation; a decree in a civil case, or in seeing a person punished in a criminal trial. In **Darya Singh v State of Punjab, AIR 1965 SC 328**, followed by **State of UP v Kishanpal (2008) 16 SCC 73,** the Court held as under:

"On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

26. Again, in **Appa v State of Gujarat, AIR 1988 SC 698**, the Court has observed:

"Experience reminds us that civilized people are generally insensitive when crime is committed even in their presence. They withdraw from both, victim and vigilant. They keep themselves away from the Court. They take crime as a civil dispute. This kind of apathy of general public is indeed unfortunate but it is everywhere whether in village life or town and city. One cannot ignore this handicap. Evidence of witnesses has to be appreciated keeping in view such ground realities. Therefore, the Court instead of doubting the prosecution case where no independent witness has been examined must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any suggested by the accused."

27. Similar view has been taken in **State of AP v S. Rayappa (2006) 4 SCC 512**, where the court observed that it is now almost a fashion that public is reluctant to appear and depose before the court especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court stated the principle as follows:

" ....by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

28. Further, in **Pulicherla Nagaraju @ Nagaraja Reddy v State of AP (2007) 1 SCC (Cri) 500,** the Supreme Court has held as under:

"In this case, we find that the trial court had rejected the evidence of PW1 and PW2 merely because they were interested witnesses being the brother and father of

the deceased. But it is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise, found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted."

29. Similarly, in **Satbir Singh v State of UP, (2009) 13 SCC 790,** the Court has held as under:-

"It is now a well-settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon....."

30. In **M.C. Ali v State of Kerala AIR 2010 SC 1639; and Himanshu v State (NCT of Delhis, (2011) 2 SCC 36, Bhajan Singh and others v State of Haryana; (2011) 7 SCC 421,** it was laid down that evidence of a related witness can be relied upon provided it is trustworthy. Again, in **Jayabalan v U.T. of Pondicherry, 2010(68) ACC 308 (SC),** the Supreme Court has made following observation:

"We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

31. **Dharnidhar v State of UP, (2010) 7 SCC 759** referred the above observation of **Jaya Balan (supra)** and held that there is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. Similar view has been taken in **Ram Bharosey v State of UP AIR 2010 SC 917**, where the Court stated that a close relative of the deceased does not become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice.

32. Again, in **Balraje @ Trimbak v State of Maharashtra, (2010) 6 SCC 673**, it has been held that when the eye-witnesses are stated to be interested and inimically deposed against the accused, it would not be proper to conclude that they would shield the real culprit and rope in innocent person. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyze the evidence of related witnesses and those witnesses who are

inimical towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

33. Subsequently, in **Jalpat Rai v State of Haryana AIR 2011 SC 2719 and Waman v State of Maharashtra AIR 2011 SC 3327,** it was observed that the over-insistence on witnesses having no relation with the victims often results in criminal justice going away. The testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. This view has been reiterated in **Shyam Babu v State of UP, AIR 2012 SC 3311, Dhari & Others v State of UP, AIR 2013 SC 308 and Bhagwan Jagannath Markad (supra). Recently, in Ganapathi v State of Tamilnadu, AIR 2018 SC 1635,** the Court found no force in the argument that the conviction based on the evidence of family members in a murder trial is not sustainable. In **Rupinder Singh Sandhu v State of Punjab, (2018) 16 SCC 475**, it has been reiterated by the Supreme Court that relationship by itself will not render the witness untrustworthy. The Supreme Court laid down as below:

*"Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. ..... A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of re*lationship far from being a foundation is often a sure guarantee of truth."

34. Recently, in **Shio Shanker Dubey v State of Bihar AIR 2019 SC 2275,** the Supreme Court has reiterated the law as under:

"..... a close relative cannot be characterized as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

35. Thus, in view of aforementioned decisions of the Supreme Court, it is settled position of law that the statements of the interested witnesses can be safely relied upon by the court in support of the prosecution story. But this needs to be done with care and to ensure that the

administration of criminal justice is not undermined by the persons who are closely related to the deceased and inimical with the accused. When their statements find corroboration by other evidence, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then there is no reason as to why the statement of so-called 'interested witnesses' cannot be relied upon by the Court. It would be hard to believe that the close relatives shall leave the real culprit and shall implicate innocent persons falsely simply because they have enmity with the accused persons. There is no rule to the effect that the evidence of related or partisan witness is not acceptable. Association or relation does not render the evidence false and partisanship is no ground to reject the testimony given on oath.

36. So far as non-examination of the independent witness is concerned, the option lies with the prosecution to examine as many witness as is required to be examined to prove the charge. Moreover, no other witness has been alleged to be present on spot at the time of incident and therefore, there was no question of examining any other witness. Moreover, it is not the quantity, rather quality of the evidence which is decisive in arriving at the right conclusion.

36. Certain contradictions, discrepancies and improvements have been mentioned in the statements of fact witnesses. PW-3 has stated that they were going to *Dr. Ramprasad of salempur where her mother used to go for injection. She has said that her mother was patient of tuberculosis and on the previous night, because of cough (khansi), blood came out from her mouth. She has also stated that when accused obstructed and gave threatening to her mother and she ran towards Salempur, accused Ram Naresh shot fire at her which hit her on her right buttock.* The submission of the learned counsel is that the name of the doctor where the deceased was going or any thing stated above in italics has not been mentioned in the FIR nor in the statement given to IO. The defence has also pointed out discrepancy on the point that the fire was shot while she was running away. PW-5 Ram Lakhan who has been examined as eyewitness has also narrated the whole incident in the similar way. Both the witnesses have stated that when both the accused persons came out in front of the deceased and threatened her, the deceased tried to run away towards Salempur and she sustained the first shot in the process and the other two shots were fired by them from close range when she fell down. Both the witnesses have stated that the deceased sustained three firearm injuries one while running and the other two when she could not run and fell down. They have also stated that her slippers were left at the place where she sustained the first fire.

37. On facts, we find that the contradiction, discrepancy or improvement mentioned above are not in respect of time, place, date and manner of the commission of offence. It needs to be mentioned that where own mother is victim of deadly assault and the eyewitnesses were son and daughter of the deceased, in such a situation, the witnesses are not supposed to be perfectionist to give the exact account of the incident and narrate every aspect related thereto in a uniform way. Some sort of contradiction, improvement and embellishment is bound to occur in the statement. As laid down in **State of UP v**

Naresh; 2011 (75) ACC 215) (SC), in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

38. In **Gosu Jayarami Reddy and another v State of Andhra Pradesh; (2011) 3 SCC(Cri) 630**, it was observed that Courts need to be realistic in their expectation from the witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorized by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased and on what part of the body, there is some mix-up or confusion.

39. Further, in **Parsu Ram Pandey v/s State of Bihar AIR 2004 SC 5068, Shivappa v State of Karnataka; AIR 2682, Ramchandaran v/s State of Kerala AIR 2011 SC 3581,** it was held that minor discrepancies or some improvements would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on which they give their depositions in Court. In **Mukesh v State for NCT of Delhi, AIR 2017 SC 2161 and Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 53,** it was reiterated that minor contradictions in the testimonies of the prosecution witness are bound to be there and in fact they go to support the truthfulness of the witnesses. In view of the above, we are of the view that there is nothing in the deposition of the eye-witnesses on the basis of which their evidence can be discarded. We do not find any contradiction discrepancy or improvement in the statement of the witness and there is consistency so far as narration of the criminal incident.

40. So far as the second limb of argument is concerned, we do not find it at all necessary that all the facts are required to be mentioned in the FIR. The purpose of FIR is to give information about commission of offence and it is not necessary to give every minute detail. In **Jarnail Singh v State of Punjab, 2009 (6) Supreme 526, Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 537 and Ramji Singh v State of UP, 2019 (4) Crimes 585 (SC)**, it has been held that the FIR is not the encyclopedia of all the facts relating to crime. The only requirement is that at the time of lodging FIR, the informant should state all those facts which normally strike to mind and help in assessing the gravity of the crime or identity of the culprit briefly. In our view, a detail description and sequence of incident constituting the offence is not at all required to be mentioned in the FIR.

41. The learned counsel to the accused-appellant has also submitted that the presence of PW-5 is highly doubtful as he had sworn an affidavit and this fact has been stated by DW-1

Ravendra Kumar Misra Advocate, a lawyer who got the affidavit prepared, that Ram Lakhan put his signature thereon. The affidavit has been proved as Ext. Kha-1 and it has been stated therein that on 3.8.1993 at about 1 PM, his mother had left to go to Salempur to her relative Pratap Bhan and when she reached near Salempur, someone killed her by firing. The people passing through came and informed him about it. He and Sudha rushed there and and saw their mother lying dead. There is a case pending in the court between the deceased and Ram Nnaresh in which he, his sister Sudha and Ram Prtap are also parties. On this basis, they suspected that accused persons killed the deceased and lodged FIR. The learned counsel has pointed out that PW-5 was examined and he has stated that the affidavit bears his photograph and signature. But, he has explained it by saying that on the saying of Chhavinath, brother in law of Ram Prtap, that it is so required in respect of the money of his father's provident fund, he signed on blank papers and he did not go to court nor he was produced before any oath commissioner. The explanation given by the witness appears to be convincing looking to his age as he was about 15 years in age when he sworn the affidavit and definitely, there was a dispute with regards to the money of provident fund of his father. It also looks strange that DW-1 has stated that he knew witness Ram Lakhan from the last three years when he prepared the affidavit. Knowing an eleven twelve years boy does not look natural. The Oath Commissioner has not been examined who could have been best person to state about it. In addition to it, it needs mention that in criminal trial, evidence cannot be given on affidavit or by filing an affidavit.

42. In **Munir Ahmad v State of Rajasthan, AIR 1989 SC 705,** it has been held that in the case of a living person, evidence in judicial proceedings must be tendered by calling the witness. Testimony of such witness cannot be substituted by an affidavit unless the law permits so as u/s 295 and S. 407(3) CrPC or the court expressly allows it. The Supreme Court has deprecated getting affidavit of witnesses in advance in **Rachapalli Abbulu v State of AP, AIR 2002 SC 1805** and has held that practice of getting affidavits of witnesses in advance is an attempt aimed at dissuading witnesses from speaking the truth before the court. The Supreme Court has laid down that such interference in criminal justice should not be encouraged and should be viewed seriously. In **Smt. Sudha Devi v M.P. Narayanan, AIR 1988 SC 1381 and Ayaaubkhan v State of Maharashtra, AIR 2013 SC 58,** it has been held that affidavits have got no evidentiary value as the affidavits are not included in the definition of "evidence" in S. 3 of the Evidence Act and can be used as evidence only if for sufficient reasons court passes an order like the one under O.19, Rule 1 & 2 of the CPC. Therefore, in view of the discussion above, we are of the view that the said affidavit is not significant and on that basis the evidence of PW-5 cannot be rejected.

43. The next submission is about motive and it has been argued that the accused persons did not have motive or adequate motive sufficient to cause the death of own mother. The defence case has been that some unknown person killed the deceased and out of enmity, the accused persons have been falsely implicated. It has been already discussed above that the defence theory that the witnesses did not see the criminal incident as they were not present there, is not convincing. It is a case of broad day murder and the two eye-witnesses were none other but the daughter and son of deceased who were accompanying the deceased and going to the doctor as the deceased was suffering

from tuberculosis. Thus, the prosecution case is based on direct evidence and the settled law is that motive goes to the back seat in such cases.

44. In a number of decisions, like **Abu Thakir v State AIR 2010 SC 2119, State of UP v Nawab Singh AIR 2010 SC 3638, Bipin Kumar Mondal v State of West Bengal 2005 SCC (Criminal) 33, Shivraj Bapuray Jadhav v State of Karnataka (2003) 6 SCC 392, Thaman Kumar v State of Union Territory of Chandigarh (2003) 6 SCC 380, State of HP v Jeet Singh; (1999) 4 SCC 370,** it has been repeatedly held by the Supreme Court that motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence by a particular person. In a case of direct evidence the element of motive does not play such an important role so as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubt raised in this regard. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused.

45. We find that the Supreme Court has reiterated the aforesaid view in various decisions, such as **Gopi Ram v St. Of UP, 2006 (55) ACC 673 SC, R.R. Reddy v State of AP, AIR 2006 SC 1656, Sucha Singh v State of Punjab; AIR 2003 SC 1471, State of Rajasthan v Arjun Singh AIR 2011 SC 3380**, **Varun Chaudhry v State of Rajasthan AIR 2011 SC 72**. In the recent judgment of **Saddik Vs. State of Gujarat, (2016) 10 SCC 663**, it has been held that the prosecution case could not be denied on the ground of alleged absence or insufficiency of motive. Motive is insignificant in cases of direct evidence of eyewitnesses. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable, truthful and acceptable evidence is available on record sufficient to establish the guilty of accused persons.

46. We are of the view that when there is sufficient direct evidence regarding the commission of offence, the question of motive should go away from the mind of the Court. Motive is a double edged weapon and the key question for consideration in cases based on direct evidence remains whether the prosecution has convincingly and satisfactorily established the guilt of all or any of the accused beyond reasonable doubt by adducing reliable and cogent evidence. As such, the proof of the existence of a motive is not necessary for a conviction for any offence. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record establishes the guilt of the accused.

47. In the case in hand, evidence shows that motive in terms of enmity has been alleged by the defence side. In addition to it, the prosecution witnesses have stated that the relationship of accused Ram Naresh with his mother was very strained and he used to live in the same house separately. The property dispute was

there as after the death of her husband, the deceased inherited the property and also the amount of provident fund. PW-1 has stated that prior to this incident, accused Ram Naresh committed marpeet with her mother in which she was also injured and FIR was lodged in relation thereto for the offence under section 325 IPC and the case is still pending. She has also stated that the accused also lodged a false cross case. This all goes to show that the relationship of the accused was very strained with deceased and civil and criminal case were pending in court. Therefore, motive has been alleged and proved by prosecution. So far as accused Kamal is concerned, it is admitted and proved that he is Samdhi of accused Ram Naresh as his daughter is married with son of accused Kamal and it is no strange if he joined hands for commission of the offence.

48. As pointed out above, both the eyewitnesses are daughter and son of the deceased and the deceased was sick and suffering from tuberculosis. If both were going to doctor with deceased, their presence on spot at the time of incident is quite natural. The incident took place in the day light and there is no possibility of mistake in identifying the accused persons, more so because the accused persons were well known to them. Both the witness have stated that their mother sustained three firearm injuries which was caused by the accused persons and their mother died on spot immediately. The medical report also supports this fact. PW-7 Dr. S.B.Singh, while conducting post-mortem, found on the dead body three firearm entry wounds which are just behind left ear, multiple pellets wound, 12 and 20 in number, on dorso-medial aspect of right forearm and posterior lateral aspect of right buttock. In the opinion of doctor, the injuries were caused by country made pistol and injury no.1 was caused from a very close range as blackening and tattooing was present and other two injuries were from a little distance. Left parietal bone and occipital bone were found broken, brain-lacerated, base of scalp was also broken. The eye-witnesses have stated that the deceased died immediately on spot and the doctor has also expressed the view that the death must have taken place on 3.8.1993 at 1.30 PM and it not only corroborates the time of death but also shows that the injuries were sufficient to cause instant death. The discrepancy tried to have been created by the defence with regards to number of firing is based on imagination and has no base whatsoever.

49. In the FIR, place of occurrence has been alleged to be the pagdandi of the field of Antu towards Salempur which comes just after crossing pakka road when the two accused persons came out from the hedge and committed the offence. Ext. Ka-13 is the site map prepared and proved by IO in which the place of occurrence has been shown as alleged in the FIR and stated by the eye-witnesses. In the site map, the place where dead body was found, from where blood stained and plain earth was picked, place near the dead body where live cartridge was found, place of two empty cartridges, place of slippers of the deceased and one live cartridge, place from where accused persons started firing, hedge where they were hidden, the pathway used by them, way to the house of deceased, way by which both the witnesses turned back and fled, way the deceased tried to escape, pagdandi and mend of the field has been shown. The distance between the place of slippers and dead body of the deceased was about 115 steps. PW-1 and PW-5 have also stated the place of occurrence to be near

Antu's field and pagdandi and the same is also established by defence version and the statement of DW-1. On the same day, inquest report was prepared and the officer has mentioned and proved that the dead body was found in the field of Antu. Thus, we find that the place of occurrence has been fully established. It is pertinent to mention that the inquest report has been prepared and dead body has been sealed after appointing 5 punch witnesses including DW-2 and it has been specifically contained therein that the deceased died because of firearm injuries. Ext. Ka-10 is the memo of recovery of slippers of the deceased and on the left slipper, blood stains were found. Similarly, Ext. Ka-11 is the memo of blood stained and plain earth which was lifted from the place of occurrence and Ext. Ka-12 is the memo of live and empty cartridges recovered from the spot. All these memos have been duly proved by prosecution witnesses and they also corroborate the prosecution version.

50. Both the accused persons made confessional statement regarding commission of the offence by them by country made pistols and on their pointing, in the presence of witnesses got two country made pistol, one of accused Ram Naresh and other of accused Kamal, recovered from the house of accused Ram Naresh which were concealed in a dig. They admitted that by the pistols so recovered, they killed the deceased on the fateful day. Both the pistols were sealed and were produced in evidence during trial. The memo of recovery is Ext. Ka-16 which has been proved by the witnesses thereto. The learned trial court has convicted both the accused persons for the offence under section 25 the Arms Act. Thus, the prosecution version is also supported by the fact of discovery of two pistols on the pointing of both the accused persons.

51. The submission of the learned counsel is that the recovery was planted by police and false. The confession cannot be relied upon since made to the police. Since, the accused-appellants have also challenged the conviction under section 25 of the Arms Act, we are required to examine the legality of impugned judgement in respect thereof.

52. We find on record that on the basis of recovery memo of pistols, offence under section 25 of the Arms Act was registered against accused persons as they could not show license for keeping the same and chick was prepared. The offence was investigated, site map was prepared, statement of witnesses recorded and charge sheet was submitted by police against them. The prosecution witnesses have proved the recovery and the accused persons have been also convicted and awarded sentence for the same.

53. The recovery memo of two pistols shows that the accused persons, in custody, made confessional statement and took the police to the house of accused Ram Naresh and after removing a stone tile inside the house, both the accused persons dig out the country made pistol kept in polythene and stated that by those pistols they killed the deceased. PW-1 SI A.K. Kulshresth has stated that both the accused gave statement that the pistols by which they killed Beti Devi are hidden by them in the house of Ram Naresh and they can get the same recovered. Their statement was noted down in the case dairy by him and extract thereof certified by the witness was filed and proved by him as Ext. Ka-14 and Ka-15. Thereafter, he took the accused persons on

remand by order of the court and on 29.3.1993, he took them to their village. All the police personnel and witnesses were mutually searched to ensure that there is nothing incriminatory with them and thereafter, the accused persons voluntarily dig out the pistols used for the commission of the offence. The pistols were sealed and memo (Ext. Ka-16) was prepared and the signatures of accused persons and witnesses were obtained after reading and explaining the same. GD report no. 15 (Ext. Ka-17) of 10.20 AM of the same date is of departure of the witness and accused persons from the Police Station. Site map of recovery (Ext. Ka-18) was prepared by the witness and sealed pistols were deposited in the Police Station and on the basis of memo of recovery, offence under section 25 of the Arms Act was registered against both the accused persons and chick (Ext. Ka-19) was prepared and an entry was made in the GD no. 26 (Ext. Ka-20). The witness has also proved the recovered pistols as Material Ext. 6 and 7. the evidence of PW-1 finds full support from the statement of PW-2 CP Kamlesh Babu who is another witness of recovery. Both the witnesses have been cross-examined by defence, but, nothing has come out on the basis of which they could be disbelieved. We find that both the witnesses have proved the recovery of those pistols which were used in the murder of deceased and for keeping the same, the accused persons could not show any licence and as such the learned trial court rightly held both the accused persons guilty for the offence under section 25 of the Arms Act.

54. The law with regards to admissibility and evidentiary value of discovery of material fact and incriminatory articles under section 27 of the Evidence Act has been variously explained and reiterated by the Supreme Court. In **Suresh Chandra Bahri Vs. State of Bihar, AIR 1994 SC 2420,** it has been laid down that where the accused had made confessional disclosure statement under section 27 of the Evidence Act to the police officer during investigation and on the basis thereof, incriminatory articles were found and seized and the evidence showed that the articles belonged to the deceased, it has been held by the Supreme Court that the disclosure statement can be said to be true and also worthy of credence. Non recording of disclosure statement and non-examination of public witness as regards to the said recovery would be of no consequence.

55. It has been held in **Bodh Raj Vs. State of J & K, AIR 2002 SC 3164** that section 27 of the Indian Evidence Act, 1872 is like an exception to Sections 25 to 26 of the Evidence Act and a confessional statement made in police custody leading to discovery of fact has been made admissible in evidence against the accused. The prohibition on admissibility of confessional statement reflects the fear of the Legislature that a person under police influence might be induced to confess because of undue pressure. The statement which is admissible under Section 27 is the one which is the information leading to discovery. The information might be confessional in nature but if it results in discovery of a fact, it becomes a reliable information. But the information permitted to be admitted in evidence is confined to that portion of the information which 'distinctly relates to the fact thereby discovered.'

56. In **Geejaganda Somaiah, T.N. v. State of Karnataka AIR 2007 SC 1355,** it has been laid down that what is important

is the information provided by the accused, which leads to the discovery of the fact, which is connected with the particular crime, provided that the accused is in custody. It is of no consequence that the information amounts to a confession which will not be allowed to be proved by the prosecution. But if a relevant fact is discovered in consequence of such information it furnishes assurance regarding the truth of such information. It is such information as relates to the fact thereby discovered is declared to be relevant and is allowed to be proved by the prosecution.

57. In **Sandeep Vs. State of UP, (2012) 6 SCC 107 and Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161,** it was further laid down that if anything or weapons etc. are recovered at the instance of the accused only in the presence of police party and there is no public witness to such recovery or recovery memo, the testimony of the police personnel proving the recovery and the recovery memo cannot be disbelieved merely because there was no witness to the recovery proceedings or recovery memo from the public particularly when no witness from public could be found by the police party despite their efforts at the time of recovery. Seizure memo need not be attested by any independent witness and the evidence of police officer regarding recovery at the instance of the accused should ordinarily be believed. The ground realities cannot be lost sight of that even in normal circumstances, members of public are very reluctant to accompany a police party which is going to arrest a criminal or is embarking upon search of some premises.

58. In **Navneethakrishnan v State, AIR 2018 SC 2027,** the SC observed-

"The exception postulated under section 27 of the Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance under the exception postulated by exception postulated by section 27 aforesaid, is limited "..... as relates distinctly to the fact thereby discovered.... ." The rationale behind section 27 of the Evidence Act is, that the facts in question should have remained unknown but for the disclosure of the same by the accused. The discovery of facts itself, therefore, substantiates the truth of the confessional statement. And since it is truth that a court must endeavour to search, section 27 aforesaid has been incorporated as an exception to the mandate contained in sections 25 and 26 of the Evidence Act."

59. It has been submitted by the learned counsel for the accused-appellants that the two public witnesses namely, Chhabi Nath and Mahesh have not been examined by the prosecution. It has been also submitted that these public witnesses gave affidavit during investigation in favour of accused persons. If it was so, in our view, it is in itself a good justification for not producing them during trial. So far as the argument that the public witnesses were not examined and they gave affidavit denying such recovery in their presence, the same will not adversely impact the prosecution version nor the recovery would become tainted. The learned trial court has taken the view that even if it was so, the police witnesses have proved the recovery. The Supreme Court in **Nathu Singh v State of MP, 1974 Cri. L J 11**, their testimony cannot be discarded for the reason that they are police witnesses and it has not been shown that the police had some enmity with accused. Further judgements such as **Pramod Kumar Vs. State (GNCT) of Delhi, AIR 2013 SC 3344 and Govindaraju alias Govinda Vs. State of Shri Ramapuram P.S., AIR 2012**

SC 1292 also affirm this view in which it has been held that the testimony of police personnel should be treated in the same manner as testimony of any other witness. There is no principle of law that without corroboration by independent witnesses, the testimony of police personnel cannot be relied on. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good reasons. As a rule it cannot be stated that Police Officer can or cannot be sole eye witness in criminal case. Statement of Police Officer can be relied upon and even form basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record. Experience shows that local people to avoid enmity and bad relation are often reluctant in

60. We are of the view that there is no error or perversity in the approach of the learned trial court. This instant case is based on direct evidence and the eyewitnesses saw the accused using pistol for causing deadly assault by firing and the recovery has been made from the house of accused. So far as his affidavit is concerned which was given by him during investigation denying such recovery is no evidence as the witness has denied the same and has stated that his statement before the court is correct, and also in view of judgement of the Supreme Court in Ayaaubkhan v State of Maharashtra, AIR 2013 SC 58, where it has been held that affidavits have got no evidentiary value as the affidavits are not included in the definition of "evidence" in S. 3 of the Evidence Act.

61. We are of the view that seizure memo need not be attested in all cases by any independent witness and the evidence of police officer regarding recovery at the instance of the accused should ordinarily be believed. The ground realities cannot be lost sight of that even in normal circumstances, members of public are very reluctant to accompany a police party which is going to arrest a criminal or is embarking upon search of some premises. There is no such rule that the police as witness of recovery cannot be believed. We get added strength to take this view on the basis of the judgement of the Supreme Court discussed above. There appears to be no error in the impugned conviction of both the accused persons for the offence under section 25 of the Arms Act as the recovery of the two pistols has been proved by the trustworthy evidence of two police witnesses of recovery and the accused persons were not able to show licence for keeping the same.

62. It has also been argued that there is no evidence to link the recovered pistols with the offence and the same has not been sent for chemical examination. Moreover, the blood stained earth and clothings of deceased have also not been sent for chemical examination. Even if it is so, this lapse is attributable to irregularity or deficiency in investigation and in **C. Muniappan Vs. State of TN, 2010 (6) SCJ 822, Hema Vs. State, 2013 (81) ACC 1 (SC), State of Karnataka Vs. Suvarnamma, (2015) 1 SCC 323 and Khem Ram Vs. State of Himachal Pradesh, (2018) 1 SCC 202**, it has been held that the lapses in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved. The only requirement is use of extra caution in evaluation of evidence. A defective investigation cannot be fatal to prosecution where ocular testimony is found credible and cogent.

63. In **Rahul Mishra Vs. State of Uttarakhand, AIR 2015 SC 3043 and**

V.K. Mishra Vs. State of Uttarakhand, (2015) 9 SCC 588 it has been remarked by the Supreme Court that the investigating officer is not obliged to anticipate all possible defences and investigate in that angle. In any event, any omission on the part of the investigating officer cannot go against the prosecution. Interest of justice demands that such acts or omission of the investigating officer should not be taken in favour of the accused or otherwise it would amount to placing a premium upon such omissions. In **Dhanaj Singh Vs. State of Punjab, (2004) 3 SCC 654, Sheo Shankar Singh Vs. State of Jharkhand, 2011 CrLJ 2139(SC) and Maqbool Vs. State of A.P., AIR 2011 SC 184**. the Supreme Court has more specifically laid down that non sending of blood stained earth and clothes of the deceased or injured to chemical examiner for chemical examination is not fatal to the case of the prosecution if the ocular testimony is found credible and cogent. Similarly, in **Maqbool Vs. State of A.P., AIR 2011 SC 184 State of Punjab Vs. Hakam Singh, 2005(7) SCC 408 and Dhanaj Singh Vs. State of Punjab, (2004) 3 SCC 654**, it has been held that non sending of weapons of assault, cartridges and pellets to ballistic experts for examination would not be fatal to the case of the prosecution if the ocular testimony is found credible and cogent.

64. It has been also submitted that there was no reason for accused Kamal to commit the offence as he was only a relative and he was not supposed to be involved in the family dispute of both the sides in relation to the property of the deceased. Two eyewitnesses have stated that the first fire was shot by accused Ram Naresh and when the deceased fell down, both the accused went closer to her and each of them fired by their pistol. This ocular version cannot be ruled out on the basis of hypothetical stand taken by the defence. Both the accused persons are close by virtue of the marriage of their children and accused Ram Naresh had very strained relations with the deceased and as such, there was every reason for both the accused persons to have intimacy and closeness and naturally, accused Kamal was the only well wisher of accused Ram Naresh as his relation with other members of the family were strained. Subsequently also, both surrendered together and were sent to jail. Both together caused death by firing and concealed their pistol in the house of Ram Naresh and the same was recovered on their pointing. Thus, both joined gloves together and shared the common intention for commission of the offence.

65. There is yet another argument that both the witnesses were children of deceased and were no less inimical. They were present on spot. There was occasion for the accused persons to assault and cause injury to them. But no injury was sustained by them. This makes their presence doubtful at the time of incident. This aspect has been adequately addressed by the learned trial court. There may be several reasons for it; the witnesses ran backwards; the accused might not be feeling them to be any hindrance in his goal; witness Ram Lakhan was just 14 years old; no resistance by witnesses during commission of the offence or any thing of like nature. It is not possible to read the mind of the accused why he did not assault or caused any injury to them. But, sustaining no injury is no reason to reject the ocular

testimony which is consistent, trustworthy, natural and spontaneous and without any material contradiction and discrepancy. No convincing reason has been assigned by the defence why the real brother and sister will implicate the accused falsely.

66. In view of the above we find that prompt FIR has been lodged in this case; prosecution version has been supported by the account of two eyewitnesses which further finds support and corroboration by medical evidence and recovery of weapon used in the commission of the offence; alleged motive has been proved; the presence of both the eyewitnesses at the time of incident and with the deceased is natural and their evidence is credible, consistent and trustworthy on which reliance has been rightly placed by the learned trial court. Once, it was established by prosecution and defence version both that at the time date and place, the deceased was killed by firearm injury and the injury was sufficient to cause death, the limited question for determination was the role and involvement of the accused persons and that has been proved by two eyewitnesses and there is nothing on record to discard their evidence. As such, we do not find any perversity or illegality in the impugned judgement. The conviction and sentence awarded by the learned trial court is upheld. The appeal is, therefore, liable to be dismissed.

67. All the three Criminal Appeals are accordingly **dismissed.**

68. The accused-appellants **Ram Naresh** and **Kamal** are directed to surrender before the learned trial court forthwith where from they shall be sent to jail to undergo the sentence.

69. Amicus Curiae Shri Pradeep Kumar Mishra, Advocate shall be paid Rs. 10,000/- for his legal assistance to the Court.

70. Office is directed to send a copy of this order to the court below for communication and compliance along with lower court record.

(2020)03-05ILR A472
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.03.2020

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 1431 of 2007

Sanjeev @ Sanju ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Afaq Zaki Khan, Anil Kumar Tiwari, Arun Kumar, Neeta Singh Chandel, Rishad Murtaza, Udai Pratap Singh

Counsel for the Respondent:
G.A., Saurabh Chandra

A. Evidence law- Indian Evidence Act, 1872- Section 8-Motive- The cases which are based on direct evidence of the witnesses should be decided on the basis of quality and probative value of the evidence of such eye witnesses.

Motive is insignificant in cases of direct evidence.

B. Evidence law- Indian Evidence Act, 1872 –Section 134 - It is not the quantity, but the quality which is material- The court can and may act on the testimony of a single witness provided he is wholly

reliable– In case of doubts and suspicion the courts will insist on corroboration.

The number of witnesses is not material, rather the quality of evidence adduced by even a single witness is enough to secure conviction provided the said evidence is credible.

C. Evidence law- Indian Evidence Act, 1872 – Section 118- Natural witnesses may not be labelled as interested witnesses - Interested witnesses are those who want to derive some benefit out of the litigation/case - Court has to adopt a careful approach and analyse the evidence of such witness to find out whether he is a natural witness and whether in the facts and circumstances of the case his evidence is cogent and credible.

A witness whose presence is natural cannot be labelled as an interested witness, only because he is a related witness, since an interested witness is a person who stands to benefit from the case.

D. Any illegality either committed knowingly or unknowingly by the investigating officer will not adversely affect the case of the prosecution and in any case the fate of a criminal trial could not be left at the mercy of an erring investigating officer.

Lapses made in the course of investigation cannot benefit the accused.

E. Evidence law- Indian Evidence Act, 1872 – Section 27- Recovery of any fact under Section 27 of the Evidence Act is only one piece of evidence amongst many pieces of evidence relied on by the prosecution and if in the process of appreciation of evidence any one piece of evidence is even not found proved, the duty of the Court is to see as to whether the remaining evidence which has been found proved is of such a nature that the case of the prosecution is proved beyond reasonable doubt.

Even where the recovery of any fact under section 27 of the Evidence act is not proved due to the error or lapses of the investigating officer, the Court can always rely upon the other evidence which proves the case of the prosecution beyond any reasonable doubt.

(Para 12, 14, 17, 21, 22, 23)

Criminal Appeal dismissed (E-3)

List of case cited:-

1. Vadivelu Thevar Vs. St. of Madras; AIR 1957 SC 614

2. Molu & ors Appellants Vs. St. of Har. AIR 1976 SC 2499

3. Krishna Pillai Sree Kumar & anr Vs. St. of Ker., AIR 1981 SC 1237

4. Praful Sudhakar Parab Vs. St. of Maha. AIR 2016 SC 3107

5. Gangabhavani Vs. Rayapati Venkat Reddy & Ors., MANU/SC/0897/2013

6. St. of Raj. Vs. Smt. Kalki and Anr. MANU/SC/0254/1981 : AIR 1981 SC 1390

7. Sachchey Lal Tiwari Vs. St. of U.P. MANU/SC/0865/2004 : AIR 2004 SC 5039

8. Bhagaloo Lodh & Ors.Vs. St. of U.P., MANU/SC/0700/2011

9. State of Karnataka vs. K. Yarappa Reddy, MANU/SC/0633/1999

10. C. Muniappan Vs. St. of T.N., (2010) 9 SCC 567

11. Appabhai and Ors. Vs. St. of Guj., MANU/SC/0028/1988

12. Bharwada Bhoginbhai Hirjibhai Vs. St. of Guj. AIR 1983, 753, MANU/SC/0090/1983

13. Krishna Mochi and Ors. Vs. St. of Bih., MANU/SC/0327/2002

14. Raj. Vs. Smt. Kalki and Anr. MANU/SC/0254/1981

15. Gangadhar Behera & ors Vs. St. of Orissa, MANU/SC/0875/2002

16. Shivaji Sahebrao Bobade Vs.. St. of Maha. MANU/SC/0167/1973 : 1973CriLJ1783

(Delivered by Hon'ble Mr. Justice Mohd. Faiz Alam Khan, J.)

1. Heard learned counsel for the appellant and Sri Chandra Shekhr Pandey, learned A.G.A. for the State and perused the record.

2. This criminal appeal has been filed by appellant/**Sanjeev alias Sanju Yadav** under Section 374 (2) of the Code of Criminal Procedure against the judgment and order dated 08.06.2007 passed by Additional Session Judge/Fast Track Court-III, Faizabad in Sessions Trial No. 73 of 2005, "State Vs. Sanjeev alias Sanju Yadav", arising out of Case Crime No. 1380 of 2004, under Section 302 of I.P.C., Police Station Kotwali Nagar, District Faizabad, whereby the appellant has been convicted under Section 302 of I.P.C. and has been sentenced for rigorous life imprisonment and a fine of Rs. 5,000/- with default clause.

3. Brief facts necessary for the disposal of this criminal appeal are that on 24.07.2004 at 21:15 hours a written application was presented to S.H.O. Kotwali, Faizabad by informant Shyam Sundar Malviya stating therein that his brother-in-law (Sala) is resident of Village Dhangada, Police Station Salempur, District Deoria. He after passing M.A. examination was living with him since 1997 and was also teaching in his school namely Surabhi Siksha Sansthan. A girl student of his school wrote a love letter to one Nirankar, resident of *"Datta ka purva'*, P.S. Kotwali which some how came in the custody of his brother-in-law, in relation to which, his wife Smt. Girija Malviya who is the Principal of school scolded appellant Sanjeev @ Sanju Yadav and Nirankar. It was further stated that some hot talks had taken place between his brother-in-law Rakesh Kumar Dubey and Sanjeev @ Sanju Yadav and Sanjeev asked his brother-in-law to hand over the love letter to him and when his brother-in-law refused to hand over the same to Sanjeev, he threatened that his brother in law will have to pay the price for that.

It was further stated that on the basis of above enmity on 24.07.2004 at 8:00 pm. his brother-in-law Rakesh was returning to his house with two bags of *"Morang'* laden on his bicycle and when he reached a little ahead of the house of Surajdeen, appellant Sanjeev @ Sanju Yadav and one unknown person with him dragged his brother-in-law into the bushes and Sanjeev @ Sanju committed his murder by assaulting him with a sharp edged weapon. The incident was witnessed by many persons and the accused persons fled away from the scene of crime. There was enough moonlight and electricity light, at the time of incident.

4. On the basis of the above mentioned written application, (Exhibit-ka-1), an F.I.R. under Section 302 I.P.C. was registered against Sanjeev @ Sanju and one unknown person at Case Crime No. 1380 of 2004 at Police Station Kotwali Nagar, Faizabad and the substance of this information was entered into the G.D. Serial No.-62, (Exhibit-ka-5) at 21:15 hours on 24.07.2004. Investigation of the crime was entrusted to S.I. Ram Shiromani Singh, who at once arrived at the spot and collected the belongings of the deceased which was scattered around his dead body and prepared a memo (Exhibit-ka6). He also collected the blood stained and simple soil from the spot and kept the same in separate containers and also prepared a memo, (Exhibit-ka-7) of the same. He

prepared the Site Plan, (Exhibit-ka-8) on the pointing of the informant and also prepared the Inquest Report (Exhibit-ka-9) of the dead body and also prepared necessary papers i.e. Form No.-13, Photo Lash, Chitthi R.I., Chitthi C.M.O., Sample of Seal, (Exhibit-ka-10 to 15) for the purpose of postmortem.

5. The postmortem on the dead body of deceased Rakesh Kumar Dubey was performed by P.W.-5/Dr. Chandra Shekhar Singh on 25.07.2004 at 2:30 pm. at District Hospital, Faizabad. The deceased was found to be aged about 25 years and it was opined by the doctor that his death had occurred 3/4 day before and that he was a person of average built and *rigor mortis* had passed away from both extremities of his body. Following injuries were found on the body of the deceased:-

(i) Injury No.1/Incised wound 18 cm. x 8 cm. x bone deep over the anterior aspect just below the mandible all around except posterior of the neck, 14 cm. left 3rd Cervical vertebra artery clean cut.

(ii) Injury No.2/Incised wound 14 cm. x 2 cm. x muscle deep over right posterior occipital region 5 cm. above the ear.

On internal examination, 3rd Cervical vertebra was found clean cut, trachea was clean cut and divided, both chambers of the heart were empty, oesophagus was clean cut and divided. 200 grams of semi-digested food was found in the stomach. Small intestine was full of fluid and gases while faecal matter and gases were found in the large intestine, gall bladder was half full, spleen and kidneys were pale, bladder was empty and the cause of death of the deceased was ascertained as shock and hemorrhage as a result of ante-mortem wounds. P.W.-4/Dr. Chandra Shekhar Singh proved to have prepared the postmortem report (Exhibit-k-3) in his hand writing and under his signatures.

6. On 25.07.2004 at about 3:00 hours, appellant Sanjeev alias Sanju was arrested and he stated to have confessed his guilt and also that he could get the weapon recovered which was used in the commission of the crime. A knife was recovered at his pointing and a memo of the same (Exhibit-ka-2) was also prepared. The investigation thereafter, was transferred to S.H.O. Ram Pal Singh., who after taking over the investigation of the case recorded the statement of the witnesses and sent the material exhibits for forensic examination and after collecting the report of the Forensic Lab (Exhibit-ka-18) submitted the charge-sheet (Exhibit-ka-19) against Sanjeev @ Sanju Yadav under Section 302 of I.P.C.

7. The case being triable by the Court of sessions was committed and charge under Section 302 of I.P.C. was framed against the appellant Sanjeev @ Sanju Yadav. He denied the charges and claimed trial.

8. The prosecution in order to prove its case beyond reasonable doubt relied on the following documentary evidences before the trial Court:-

Written application (Exhibit-ka-1), memo of arrest and recovery of knife by the appellant (Exhibit-ka-2), Postmortem Report (Exhibit-ka-3), Chick F.I.R., (Exhibit-ka-4), G.D. Qayami (Exhibit-ka-5), memo of seizing the belongings of deceased found at the place of occurrence (Exhibit-ka-6), memo of taking simple and blood stained soil from the spot (Exhibit-ka-7), Site Plan of the place of occurrence

(Exhibit-ka-8), Inquest Report (Exhibit-ka-9), Chitthi C.M.O. (Exhibit-ka-10), Chitthi R.I. (Exhibit-ka-11), Photo Lash (Exhibit-ka-12), Report of Police Station to R.I. (Exhibit-ka-13), Letter to C.M.O. (Exhibit-ka-14), Sample seal (Exhibit-ka-15), Site Plan of the place of occurrence (Exhibit-ka-16), letter whereby the material was sent to forensic lab (Exhibit-ka-17), report of the forensic lab (Exhibit-ka-18), charge-Sheet (Exhibit-ka-19).

9. The prosecution also testified following witnesseses in support of its case:-

P.W.-1/Shyam Sundar Malviya (Informant/eye witness), P.W.-2/Smt. Girja Malviya, P.W.-3/Saurabh Malviya (Eye witness), P.W.-4/Gulab Chandra Malviya (Eye witness), P.W.-5/Dr. Chandra Shekhar Singh (Doctor, who conducted the postmortem), P.W.-6/Constable Lalmani Rai (Scribe of Chick F.I.R. and G.D.), P.W.-7/Ram Shiromani Singh (First Investigating Officer), P.W.-8/Ram Pal Singh (Second Investigating Officer).

10. Learned counsel for the appellant while pressing the appeal submits that the trial Court has committed manifest illegality in appreciation of prosecution evidence and has relied on inadmissible evidence and passed a judgment of conviction only on the basis of *''surmises and conjectures'*.

It is further submitted that the trial Court has not taken into consideration the fact that the love letter allegedly written by the girl student to one Nirankar was never produced either before the Investigating Officer or before the trial Court and when the basis of the prosecution case was missing it was not justified for the trial Court to convict the appellant, more so when the girl who had allegedly written the love letter was also not being produced as a witness.

It is further submitted that it is not clear from the evidence on record as to whether the said love letter was written to Nirankar or to Sanjeev @ Sanju and that if the letter was written to Nirankar, how Sanjeev @ Sanju was concerned with the same. It is next submitted that all witnesses of fact and of recovery are family members and related to each other, while the independent witnesses having houses on both side of the scene of occurrence namely Surajdeen and Ram Narayan Gupta have not been produced before the trial Court as witnesses, therefore, the story of the prosecution is doubtful on this score. The recovery stated to have been effected on the pointing of the appellant is also not believable.

It is next submitted that Sanjeev @ Sanju was not studying in the school of P.W.-1/Shyam Sundar Malviya, while Nirankar was stated to be a student of that school. Therefore, the trial Court has erred in concluding that appellant was having any connection with Nirankar. The motive suggested by the prosecution is weak and has not been proved. The prosecution witnesses were not in a position to see the assailants, as there was no source of light and in site plan the Investigating Officer has also not shown any electricity pole around the scene of occurrence belying the story of the prosecution that there was an electricity pole around the spot. It has overwhelmingly been submitted that the prosecution witnesses who have claimed to have witnessed the incident are not reliable and, therefore, the appeal of the appellant be accepted and the judgment and order of the trial Court be set-aside.

11. Learned A.G.A., per contra, submits that the trial Court after meticulously appreciating the evidence available on record has came to a conclusion that the appellant has committed the offence and the finding of the trial Court is based on acceptable, reliable and truthful evidence of prosecution witnesses.

It is next submitted that the evidence of the prosecution witnesses who claimed to have seen the occurrence is reliable, trustworthy and the appellant has also recovered the weapon of assault on his pointing and there is no difference or alteration between ocular and medical evidence, rather the medical evidence supports the ocular testimony of prosecution witnesses. The motive is also proved, however, there was no need for the same as the case was based on direct evidence of the eye-witnesses. Therefore, keeping in view the facts and circumstances of the case as well as evidence available on record, no illegality appears to have been committed by the trial Court in arriving to a conclusion that the offence has been committed by the appellant. The minor irregularities committed in the investigation could not be the basis to doubt the prosecution.

12. Having heard the submissions of learned counsels for the parties, the question which arises for adjudication in this criminal appeal is as to whether the trial court has convicted the appellant on the basis of evidence available on record or the prosecution has failed to prove its case beyond all reasonable doubts.

Hon,ble Apex Court in **Vadivelu Thevar Vs. State of Madras; AIR 1957 SC 614** has held as under:-

"The contention that in a murder case, the Court should insist upon plurality of witnesses, is much broadly stated."

"The Indian Legislature has not insisted on laying down any such exceptions to the general Rule recognized in Section 134 quoted above. The Section has enshrines the well recognized maxim that "Evidence has to be weighed and not counted." Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon.

"Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution."

"Generally speaking oral testimony in this context may be classified into three categories, namely (1) wholly reliable (2) wholly unreliable (3) neither wholly reliable nor wholly unreliable. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly

encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The Court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony."

Vadivelu Thevar case (supra) has been referred to with approval in many cases thereafter and it has been held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. This is what the essence of Section 134 of the Indian Evidence Act, 1872 is. But, if there are doubts and suspicion about the testimony of such a witness, the courts will insist on corroboration. Therefore, it is not the number and the quantity, but the quality which is material. The time tested principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth around it, is cogent, credible and trustworthy, or otherwise.

13. Before proceeding further, it appears necessary that a brief survey of the prosecution evidence be made so that the evidence available on record may be appreciated in an effective way, keeping in view the above legal principles.

P.W.1- Shyam Sundar Malviya, who is the brother-in-law *(bahnoi)* of the deceased- Rakesh has stated in his statement that a girl student of class-8th of his school wrote a love letter to Nirankar and appellant- Sanjeev @ Sanju. His wife Girja Malviya was the Principal of the school and deceased- Rakesh, was his brother-in-law who somehow got this love letter and showed it to his sister Girja Malviya and thereafter kept the same with him. On 24.07.2004 his wife, namely, Girja Malviya called Nirankar and appellant- Sanjeev and scolded them for this. Sanjeev asked Rakesh to handover the letter to him, who refused and some hot exchanges took place between them and Sanjeev threatened deceased- Rakesh of dire consequences.

He further stated that on the same day deceased- Rakesh went to took some *"morang'* as some repair work was going on in the house of the informant. When deceased did not return for quite some time, he went out, at about 8:00 P.M. in search of him. When he reached at the *"kharanja'* road, he saw in the light of electric bulb and moonlight that one unknown person dragged deceased towards bushes and Sanjeev assaulted deceased with a knife. According to this witness, Sanjeev assaulted Rakesh firstly on his ear and thereafter on his neck by which the whole neck of the deceased was cut and only a small portion of the same remained connected. Deceased- Rakesh was carrying two bags of *"morang'* on his bicycle and the bags were scattered on the road. This incident was witnessed by his son Saurabh Malviya and many others. Sanjeev and an unknown person fled away from the scene and thereafter they went to the police station and lodged the F.I.R. (Exhibit ka-1). He also stated that investigating officer had come on the spot and he had shown him the place of occurrence. The Investigation Officer recorded his statement and also took soil samples and bicycle of deceased in his custody.

P.W.2- Smt. Girja Malviya in her statement has stated that deceased- Rakesh was her brother, who was living with her and was teaching in her school. One of the

girl student of class- 8th of her school wrote a letter to Nirankar and Sanjeev, which was taken by his brother and his brother showed that letter to her. She stated to have summoned and scolded both Nirankar as well as Sanjeev for this and there were some hot exchanges between Rakesh and Sanjeev and Sanjeev threatened her brother either to return the letter or to face the consequences. Her brother did not handover the letter to appellant- Sanjeev and due to this he was done to death by Sanjeev.

P.W.3- Saurabh Malviya is the son of P.W.1- Shyam Sundar Malviya (informant) who has stated in his statement that his maternal uncle deceased- Rakesh Kumar was teaching in the school managed by his father and mother. Corroborating the statement of P.W.1- Shyam Sundar Malviya and P.W.2- Smt. Girja Malviya, he further stated that a girl student of class- 8th wrote a letter to Sanjeev and Nirankar and the same was taken by deceased- Rakesh and he also showed this letter to his mother, namely, Smt. Girja Malviya, who in-turn scolded Sanjeev and Nirankar. Rakesh Kumar told Sanjeev that he will inform his parents about this letter on which a quarrel had taken place between them. Sanjeev was continuously persuading Rakesh to handover the letter to him while Rakesh was not handing over the letter to him and thereon Sanjeev had threatened his maternal uncle of dire consequences.

This witness has further stated that on 24.07.2004 at about 8:00 P.M., he went out of his house and when he reached at *''Kharanja'*Road' he saw that Sanjeev was standing there with an unknown person and his maternal uncle, namely, Rakesh Kumar was coming on bicycle carrying two bags of *''morang'*. At that time Sanjeev assaulted Rakesh with a knife on his neck and ear. He saw the incident in the light of electric bulb and moonlight. Apart from him, his father and other persons had also witnessed the incident.

P.W.4- Gulab Chandra Malviya is stated to be a witness of the recovery of a knife on the pointing of appellant- Sanjeev @ Sanju and has proved the knife, which was also presented in the Court as Material Exhibit No.1. He also stated that a memo was also prepared pertaining to recovery of knife.

P.W.5- Dr. Chandra Shekhar Singh has conducted the post-morterm on the body of the deceased- Rakesh on 25.07.2004 at 2:30 P.M. and has proved the post-morterm report in his writing and signature as (Exhibit ka-3).

He further stated that both the injuries, i.e., Injury nos.1 and 2 on the deceased were caused by a sharp edged weapon and both these injuries may have been caused on 24.07.2004 at 8:00 P.M. Detailed description of the post-morterm report has been given in the paragraph no. 5 of this judgment .

P.W.6- Constable Lalmani has proved the Chik F.I.R. as (Exhibit ka-4) and also the G.D. *Qayami* as (Exhibit ka-5) in his writing and signature.

P.W.7- Sub-Inspector Ram Shiromani Singh is the first Investigating Officer of the crime, who has stated that on 24.07.2004 after taking over the investigation, he departed towards the scene of crime and after arriving at the spot took into possession the dead body of the deceased and his other belongings which were scattered there. He also stated to have prepared a memo of the same as (Exhibit ka-6). He also stated to have collected the blood stained and simple soil from the spot and also prepared a memo of the same (Exhibit ka-7). He further stated to have prepared the site plan (Exhibit ka-8) of the spot at the pointing of informant and also

prepared inquest report (Exhibit ka-9) of the dead body and after preparing necessary papers forwarded the dead body for the purpose of post-morterm.

He further stated that he arrested the appellant- Sanjeev @ Sanju on the same day at about 13:00 hours, who during interrogation confessed his guilt and a knife was recovered on his pointing. A memo of the recovered knife (Exhibit ka-2) was also prepared. This witness has also proved the site plan (Exhibit ka-16) of the place from where the knife was got recovered by appellant.

P.W.8- S.H.O. Ram Pal Singh is the second Investigating Officer of the case who after recording the statement of the witnesses and having found sufficient evidence against the appellant submitted the charge-sheet (Exhibit ka-19) against him.

14. Learned counsel for the appellant submits that the motive as alleged by the prosecution has not been proved and letter which was the basis of dispute has not been produced before the Court.

A three Judges Bench Of **Hon'ble Supreme Court in Molu and others Appellants v. State of Haryana AIR 1976 SUPREME COURT 2499** has opined as under :-

"11. Finally it was argued by the appellants, following the reasons given by the Sessions Judge, that there was no adequate motive for the accused to commit murder of two persons and to cause injuries to others. It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes the motive is clear and can be proved and sometimes. however, the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of the eye-witnesses is credit-worthy and is believed by the Court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant. For these reasons, therefore, we agree with the High Court that the prosecution has been able to prove the case against the appellants beyond reasonable doubt."

Hon'ble Supreme Court in **Krishna Pillai Sree Kumar and another v. State of Kerala, AIR 1981 SUPREME COURT 1237** has held as under:-

"7. It is undisputed that some bad blood existed between the deceased on the one hand and the appellants on the other prior to the occurrence. The animosity may not have been very bitter but then it is too much to say that it could not possibly form a motive for the occurrence. The variation in human nature being so vast murders are known to have been actuated by much lesser motives. In any case, it is not a sine qua non for the success of the prosecution that the motive must be proved. So long as the other evidence remains convincing and is not open to reasonable doubt, a conviction may well be based on it."

In **Praful Sudhakar Parab v. State of MaharashtraAIR 2016 SUPREME COURT 3107** Hon'ble Supreme Court stated as under :-

"16. One of the submissions which has been raised by the learned amicus curiae is that the prosecution failed to prove any motive. It is contended that the evidence which was led including the recovery of bunch of keys from guardroom was with a view to point out that he wanted to commit theft of the cash laying in the office but no evidence was led by the prosecution to prove that how much cash

were there in the pay office. Motive for committing a crime is something which is hidden in the mind of accused and it has been held by this Court that it is an impossible task for the prosecution to prove what precisely have impelled the murderer to kill a particular person. This Court in Ravinder Kumar and another v. State of Punjab, 2001 (7) SCC 690 : (AIR 2001 SC 3570), has laid down following in paragraph 18:

"18.....It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. In this connection we deem it useful to refer to the observations of this Court in State of Himachal Pradesh v. Jeet Singh {1999 (4) SCC 370 : (AIR 1999 SC 1293)}:

"No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."

Keeping in view the above referred law, we are of the considered opinion that the prosecution is not obliged to prove those facts which are either impossible for the prosecution to prove or which are locked up in the mind of the accused persons, as to what tempted them to commit the crime. Therefore, the cases which are based on direct evidence of the witnesses should be decided on the basis of quality and probative value of the evidence of such eye witnesses.

15. In the First Information Report, it was stated that deceased- Rakesh who was the brother-in-law of informant was living with informant and his wife. P.W.2- Girja Malviya, was running a school and deceased- Rakesh was teaching in the same school. It is also mentioned in the F.I.R. that a girl student of class-8th of this school wrote a love letter to Nirankar which somehow fell in the hands of deceased- Rakesh and P.W.2- Smt. Girja Malviya having seen the letter called and scolded Nirankar and Sanjeev @ Sanju. Sanjeev asked deceased- Rakesh to handover that letter to him or to face the consequences. However, deceased- Rakesh did not give the letter to appellant and on the basis of this enmity appellant along with one other person committed the murder of deceased on 24.07.2004 at 8:00 P.M. when deceased was returning home after getting two bags of *"morang'* on his bicycle.

P.W.1- Shyam Sundar Malviya in his statement has specifically stated that only enmity of appellant with his family was due to the love letter, which was written by a girl student of his school to Nirankar and Sanjeev. He also stated that Rakesh after showing this letter to his sister- Girja Malviya kept it with him and did not give this letter to Sanjeev and it was for this letter that Sanjeev has committed his murder. In his cross-examination, this witness has stated that he did not see the letter himself and his wife Girja Malviya

told him about this letter and it was only on this basis, he has stated that the letter was written to both Sanjeev and Nirankar.

P.W.2- Smt. Girja Malviya in her statement has also corroborated the fact of writing a letter to Sanjeev and Nirankar by a girl student of class-8th of her school. She has also stated that after reading the letter she scolded Nirankar and Sanjeev and Sanjeev threatened her brother of dire consequences if the letter is not handed over to him. In her cross-examination, she has stated that she did not provide that letter to the investigating officer as her brother kept the same with him.

P.W.3- Saurabh Malviya has also stated of getting the information of this letter from her mother P.W.2- Girja Malviya and also that he himself had not seen the letter.

P.W.8- Sub-Insepctor Ram Pal Singh has also stated that no letter was given to him by anyone during investigation, however, P.W.2 Girja Malviya informed him about this letter which was written to Nirankar. He also stated that he did not record the statement of the girl student.

A perusal of the evidence of above witnesses would reveal that P.W.1- Shyam Sundar Malviya, who is the brother-in-law of the deceased- Rakesh has never seen the love letter which was written by a girl student of his school to Nirankar and Sanjeev and also that the love letter which was intercepted by deceased- Rakesh was either seen by the deceased or it was read by P.W.2- Girja Malviya, who was the Principal of the school, where the girl was studying. It has also come in the evidence that deceased- Rakesh after showing the letter to his sister, kept the same with him. So there is no evidence on record which may suggest that any letter was provided to P.W.2- Girja Malviya by deceased- Rakesh. Perusal of the memo prepared by the investigating officer of the belongings of the deceased found at the place of occurrence would also reveal that no such letter has been found either with the deceased or in his belongings which were scattered on the spot. Therefore, this possibility could not be ruled out that deceased himself had kept the letter somewhere or the same could have been taken away by the appellant after commission of the offence. It has been categorically stated by prosecution witnesses that apart from this letter, there was no enmity of any kind with the appellant and the deceased- Rakesh has done to death only due to this letter.

16. It is also pertinent to mention here that the appellant in his statement recorded under Section 313 of the Cr.P.C. has also stated that he has been falsely implicated in this case due to enmity but he has not specified as to what enmity he was having with the deceased. Instant case is based on the direct testimony of the eye-witnesses P.W.1- Shyam Sundar Malviya and P.W.3- Saurabh Malviya, who have claimed to have seen the occurrence and have also claimed to have identified the appellant in the light of the electric bulb which was lighting on the electric pole near the place of occurrence and also in the moonlight. Since the case is based on eye-witness account, hence motive is not of much significance, but in the facts and circumstances of the case, it is evident that the prosecution has been able to prove that a letter was written by a girl student of class-8th of the school to appellant and Nirankar and the same was intercepted by deceased- Rakesh. P.W.2- Girja Malviya scolded Sanjeev and Nirankar and appellant- Sanjeev thereafter threatened the deceased to handover the letter or to face

the consequences. In our considered opinion, this was sufficient motive for the appellant to commit crime.

17. It has been overwhelmingly argued by learned counsel for the appellant that all the witnesses of the prosecution are related to each other and also to the deceased and, therefore, there testimony could not be believed in absence of independent witnesses.

The law with regard to the submission made by learned counsel for the appellant pertaining to the appreciation of evidence of related or interested witnesses is no more res-integra.Hon'ble Supreme Court in **Gangabhavani vs. Rayapati Venkat Reddy and Ors., MANU/SC/0897/2013** has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.(Vide: Bhagaloo Lodh and Anr. v. State of U.P. MANU/SC/0700/2011 : AIR 2011 SC 2292; and Dhari and Ors. v. State of U.P. MANU/SC/0848/2012 : AIR 2013 SC 308).

In **State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981** : AIR 1981 SC 1390, it has been held as under:

"5A. As mentioned above the High Court has declined to rely on the evidence of P.W. 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased".....For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True it is she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested'. In the instant case P.W. 1 had no interest in protecting the real culprit, and falsely implicating the Respondents."(Emphasis added)(See also: Chakali Maddilety and Ors. v. State of A.P. MANU/SC/0609/2010 : AIR 2010 SC 3473).

In **Sachchey Lal Tiwari v. State of U.P. MANU/SC/0865/2004 : AIR 2004 SC 5039**, while dealing with the case, it was held as under:

"7....Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal

and more casual, at any rate in the matter explaining their presence."

In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased.

In **Bhagaloo Lodh and Ors. vs. State of U.P. reported in MANU/SC/0700/2011**, it was held as under :-

"14. Evidence of a close relation can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinised and appreciated before resting of conclusion to convict the accused in a given case. But where the Sessions Court properly appreciated evidence and meticulously analysed the same and the High Court re-appreciated the said evidence properly to reach the same conclusion, it is difficult for the superior court to take a view contrary to the same, unless there are reasons to disbelieve such witnesses. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased. ***(Vide: M.C. Ali and Anr. v. State of Kerala MANU/SC/0247/2010 : AIR 2010 SC 1639; Myladimmal Surendran and Ors. v. State of Kerala MANU/SC/0670/2010 : AIR 2010 SC 3281; Shyam v. State of Madhya Pradesh MANU/SC/7112/2007 : (2009) 16 SCC 531; Prithi v. State of Haryana MANU/SC/0532/2010 : (2010) 8 SCC 536; Surendra Pal and Ors. v. State of U.P. and Anr. MANU/SC/0713/2010 : (2010) 9 SCC 399; and Himanshu @ Chintu v. State (NCT of Delhi) MANU/SC/0006/2011 : (2011) 2 SCC 36).***

In view of the law laid down herein above, no fault can be found with the evidence recorded by the courts below accepting the evidence of closely related witnesses."

It is therefore settled that merely because witnesses are close relatives of the victim, their testimonies cannot be discarded. Relationship with deceased is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence of such witness to find out whether he is a natural witness and whether in the facts and circumstances of the case his evidence is cogent and credible.

18. Perusal of record in the background of the above legal proposition would reveal that the place where the incident has happened is situated near the houses of Ram Narayan and Sooraj Deen. The incident is stated to have occurred at about 8:00 P.M. in the night. In sub-urban areas 8:00 P.M. in the night is not a time whereon the residents are usually outside, rather they remain inside their houses to relax after a full day of hard work. P.W.1-Shyam Sundar Malviya has specifically stated that when he arrived at the scene of crime no resident was there and they all came on the spot afterwards. According to him deceased- Rakesh had raised alarm twice but his second cry was very mild. According to him his house is situated towards South of *"kharanja road'* after five houses. He has acknowledged that houses of Sooraj Deen and Ram Narayan as well as that of Hriday Ram are also situated there. He further stated that wife of Ram

Narayan Gupta seldom lived in her house and the place where deceased- Rakesh fell, is situated about 15 paces away from the house of Sooraj Deen. P.W.1- Shyam Sundar Malviya has also stated that half an hour before his departure Rakesh had gone to take *"morang'* and when he did not return for quite some time, he went out in search of him. P.W.3- Saurabh Malviya, who is the son of P.W.1- Shyam Sundar Malviya has stated that at the fateful time he was going to Kaushalpur to meet his friend and when he arrived at the *"kharanja road'* he saw the incident from in front of the house of Ram Narayan Gupta. According to P.W.1- Shyam Sundar Malviya and P.W.3- Saurabh Malviya an electric bulb was lighting at the spot and there was moonlight also.

It has also come in the evidence of prosecution witnesses that only six houses are situated between the house of informant and *"kharanja road'* and according to P.W.1- Shyam Sundar Malviya no one was present at that time at the scene of crime. In the facts and circumstances of the case, it is evident that the deceased on the fateful day and time had gone to take *"morang'* from a shop and he was returning from there, after taking two bags of *"morang'* on his bicycle and also that the house of appellant- Sanjeev is situated on that way by which the deceased- Rakesh was returning. It has also come in the evidence that the distance of the shop of *"morang'* from the house of P.W.1- Shyam Sundar Malviya is about 1/2 to 2/3 km. Therefore, what transpires from the evidence of both witnesses of fact is that the incident had occurred at 8:00 P.M. in the night and there was no person other than P.W.1- Shyam Sundar Malviya and P.W.3- Saurabh Malviya at the road where the incident had taken place. P.W.3- Saurabh Malviya has also stated that none from the house of Sooraj Deen or Ram Narayan was there at the time of incident. Therefore, this is not a case where the independent witnesses were present at the scene of crime and the prosecution has suppressed them. Rather in this case, this is a consistent case of the prosecution that deceased went out to fetch some *"morang'* from a place which was situated about 1/2 to 2/3 km. away from the house of informant and the path to that place passes through the front of the house of appellant and when deceased did not return, even after half an hour, P.W.1- Shyam Sundar Malviya went out of his house to search him and when he came on the road he saw the incident. P.W.3- Saurabh Malviya has specifically stated that he and his father came out of the house together though he came out to go to Kaushalpur and he has seen the incident from near the house of Ram Narayan Gupta. One more thing which fortifies the evidence of P.W.1- Shyam Sundar Malviya is that the anxiety, which was being felt by him when deceased did not return for long time, appears to be natural as the house of appellant- Sanjeev was situated on the way through which the deceased had gone to take *"morang'* and appellant had earlier threatened the deceased- Rakesh to face dire consequences if the letter is not returned to him.

In view of the above and having perused the evidence of the eye-witnesses P.W.1- Shyam Sundar Malviya and P.W.3- Saurabh Malviya, in our considered opinion, it is not a case where the evidence of these two reliable eye witnesses could be disbelieved for want of independent witnesses.

19. So far as the submission of learned counsel for the appellant pertaining

to the fact that First Information Report of this case has been *''ante-timed'* and, therefore, no reliance can be placed on such report and when the foundation of the case, in the shape of F.I.R. is doubtful the conviction could not be held, is concerned, the evidence available on record would reveal that F.I.R. of the incident was lodged on 24.07.2004 at 21:15 hours (9:15 P.M.) while incident is stated to have occurred on the same day at 20:00 hours (8:00 P.M.) and the distance of the police station from the place of occurrence has been mentioned in the Chik F.I.R. as 4 km. The date and the time of lodging the First Information Report and making of a corresponding entry in the General Diary of the police station has been sufficiently proved by P.W.6- Constable Lalmani as 9:15 P.M. on 24.07.2004. We have very carefully perused the testimony of this witness and have not found anything which may shake the reliability of this witness, so far as the date and time of lodging of First Information Report is concerned. Chik F.I.R. (Exhibit ka-4) shows that the investigation of the case was entrusted to Sri Ram Shrimoni Singh, who has also been produced as P.W.7 and has very elaborately described the steps taken by him in furtherance of the investigation of crime. In his evidence, he stated to have reached the spot and taken the belongings of deceased in his possession and also prepared a Memo (Exhibit ka-6). He also stated to have collected blood stained and simple soil from the spot and also to have prepared a memo of the same (Exhibit ka-7). He also inspected the spot and prepared the site plan (Exhibit ka-8) on the pointing of informant. He also prepared the inquest report of the body of the deceased (Exhibit ka-9) and all necessary papers for the purpose of post-morterm of the dead body. Perusal of Inquest report (Exhibit ka-9) available on record would reveal that it contains the time of lodging of First Information Report as 21:15 hours and also the manner of commission of offence, which corresponds with the manner of committing the offence stated in the F.I.R. The time of the beginning of the inquest has been shown as 22:20 hours (10:20 P.M.) and the name of the informant has also been stated as Shyam Sundar Malviya. Perusal of papers prepared for post-morterm would also reveal that in all these papers crime number and other particulars of the First Information Report have been mentioned. In our considered view, the cumulative effect of these documents would certainly be that at the time of inquest the First Information Report had come into existence and, therefore, the submission of learned counsel for the appellant with regard to the F.I.R. being *''ante-timed'* is not correct.

Another submission, which has been put-forth by learned counsel for the appellant is that recovery of knife on the pointing of the appellant could not be believed in the facts and circumstances of the case. He invited our attention to the site plan (Exhibit ka-16) of the place from where the recovery of the knife has been shown. Submission is that in this site plan the name of the accused has been shown as Rakesh Kumar while in this case Rakesh Kumar is the deceased and, therefore, the recovery could not be believed.

20. We have perused the evidence of the prosecution witnesses available on record as well as judgment of the trial court. What we find is that the trial court has disbelieved the recovery of knife on the pointing of appellant on the ground that the memo of recovery (Exhibit ka-2) has been so written, as the writing in the recovery

memo has become very congested towards the end of it and this belies the claim of the investigating officer that the *"fard"* (memo) was written at the spot. P.W.4- Gulab Chandra Malviya has stated in his statement that on 25.07.2004 investigating officer called him and when he reached there he saw that *"Daroga Ji"* was sitting in a jeep with appellant- Sanjeev along with other police personnel and he asked him to accompany them and thereafter a knife *(chhuri)* was recovered at the pointing of the appellant from a spot situated near the palm tree. It is also stated by him that some amount of dry blood was also visible on this knife. The knife so recovered has also been produced in the Court in a sealed condition. P.W.4 has also stated that *"Daroga Ji"* prepared a memo of recovery of the knife and after writing the memo he read over the same to him and thereafter he put his signatures on the *"fard baramadgi*' (Recovery Memo).

21. We have perused the *"fard baramadgi*' (Exhibit ka-2) in the light of the submissions of learned counsel for the appellant and observations of the trial court and we find that the last four lines of the recovery memo have been written congestly in comparison to the writing of the *"fard"* at the beginning or in the middle but it does not reveal that the writing in the *"fard"* is of such a nature which may give an impression that the last four or five lines have been subsequently added or the *"fard baramadgi*' has been manipulated, however, it certainly creates a little amount of doubt about the statement of the investigating officer that *"fard"* recovery was written at the spot. The law with regard to any illegality or to say any irregularity committed by the investigating officer during the investigation of a criminal case is well settled according to which any illegality either committed knowingly or unknowingly by the investigating officer will not adversely affect the case of the prosecution and in any case the fate of a criminal trial could not be left at the mercy of an erring investigating officer. This is based on the simple legal proposition that why should the victim or in case of murder, his family suffer for the illegality committed by the investigating officer.

22. It is to be understood that Investigating Officer knows as to how the investigation should be done. He has all the means to conduct a proper and fair investigation but some times either knowingly or unknowingly, if any irregularity or even illegality is committed by the Investigating Officer, the same could not form the basis to reject the otherwise truthful evidence of eye witnesses. Any illegality or irregularity committed by the investigating officer, where the informant or witnesses are not privy, either bonafidely or deliberately, could not be the basis to reject the testimony of truthful eye witnesses. The Criminal Justice Administration could not be left on the mercy of an erring Investigating Officer.

In **State of Karnataka vs. K. Yarappa Reddy, MANU/SC/0633/1999** it has been held as under :-

"It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well settled that even if the investigation is illegal or even suspicious the rest of evidence must be scrutinized independently of the impact of it. Otherwise criminal trial will plummet to that level of the investigating officers ruling the roost. The Court must have

predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not he made the casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit investigating officer's suspicious role in the case."

In **C. Muniappan v. State of T.N. [C. Muniappan v. State of T.N., (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402]** , Hon'ble Supreme Court explained the law on this point in the following manner:-

"55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

23. We are also of the considered view that recovery of any fact under Section 27 of the Evidence Act is only one piece of evidence amongst many pieces of evidence relied on by the prosecution and if in the process of appreciation of evidence any one piece of evidence is even not found proved, the duty of the Court is to see as to whether the remaining evidence which has been found proved is of such a nature that the case of the prosecution is proved beyond reasonable doubt.

In **Appabhai and Ors. vs. State of Gujarat**, MANU/SC/0028/1988 it was observed that :-

"A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him -perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

Honble Apex Court long back in the matter of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat as reported in AIR 1983, 753, MANU/SC/0090/1983** while appreciating evidence of witnesses in

the background of minor discrepancies laid down the following principles:-

"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

In **Krishna Mochi and Ors. vs. State of Bihar, MANU/SC/0327/2002** relying on State of **Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981** it was opined by Hon'ble Supreme Court that normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

24. Having perused the evidence of the prosecution with care and caution, keeping in view of the submissions made by learned counsel for the appellant, we are of the considered view that the F.I.R. in the instant matter has been lodged promptly. P.W.1- Shyam Sundar Malviya, P.W.2- Smt. Girja Malviya and P.W.3- Saurabh Malviya though are closely related being husband, wife and son but their testimony appears to be natural in the facts and circumstances of

the case. Their testimony could not be rejected only for the reason that no independent person was present at the scene of crime. At the cost of repetition, we would like to add that at 8:00 P.M. in sub-urban areas it is not expected that many persons would be out of their houses as it is a time to relax. Moreover, the departure of deceased- Rakesh to bring some *"morang'* for the repair work of the house of P.W.1- Shyam Sundar Malviya does not appear to be unnatural and when the deceased did not return for a long time, it was but natural for P.W.1- Shyam Sundar Malviya to have gone outside in search of the deceased- Rakesh, more so in the background of the fact that to get the *"morang'* deceased had to pass through the way whereon the house of appellant- Sanjeev was situated and he had threatened the deceased to face dire consequences in case the letter, which was written by a girl student of class- 8th, was not returned to him. Therefore, both P.W.1 and P.W.3, who went out to go to Kaushalpur, are natural witnesses of the crime and having scrutinized their testimony, we do not find any lacunae or contradictions in the same. In our considered opinion, the testimony of these two witnesses is reliable, trustworthy and could be safely relied upon. Therefore, no illegality appears to have been committed by the trial court in accepting their testimony as truthful. The ocular evidence of these two witnesses has been duly corroborated by the medical evidence available on record. We are also of the considered view that it is only the reasonable doubt, the benefit of which may be claimed by the accused persons(s) of a crime.

For the reasons aforesaid, we do not find any substance in the submissions made by learned counsel for the appellant and in our considered opinion the evidence produced by the prosecution is strong enough to prove the case of the prosecution beyond reasonable doubt.

In **Gangadhar Behera and others v State of Orissa, reported in MANU/SC/0875/2002** it is held in para 18 and 19 of the report as under :-

"18. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. [See: Gurbachan Singh v. Satpal Singh and Ors. MANU/SC/0034/1990 : 1990CriLJ562]. Prosecution is not required to meet any and every hypothesis put forward by the accused. [See State of U.P. v. Ashok Kumar Srivastava MANU/SC/0161/1992 : [1992]1SCR37]. A reasonable doubt is not an imaginary trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See Inder Singh and Anr. v. State (Delhi Admin.). MANU/SC/0093/1978 : 1978CriLJ766]. Vague hunches cannot take place of judicial evaluation. "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." (Per Viscount Simon in

Stirland v. Director of Public Prosecution (1944 AC (PC) 315) quoted in State of U.P. v. Anil Singh AIR 1988 SC 1988. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.

In matters such as this, it is appropriate to recall the observations of this Court in **Shivaji Sahebrao Bobade v. State of Maharashtra MANU/SC/0167/1973 : 1973CriLJ1783 :**

".....The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt....."

".....The evil of acquitting a guilty person light-heartedly as a learned author Glanville Williams in 'Proof of Guilt' has sapiently observed, goes much beyond the simple fact that, just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltiness....."

".....a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent....."

25. In view of the reasons given herein above, we do not find any force in this appeal and the same is liable to be dismissed.

26. The appeal filed by the appellant-Sanjeev @ Sanju Yadav, is thus, dismissed and the judgment and order of the court below dated 08.06.2007 is affirmed.

27. As per record of this Court and report of office dated 07.02.2020, the appellant- Sanjeev @ Sanju Yadav is in jail. He will serve out the sentence as ordered by the trial court.

28. A copy of this judgment be immediately sent to the trial court for compliance.

(2020)03-05ILR A491
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

CRIMINAL APPEAL No. 1466 of 2000
Alongwith
CRIMINAL APPEAL No. 1498 of 2000

Ashok Misra & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri R.K. Gupta, Sri Arunesh Khare, Sri Gautam Baghel, Sri Lav Srivastava, Sri Mani Shanker Mishra, Sri Rajrshi Gupta,Sri Shiv Badan Singh, Sri M.P. Yadav, Sri Om Prakash Singh, Sri Neeraj Kumar, Sri Muktesh Singh, Sri Rajan Srivastava, Sri Dilip Kumar, Sri V. P. Srivastava

Counsel for the Opposite Party:

A.G.A.

Criminal law- Indian Penal Code - Section 146/148/149/302 - Appeal against conviction.

Testimony of single witness-

Held :- No inconsistency in the oral and medical evidence which corroborated the eye witness account.The testimony of the single witness is enough for conviction of found to be reliable on the touchstone of credibility. (Para 69)
Case proved beyond all reasonable doubt. (Para 72)

Appeals rejected. (E-2)

List of Cases Cited:-

1. Mohar Rai Vs. St. of Bihar, 1968 (Cr.LJ) 1479,

2. Laxshmi Singh & ors. Vs. St. of Bihar, 1975 (5) SCC 394,

3. Babu Ram & ors. Vs. St. of Punj., 2008 CriLJ 1651,

4. Amar Jeet Singh Vs. St. of Hary., AIR 2010 (2) SC 2502,

5. Krisne Gowda & ors. Vs. St. of Karn, Arhalgud Police, AIR 2017 (SC) 1657,

6. V. Subramani Vs. St. of T.N., 6.2005 (Cr.LJ) 1727,

7. Anand Ramchandera Chougule Vs. Sidaraj Laxman Chougule & ors., 2019 (8) SCC 50,

8. Puran Singh Vs. St. of Punj., AIR 1975 SC 1674,

9. St. of Gujrat Vs. Bai Fatima, AIR 1975 SC 1478,

10. Mitter Sen Vs. St. of U.P., AIR 1976 SC 1156,

11. Babu Ram & ors. Vs. St. of Punj., 2008 (3) SCC 709,

12. Veer Singh Vs. St.of U.P., 2014 (2) SCC 455,

13. St. of U.P. Vs. Satveer Singh, 2015 (9) SCC 44,

14. Sudip Kumar Sen Vs. St.of W.B., 2016 (3) SCC 26,

15. Dinesh Singh Vs. St.of U.P., 2009 (67) ACC 737 (SC),

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Shri Dilip Kumar and Shri V.P. Srivastava, learned Senior Advocates assisted by Shri Ram Kishore Gupta, Mukhtesh Singh, Rajan Srivastava, Advocates and Shri M.P.Yadav, learned Advocate holding brief of Shri Shiv Badan Singh; Shri Arunesh Khare and Shri Gautam Baghel, learned Advocates for appellant no. 10. Shri. L.D.Rajbhar; Shri. Sunil Kumar Tripathi, learned A.G.As have been heard for the State.

2. Two connected criminal appeal No.1498 of 2000 and 1466 of 2000 have been filed against the judgment and order dated 20.06.2000 passed by the Special Judge (E.C. Act)/Additional Sessions Judge, Hamirpur in Session Trial No.44 of 1991 and 44-A of 1991 under Section 146/148/149/302 IPC registered as Case Crime No.20-A of 1990, Police Station-Sumerpur, District Hamirpur. By the impugned judgment, the appellants-herein (12 in number) have been convicted for offence under Section 302 read with Section 149 IPC and sentenced for life imprisonment. In addition to the same, they have been convicted of the offences under Section 147 and 148 IPC and sentenced for six months imprisonment for each offence, separately. All the punishments are to run concurrently.

3. At the outset, it is informed by the learned Advocates for the appellants that the accused appellants Shiv Baran Singh son of Ranjeet Singh, Chunubad Singh son of Pran Singh and Ram Gulam son of Ranjeet Singh had died during pendency of the appeal and the appeal has been abated for them after ascertaining the factum of their death by order dated 13.09.2019.

4. The prosecution story unfolded as under:-

5. The first information report regarding four murders committed in the field near Village Mohar, Police Station Sumerpur, District Hamirpur on 11.01.1990 at about 03.30 PM, was registered at 17.30 hours (5.30 PM) on 11.01.1990 itself, on a written report filed by the Raja Bhaiya Singh son of Phool Singh resident of Village Surauli Buzurg, Police Station Sumerpur, District Hamirpur, under Section 147, 148, 149 and 302 IPC against 15 persons. After completion of the investigation, the police had submitted the charge sheet.

6. The accused persons were committed to the Sessions court on 18.01.1991. They were charge sheeted on 15.05.1992. They denied all the charges against them being false and demanded trial. The Sessions trial had commenced against 15 accused (three of **them had died during the course of trial)**, 12 accused persons have been convicted and sentenced for life imprisonment and other punishments as well.

7. As per the first information report (written report), on 10.01.1990 first informant Raja Bhaiya Singh son of Phool Singh resident of Village Surauli Buzurg, Police Station Sumerpur, District Hamirpur had gone to Village Kiswahi alongwith Arjun Singh son of Gulab Singh, Chatrapal Singh son of Bheesam Singh both residents of Village Surauli Buzurg and Mahesh Chandra Shukla son of Shiv Narayan resident of Mundaura, Awdhesh Kumar @ Raja Nigam son of Shiv Prasad resident of Sumerpur, District Hamirpur and Sahab Singh son of Dalgajan Singh, resident of Village Swasa Haal Mukaam Kalauki Jaar. The purpose to go to Village Kishwahi was to fix marriage of Bhopat Singh son of Chatrapal Singh with the daughter of Chhiddu Singh son of Jaggu Singh resident of Village Kishwahi. It is stated in the said report that the above named persons reached the house of Chhiddu Singh son of Jaggu Singh at Village Kiswahi on 10.01.1990 and had a talk regarding settlement of marriage. In the night of 10.01.1990, they stayed in Village Kiswahi, witnessed Ramleela in the night and remained there till the afternoon on 11.01.1990.

8. At around late afternoon on 11.01.1990, they were returning to the Village Sumerpur through Village Mohar and Chhiddu Singh came to See off them till the boundaries of Village Mohar. Soon after they left Village Mohar, Chhiddu Singh requested them to relax and have 'Supari' and then go. They sat near the road to chew 'Supari' keeping their weapons on the ground. At that point of time, Ashok Kumar and Santosh Kumar sons of Kanhaiya Lal resident of Village Mohar came with 13 other persons each carrying arms in their hands. All of the accused persons were carrying weapons such as Kulhari, Farsa, Rifle, Double Barrel Gun, Lathi. Ashok and Santosh exhorted others by saying that they (other party) were saved at the instance of deceased Mahesh but no enemy should escape. While shouting "मारो

सालो को", the accused persons opened fire on all of them. But the first informant, Chhiddu Singh and Sahab Singh ran from the spot and succeeded in saving their life. Whereas, four deceased persons were gheraoed by the accused persons and brutally murdered near the field from the weapons they were carrying.

9. Leaving the dead bodies of four deceased near the field, the informant reached at the police station to lodge the first information of the incident, which occurred at around 03.30 PM as noted above. On the said written report, chick FIR was prepared with the case number registered as Case Crime No.20-A of 1990 under Section 147, 148, 149 and 302 IPC. The copy of Chick FIR was given to the informant and is proved by him on record as 'Exhibit Ka-3'. The written report submitted by the first informant is proved and exhibited as "Exhibit Ka-1".

10. The prosecution had produced three eye witnesses of fact namely Raja Bhaiya Singh (the first informant), Chhiddu Singh (PW-2) and Sahab Singh (PW-4), two of them namely Chhiddu Singh and Sahab Singh, however, turned hostile. The prosecution, thus, based its entire case on the testimony of solitary eye witness Raja Bhaiya Singh.

11. Amongst formal witnesses, PW-3, PW-7, PW-9 and PW-10 were examined being postmortem doctors. P.W-5 is the officer who conducted inquest of the dead bodies. P.W-11 is the investigating officer namely Surendra Nath Yadav.

12. Apart from the above witnesses, one more witness of fact (PW-8) Ram Babu, Village Chowkidar of villages Dundhpur and Mohar had been produced by the prosecution in the witness box to prove the occurrence of the incident as reported by him in another report lodged on 11.01.1990 at about 03.40 PM. The said report is exhibited as 'Exhibit Ka-6'. Five witnesses (DW-1 to DW-5) had been produced from the defence side to prove injury reports of three accused persons namely Balram Singh son of Phool Singh, Santosh Kumar Mishra son of Kanahiya Lal and Gaya Prasad son of Jagannath. The recovery memo of one broken rifle (from the butt) belonging to accused-appellant Balram Singh son of Phool Singh handed over by him to the police had been documented as Exhibit Ka-'43'.

13. The recovery memo of SBBL gun alongwith one canvas bag containing eight cartridges (of red color and one white) alongwith a license having photograph of deceased Chatrapal Singh found near his dead body, had been documented and exhibited as 'Exhibit Ka-29'. Plain and blood stained earth collected from below the dead body of deceased Chatrapal is the recovery memo 'Exhibit Ka-30'. The memo of blood stained clothes of Chatrapal deceased is exhibit Ka-31. The memo of blood stained clothes of deceased Mahesh Shukla son of Shiv Narayan Shukla is exhibited as 'Exhibit Ka-32'. The memo of one rifle, having one used cartridge in its chamber and one empty cartridge (of brass) found near the dead body of Mahesh Shukla son of Shiv Narayan Shukla has been exhibited as 'Exhibit Ka-33'. The memo of blood stained and plain earth collected from below the dead body of deceased Mahesh Shukla is exhibited as 'Exhibit Ka-34'.

14. The memo of one SBBL gun bolted and four empty cartridges (three green color and one white plastic)

recovered from besides the dead body of Awdesh Kumar @ Raja Nigam is exhibited as 'Exhibit Ka-35'. The memo of clothes of deceased Awdesh Kumar @ Raja Nigam has been exhibited as 'Exhibit Ka-36'. The memo of blood stained and plain earth collected from below the body of deceased Awdhesh Kumar @ Raja Nigam is exhibited as 'Exhibit Ka-37'.

15. The memo of blood stained clothes of deceased Arjun Singh son of Gulab Singh had been exhibited as 'Exhibit Ka-38'. The memo of plain and blood stained earth collected from below the dead body of deceased Arjun Singh has been exhibited as 'Exhibit Ka-38'. One DBBL gun with a sealing canvas (to hang it), found on the chest of deceased Arjun Singh and the memo thereof has been exhibited as 'Exhibit Ka-40'.

16. The inquest of the four dead bodies as per the reports was conducted on 12.01.990 between 07.00 AM to 04.00 PM. First inquest commenced at around 07.00 AM of the dead body of Chatrapal Singh and completed around 09.00 AM and the last one of the dead body of Arjun Singh son of Gulab Singh had commenced at around 02.00 PM and completed at around 04.00 PM. Five witnesses of four inquests reports are; (i) Kallu Singh son of Gehwar Singh resident of Dundhpur; (ii) Ram Sahai Pal son of Chhidua Gram Pradhan Dundhpur; (iii) Binda Prasad Kewat son of Tulsi resident of Dhundhpur; (iv) Shiv Narayan Kewat son of Rameshwar resident of Village Dhundhpur; (v) Moti Lal Kewat, Gram Pradhan Mohar, resident of Village Mohar, Police Station Sumerpur.

17. Charge sheet was submitted by the police against 13 accused persons as two accused Mukhiya son of Suraj Pal and Om Prakash son of Purshottam had died before commencement of trial.

18. The Sessions trial of accused Pancha Chamar son of Mahaveer was separated and registered as Session Trial No.44-A of 1991. Whereas 10 remaining accused/appellants were tried in the Sessions Trial No.44 of 1991 (State Vs. Ashok Mishra and 9 others).

19. The Criminal Appeal No.1466 of 2000, arising out of Sessions Trial No.44 of 1991 by ten appellants (three died, remaining seven accused persons/appellants) has been argued by Sri Dilip Kumar learned Senior Advocate assisted by Shri Ram Kishore Gupta; whereas the connected Appeal No.1498 of 2000 of Pancha Chamar and Jaihind Singh arising out of Sessions Trial No.44-A of 1991 (State Vs. Pancha Chamar & others) has been argued by Sri V.P. Srivastava learned Senior Advocate assisted by Sri Lav Srivastava. Both the appeals have been heard and are being decided together by this common judgment.

20. It is vehemently argued by learned Senior Advocates appearing for the appellants that as per the prosecution story, seven persons were surrounded and attacked by the accused persons (15 in number) in a pre-planned manner while they were sitting unaware and unarmed in the field near Village Mohar. Every accused person was armed with a deadly weapon such as Kulhari, Farsa or Gun (firearm). Four persons were murdered whereas three of them had fled from the scene. This prosecution story is unbelievable as not a single injury had been caused to any of the three prosecution witnesses who as per their own version were attacked by a mob of 15 accused

persons; whereas, on the other hand, three persons on the defence side had received firearm injuries. There is no whisper nor any explanation by the prosecution of the injuries caused to three accused persons, i.e. the defence side. The injuries of three above named persons (Exhibited as Exhibit 'Kha-2, 3 & 4') have been duly proved by the defence witnesses. The FIR or the PW-1 (sole eye witness) in his deposition is completely silent regarding the injuries of the defence. The first informant examined as eye witness (PW-1) on a specific question put to him in the cross examination regarding the act of firing by four deceased, had categorically denied saying that no firing was made by any of the deceased persons and that apart from the four deceased, no other person from their side was carrying any weapon. The recovery memos of the firearms belonging to four deceased found near their dead bodies indicate that their firearms (guns) was used during the incident. Empty cartridges found on the spot and used bullets found in the chamber of the gun of one of the deceased persons, are ample evidence of the said fact. The statement of denial on the part of the prosecution witnesses PW-1, thus, makes the whole story of the prosecution doubtful. Non-explanation of the injuries of defence by the prosecution in the said scenario would go to the root of the controversy and shake the version of the prosecution regarding the genesis and the manner, i.e. why and how the murders took place. The genesis of the incident is something else and the incident has not occurred in the manner as put by the prosecution. The prosecution has, thus, not come with clean hands.

21. It is further stated that two incidents of Maar Peet and firing had occurred during the day time, before noon on 11.01.1990 itself, i.e. before seven persons (four died & three escaped) who were guests took lunch at the Village of Chhiddu Singh namely Kiswahi. The incident-in-question which occurred at around 03.30 PM was infact third incident of fighting in a row during which 'Maar Peet' and 'firing' took place between two groups. The question would be as to who was the aggressor of the crime reported by PW-1. In fact, three accused persons were attacked in their own Village by four deceased persons who were carrying firearms, consequently, in retaliation and in defence of the accused persons, a mob of Villagers attacked all of them and murdered four. The accused persons cannot be said to be guilty as they have a right to exercise their private defence.

22. The Village Chowkidar PW-8 lodged a written report exhibited as 'Exhibit Ka-6', immediately reporting the incident. The written report lodged by the Village Chowkidar (PW-8) of the incident of firing by four unknown persons was registered as Case Crime No.20 of 1990. The said report being prior in point of time to the FIR lodged by PW-1 Raja Bhaiya Singh, his report should be treated as a cross-version of the defence and, accordingly, registered by the police as Case Crime No.20-A of 1990. The version of the Village Chowkidar (PW-8) in the said report is clear that he heard a 'Shoor' (noise) at around 03.30 PM on 11.1.1990 while he was in his Village and saw firing by four persons who were unknown to him. He immediately ran to the police Station Sumerpur to report the incident and on the information given by him, the report was written by the Head Moharrir, copy of which was read over to him during his deposition before the Court and as he proved it to be the same, it was exhibited as

'Exhibit Ka-6'. In his cross examination by the defence, the Village Chowkidar stated that on the information given by him, the police personnel alongwith the Station House Officer reached the spot of the crime before he himself reached back.

23. It is, then submitted by the learned Advocates that, in fact, three accused injured persons were taken to the hospital by the police officers though admittedly none of the accused persons were arrested by the police on that day. The arrest of the accused persons made later would go to show that they were implicated falsely by the prosecution after deliberations of the first informant with others in connivance with the local police.

24. It is vehemently argued that in the above facts and circumstances, it was the duty of the prosecution to explain the injuries caused to the accused persons during the course of occurrence of the incident. There is no explanation nor a whisper from the side of the prosecution as to how injuries had been caused to three accused persons and who took the injured to the hospital and got them examined. For the reason of non-explanation of injuries of the defence, whole case of the prosecution falls. None of the accused persons can be held guilty of the alleged offence of murder of four deceased who themselves were aggressors of the crime.

25. Further, it is urged that there is no evidence of any previous enmity of the deceased persons with the accused. They were from different Villages. In fact, they were guests of the Villages Mohar and Kiswahi as they came to see a girl, daughter of a fellow villager Chhiddu Singh for marriage. There was no animus. The deceased persons were unknown to the entire Village. There is not even a suggestion of enmity of the villagers or the accused persons with Chhiddu Singh of Village Kishwahi. On the other hand, the deceased persons and first informant had criminal antecedents. The four deceased persons were armed with licensed guns which may be normal for persons living in Bundelkhand area but there is no explanation on the part of the prosecution as to what motivated the appellants to assault them. Why would the accused kill four persons who were guest in the Village?

26. Further, the version of sole eye witness PW-1 is inconsistent and highly unbelievable, in as much as, he had simply denied firing by the four deceased persons whereas the said fact has been categorically proved by P.W.-8, the prosecution witness itself and also is corroborated from the recovery memo prepared by the police of the firearms of the deceased found besides their bodies. The Star prosecution witness PW-1 is a lair. The prosecution story of the incident is, thus, completely belied by the said fact.

27. It is further contended that there is one more relevant fact which needs consideration. One of the deceased Arjun Singh was own nephew of PW-1 and it is highly improbable rather inconceivable that PW-1 had left the spot of occurrence before the inquest of dead body of his nephew was done that too to attend his duties in the school. PW-1 admitted his presence on duty on 12.01.1990 in the school at Risaipara situated at about 50 KM away from the scene of incident. His version that he left the scene of incident at about 09.00 AM to attend his duty at the school furthermore makes his conduct highly questionable. Rather for his admission of

being present in the school on duty on 12.01.1990, his presence in Village Kiswahi on 10.01.1990 and 11.01.1990 accompanying four deceased persons to visit the house of Chhiddu Singh is completely ruled out. The entire prosecution story is a result of concoction by PW-1 who is a related and interested witness. Even otherwise, his own personal character and that of his immediate family as reflected in the cross-examination shows that he is a man of criminal nature and was implicated in several criminal cases prior to the incident. He cannot be said to be reliable or dependable witness and his testimony being uncreditworthy cannot be made basis to convict the accused person in the murder of four strangers. PW-1 is not a witness of any of the four inquest reports. This clearly implies that he was not present at the scene of occurrence.

28. It is further pointed out that from the inquest report, it is evident that the inquest of Chatrapal Singh commenced at about 07.00 AM and completed at about 09.00 AM. As per the version of PW-1 in examination-in-chief, his statement was recorded by the police on the spot at about 06.15 AM but the site plan was not prepared as it was dark at that point of time. PW-1 is also not the witness of the site plan. He, however, states in the cross examination that the police had first prepared the site plan on 12.01.1990 and, thereafter, they proceeded to do the inquest. His version that the site plan was of the place of the incident where the dead bodies were lying is in clear contradiction to his own statement and his presence at the scene of occurrence becomes highly doubtful.

29. Further, the version of PW-1/first informant in the first information report that the murder of four persons had occurred in a field near Village Mohar is not in-consonance with the place of occurrence as shown in the site plan prepared by the investigating officer/PW-11.

30. Thus, once it is established that the sole eye witness is a liar the creditworthiness of the entire prosecution case based on his sole testimony is completely ruled out.

31. It has been further argued that in fact, non-explanation of the injuries of the defence by the prosecution would lead to an inference that the prosecution has suppressed the genesis and origin of the occurrence and has not presented the true version. The defence version of the explanation of injuries on the persons of three accused is sufficient to create a serious doubt on the prosecution case. Reliance is placed upon the decisions of the Apex Court in **Mohar Rai Vs. State of Bihar1, Laxshmi Singh & others Vs. State of Bihar2, Babu Ram & others Vs. State of Punjab3, Amar Jeet Singh Vs. State of Haryana4 & Krisne Gowda & others Vs. State of Karnataka Arhalgud Police** to state that for the contradiction between the version of PW-1 and the prosecution evidence regarding the place of occurrence of the incident and the inherent improbabilities, the omission and infirmities of the prosecution case the defence version becomes highly probable. Non-explanation of injuries sustained by three accused persons at the time of occurrence in the course of altercation is a very important circumstance which would lead to an inference that the prosecution has failed to prove the case against the appellants beyond reasonable doubt.

32. Further argument is that moreover the police had not conducted proper investigation. One of the major lacuna evident from the version of the

Investigation Officer is that the empty cartridges were neither collected from the scene of the occurrence nor tallied with the recovered guns/firearms of the four deceased. Though it was most necessary as the incident of firing was first reported by the Village Chowkidar/peon who has also proved his report by entering in the witness box. A reading of the report Exhibit 'Ka-6' indicates that PW-8 had rushed to the police station to report the incident when he saw firing by four unknown persons in the Village. His report being prior in point of time was registered as Case Crime No.20 of 1990. It was, therefore, incumbent upon the investigating officer to ascertain the reasons for injuries found on the persons of three accused. In a case of cross version of the incident of a crime, it becomes necessary for the investigating officer to examine the probabilities of the defence version. The entire investigation was illegally conducted in one direction oblivious of the above circumstance.

33. The learned counsel has also argued that even the version of the investigating officer (PW-11) that he had prepared the site plan in the presence of the first informant/complainant (PW-1) is in contradiction with the deposition of the complainant (PW-1). The statement of 'PW-11' that he did not go to the scene of incident soon after lodging of the report by the Village Peon registered as Case Crime No.20 of 1990 under Section 307 IPC, is an extra effort to establish the prosecution story. In fact, he did not conduct proper investigation of the case crime No.20 of 1990, which was nothing but a cross version of the incident reported by PW-1 as Case Crime No.20-A of 1990 giving a false version, having been lodged after due deliberations. The apparent lapses in the investigation also establishes that the prosecution has presented a wholly false version of the incident.

34. Above all, as stated by the learned counsel, in a case of injuries sustained by the accused persons at about the time of occurrence or in the course of altercation, it is the duty of the Court to consider the circumstances of the case so as to see whether the accused persons can legitimately exercise the right of private defence. It is not necessary for the accused to take the plea of right of private defence and to lead evidence. It would be sufficient to create a doubt in the prosecution case by establishing this plea by referring to the circumstances transpiring from the prosecution evidence itself. The question in such a case would be of assessing the true effect of the prosecution evidence and not the question of accused persons discharging any burden. As soon as the defence placed the necessary material on record for claiming the right of private defence, it becomes the duty of the Court to see as to whether the defence has a reasonable and probable version of his side of the story. The law that the burden of establishing the plea of self defence is on the accused cannot be stretched to the extent that the defence has to adduce positive evidence so as to establish its case beyond doubt. In other words, an accused is not under obligation to prove his defence beyond all reasonable doubts, rather, unlike the prosecution, it is only to create doubt about the prosecution case and the probabilities of its defence. The proof of defence by preponderance of probabilities is sufficient. Reliance is placed on the judgment of the Apex Court in **V. Subramani Vs. State of Tamil Nadu6 and Anand Ramchandera Chougule Vs. Sidaraj Laxman Chougule & others** to state that the firearm injuries on the persons of three accused and prompt

report of firing occurred in the Village by the Village Peon (exhibit Ka-6) are material circumstances coming out of the prosecution evidence itself, which establish that the accused persons are entitled to take the right of private defence and that the defence had proved their version that four deceased persons were attacked by a mob of Villagers when they opened firing at the accused persons.

35. The defence version regarding the genesis of the incident and the reasons for altercation, in all probabilities, proved that the deceased were aggressors of the crime. The accused persons, thus, cannot be held responsible for committing homicidal death of four persons.

36. Learned AGA, on the other hand, disputing the version of the learned Advocates for the appellant submitted that instant case is not a case where plea of private defence can be pressed into service, merely because some of the accused persons have suffered firearm injuries as the presence of the injuries itself does not make it imperative to interfere with the well reasoned and well discussed judgment of the court below. From the defence version itself, it is evident that the accused persons had sustained injuries prior to the time of occurrence and not in the course of occurrence of the incident in question. The prosecution need not give explanation of the injuries sustained by the accused persons as the defence version that the firearm injuries were sustained by the accused in the course of altercation is neither reasonable nor probable from the circumstances brought on record.

37. In any case, the burden to prove the plea of legitimate exercise of self defence is on the accused persons and in absence of any proof much less cogent one, it is not possible for the Court to presume the truth of the plea of self defence. The legal position is that the Court shall presume the absence of such circumstance and it is for the accused(s) to place necessary material on record either by adducing positive evidence himself or by eliciting necessary facts from the evidence of the witnesses examined for the prosecution to establish his/their plea of the right of private defence.

38. The decisions of the Apex Court relied upon by learned counsel for the appellants do not come to the rescue of the accused persons/appellants rather support the stand of the prosecution that it was not under obligation to explain the injuries sustained by the accused persons.

39. Having heard learned counsels for the parties and perused the record, to appreciate the arguments of learned Advocates for the appellants that the accused persons have a right of self defence and to ascertain the effect of alleged non-explanation of the injuries of accused persons by the prosecution, we would like to first appreciate the prosecution and defence evidences.

40. The prosecution case commenced with the first information report lodged by PW-1 on a written report given by him after approximately two hours of the incident wherein it was stated that four deceased persons were brutally murdered by the accused persons (who were 15 in number). The accused were named in the first information report with the details of the weapons they were carrying. The murder weapons which the accused persons were carrying, as per the description in the first information report and the deposition

of the PW-1, are tallying with the injuries sustained by the four deceased persons as is clear from the Medico-legal reports. The Doctors who conducted the postmortem examination of four deceased had proved their reports by entering in the witness box. Nothing material could be pointed out by the learned Senior Advocates for the appellants which would make the injuries of the deceased persons improbable from the weapon assigned to the accused persons. Learned counsel for the appellant, thus, could not dispute the ocular version of the prosecution regarding the homicidal death of the four deceased. In this regard, only submissions of learned Senior Counsel Sri V.P. Srivastava for the appellant in the connected appeal is that only one gun shot wound of entry has been found on the person of deceased Chatrapal Singh and more than one gun shot wounds were found on the person of the deceased Awdhesh Kumar @ Raja Nigam, whereas two other deceased namely Arjun Singh and Mahesh Chandra Shukla did not receive a single gun shot injury. Absence of gun shot injuries to the two deceased persons, who according to prosecution were gheraoed by the accused persons and murdered, is conspicuous and makes the prosecution story improbable to the extent that four deceased persons were cornered by the accused persons carrying firearms and then murdered. In its zeal to rope in all the accused persons in the false case of murder, the prosecution had shown firearms in the hands of the four accused persons. The injuries of the deceased do not correspond to the murder weapons assigned to the accused making the prosecution version unbelievable.

41. Dealing with the above submission, it would be relevant to note that all four deceased sustained at least 12 to 15 injuries which are "incised wound bone deep", "lacerated wound" on their head and forehead, i.e. mostly on the upper and vital parts of their bodies. "Two Gun shot wounds" of the deceased Awdhesh Kumar @ Raja Nigam are deep inside abdomenal cavity and lower part of the right thigh with blackening and tattooing present around both the wounds. "One gun shot wound" with blackening and tattooing around the wound at L-5 level 2 cm from the middle on left side of the back was on the dead body of Chatrapal Singh.

42. A perusal of the above injuries sustained by four deceased shows that they were attacked and brutally beaten in such a manner that they could not escape the scene of occurrence. The prosecution version that four deceased were gheraoed/cornered and then murdered by a group of persons who were carrying deadly weapons cannot, therefore, be said to be inconsistent to the evidence on record.

43. Further, the presence of the accused persons at the scene of occurrence has not been disputed by the learned Senior counsels nor can it be doubted in any manner. Their argument, however, is that none of the accused persons can be pinpointed in commission of murder of four persons, in as much as, three of the accused persons themselves had sustained serious gun shot injuries. The defence version is that four deceased persons had opened fire at the accused persons. Any action on the part of the appellants accused persons, therefore, was only in reaction and they cannot be convicted of the offence of committing homicidal death of four deceased.

44. To appreciate the said argument, we have to assess the probabilities of the

defence version sought to be established by production of five defence witnesses (DW-1 to DW-5) to prove the injuries of three accused persons. We would also be required to examine the prosecution evidence to ascertain as to whether the probabilities of the defence version would make the prosecution story doubtful. We would also have to assess the weight of the report of the incident lodged by the Village Peon (prosecution witness PW-8), the written report of Case Crime No.20 of 1990, exhibited as 'Ka-6'. The statement of the investigating officer PW-11 is also relevant to assess as to whether the version of the Village Peon (PW-8) would lean in favour of the defence.

45. As noted above, the prosecution has given its version of the occurrence of incident that seven persons including Chhiddu Singh a resident of Village Kiswahi were attacked while they were sitting leisurely chewing Gutka (Tambaku) in a field near the border of Village Mohar. The place of occurrence of the incident being near the border of Village Mohar is established from the version of the eye witness PW-1 and the investigating officer PW-11 as also from the site plan prepared by him.

46. From a reading of exhibit 'Ka-6', the report lodged by the Village Peon registered as Case Crime No.20 of 1996, it appears to us that he had simply reported the incident of firing which was going on at about 03.00 PM near the border of the Village Mohar and Dhundhpur in discharge of his duties as Village Chowkidar of Villages Mohar and Dhundpur. His report that four persons (unnamed) were firing in the Village cannot be said to be cross version of the defence. The submission of the learned counsel for the appellants that four persons mentioned in the report of the Village Peon were in fact deceased persons as they were not known to the Village Chowkidar is only an assumption. There is no basis or reason to accept the same. Mere fact that the FIR lodged by the eye witness (PW-1) was numbered as Case Crime No. 20-A/90 would not make the report of village Peon a cross case of the defence. There is no inconsistency in the version of PW-1 (eye witness) and PW-11 (the investigating officer) regarding the FIR having been lodged by PW-1 (the eye witness) at about 05.30 PM by submitting a report of the incident in his own handwriting. The investigating officer (PW-11) stated that he went to the scene of occurrence after registration of the FIR by the eye witness (PW-1) and making entry of his movement in the General Diary; the statement of PW-1 was recorded at the place of occurrence but since there was no source of light on the spot, the inquest could commence only in the next morning at the site of occurrence itself. Two injured accused namely Santosh Kumar Mishra and Balram Singh were admitted in the Sadar Hospital, Hamirpur when they were arrested on 15.01.1990 and their statements were recorded. Rifle of one injured accused Balram Singh (in broken condition) was deposited by him in the police station and recovery memo of the same was prepared by the investigating officer. Some of the accused persons had surrendered before the Chief Judicial Magistrate whereas against others, proceedings under Section 82 and 83 Cr.P.C. had to be initiated before they were charge sheeted by the Investigating Officer. The charge sheet (exhibit Ka-'42') against one accused Jhandu Singh was submitted as 'absconder'.

47. The submissions of learned Senior Advocates for the appellants that three

injured accused persons were taken to the hospital by the police who reached at the spot of crime after the report of firing was lodged by the Village Peon, is sought to be substantiated from the statement of the defence witnesses namely DW-2 and DW-3. DW-2 is the Doctor who was posted in the District Hospital, Hamirpur on the date of the incident. He states that he examined the accused injured Santosh Kumar Mishra son of Kanahiya Lal Mishra when he was brought to the hospital by the Constable CP-345 Manohar Singh, police station Sumerpur and his injury report was prepared by him. As per the injury report, a gun shot wound of entry 1 cm x 1/2 cm deep was found at the lower side of the abdomen 8 cm towards the left side of the middle and 12 cm from the naval which was kept under observation. No blackening, tattooing or ceasing of hair was present around the wound. The injured was advised X-ray of the abdomen but no supplementary report or X-ray report was entered in the medico legal register. DW-3 is the Doctor who was posted as 'E & T' surgeon in the District Hospital, Hamirpur on the date of the incident. He states that he had examined two injured accused persons namely Balram Singh and Gaya Prasad at about 05.55 PM and 06.15 PM when they were brought to the hospital by a Constable 513 Shiv Ram Singh, police station Sumerpur. The injury report of Balram Singh indicates that his palm was badly injured detaching his thumb and the said injury was caused by the firearm. The injured was admitted in the hospital under observation. Two firearm wounds of entry at the right side of the forehead and neck were found on the person of the injured Gaya Prasad. One firearm wound (abrasion) was present at the left upper arm of the injured Gaya Prasad. However, there is no indication of the time when Santosh Kumar Mishra was taken to the hospital. There is nothing on record to substantiate that three injured persons were taken to the hospital on the instruction of the Investigation Officer from the scene of occurrence, who reached the place as per own version of the defence.

48. Further, from the deposition of defence witness/DW-4, Durga son of Badlu, it is evident that some physical altercation took place at around 11.00 AM to 12.00 Noon in front of the house of the father of two accused persons namely Santosh and Ashok sons of Kanahiya Lal Mishra who was an Ex-Gram Pradhan. A careful reading of the statement of DW-5 Sabhajeet son of Chunubad (one of the accused) shows that the firearm injury to accused Santosh was caused at about 08.00 to 09.00 AM in the altercation which took place near his house in the Village Mohar, Police Station Sumerpur. In his cross examination, DW-5 states that in the incident of firing which occurred at around 08.00 to 09.00 AM, accused Santosh got injured in his stomach. The said altercation took place on a petty dispute of plucking of fresh coriander (Dhaniya) from the field of DW-4 Durga Chamar. This fact is also evident from the deposition of DW-4. Thus, as per own version of defence witnesses DW-4 and DW-5, two separate incidents had occurred one after the other in the morning on 11.01.1990; first at around 08.00-09.00 AM and second before noon between 11.00 AM to 12.00 hours, during which some injuries were caused to accused Santosh Kumar Mishra. DW-5 had categorically stated that injured Santosh Kumar Mishra was not taken to the hospital when he got injured in the incident of Maar Peet occurred before Noon but the said incident was reported to the police through the Village Peon Ram Babu on the

instruction of the villagers. DW-5 further states that he did not witness the last incident of fighting (Muthbhed) which occurred in the evening at around 03.30 to 04.00 PM.

49. Further, from the version of DW-4 & 5, it can only be gathered that some altercation and incident of Maarpeet took place near the house of accused Ashok Kumar and Santosh Kumar Mishra before Noon. The presence of Chhiddu Singh, the resident of the Village Kiswahi alongwith four deceased persons at the time of the said incident though has been narrated in the statements of DW-4 & DW-5 to assert that they were aggressors of the crime, but their testimony in this regard is not consistent.

50. According to version of DW-4, the dispute commenced with the act of Chirportan & Pancha (two accused) of plucking Dhaniya (fresh Coriander) from the field of DW-4 Durga Chamar. When they were stopped by DW-4, they hurled abuses at him. DW-4 then went to the house of Kanahiya Lal Mishra father of the accused Santosh and Ashok to complain. There Chhiddu Singh was called by Chirportan who came with four deceased persons (who were guests in the Village) and they started beating DW-4. When Ashok and Santosh stopped them, they messed up with Ashok and Santosh and shot at them. The fire struck the accused Santosh in his abdomen. DW-5 states that he resides at some distance from the house of Kanahiya Lal Mishra. On hearing Shoor (noise), he went out of his house and witnessed that four accused persons were fighting with Ashok and Santosh and one of them fired at accused Santosh. After villagers intervened, they were separated but four deceased had threatened Ashok and Santosh that they would not spare him.

51. In this whole story of the defence narrated by the DW-4 & DW-5, it is evident that the incident which was reported by Village Chowkidar Ram Babu had occurred before Noon and "Exhibit Ka-6" was not the report of the incident occurred at about 3 P.M. near the border of Village Mohar and Dhundpur. In his report, the Village Chowkidar has not been reported the time of incident. It is vaguely written therein that four accused persons were firing in Village Mohar. The said report, therefore, cannot be said to be a first information report lodged by the defence side to give their version of the incident in question. Heavy reliance placed by the learned Senior Advocates on the said report to assert that the said report probalise defence story of the genesis and occurrence of the incident and four deceased persons being aggressors of the crime, is, thus, misplaced. This apart, the defence version of four deceased attacking accused Ashok and Santosh in front of their house also seem improbable. It is not understandable as to why four outsider who were guests of the Village would attack residents of the Village who were not known to them that too in front of their houses on a petty dispute with a fellow villager. There is no suggestion of any previous enmity of four deceased with Ashok and Santosh whose father was an Ex-Gram Pradhan. The defence story regarding genesis of the incident-in-question does not, therefore, seem to be probable.

52. The reason for the incidents of Maarpeet occurred in the morning though is not clear. But it is clear from the statement of DW-5, the defence witness itself, that the injuries by accused Santosh Kumar Mishra were not sustained at the time of occurrence of the incident in question or in the course of occurrence of incident at around 03.30 PM near the border of Village Mohar, during which four

persons were brutally murdered. The injury report of Santosh Kumar Mishra though indicates that the injuries were fresh but the time when he was examined by the doctor DW-2 is conspicuously missing from the deposition of DW-2, who further explained in the examination-in-chief itself that the injuries might have caused eight hours prior to the examination of the injured.

53. The defence has utterly failed to prove that the injuries were sustained by the accused Santosh Kumar Mishra in the same incident. As far as the injuries of other two accused persons namely Balram Singh and Gaya Prasad are concerned, from the mere statement of DW-3 that they were taken to the hospital by a Police Constable namely Shiv Ram Singh of the Police Station Sumerpur, it cannot be accepted that they were injured during the course of altercation. The investigation officer (PW-11) clearly denied having visited the scene of occurrence soon after the report (Exhibit 'Ka-6') was lodged by the Village Chowkidar, though he categorically states that he immediately went to the place of incident after the report was lodged by PW-1 (the first informant). There is no suggestion in the cross-examination of PW-11 that three injured accused persons were taken to the hospital on his instructions being Station House Officer of the police station concerned straightway from the place of incident-in-question.

54. Moreover, the injuries of these two persons are simple in nature and not such so as to give them a right of self defence to commit murder. The Doctor DW-3 who has prepared the injury report stated that those injuries had been caused from a distance and there was probability of such injuries having been caused during an altercation. The injuries of Balram might be the result of bursting of the revolver in his hand. Noticeable is the fact here that Balram had deposited his damaged revolver to the police when he was arrested.

55. Further, from the deposition of DW-1 who proved the entries in the Medico-legal register, it is evident that three injured persons were examined during the same time period. First entry is regarding the injury report of Balram at Serial No.55 in the said register. Whereas, injury reports of Gaya Prasad & Santosh Kumar Mishra were entered at serial No.56, 57; respectively.

56. The legal position relating to non-explanation of injuries of defence and right of private defence has been placed before the Court with the aid of the decisions of the Apex Court as under:-

(i) In **Mohar Rai Vs. State of Bihar,** the Apex Court has considered the plea of defence as the accused Mohar Rai sustained injuries in the course of incident and the prosecution did not give any explanation to the said injuries. It was held that the failure of the prosecution to offer any explanation in that regard proved that evidence of the prosecution witness relating to the incident was not true. The injuries of the accused probabilised the plea taken by the appellant that a false case was foistered against the appellant. The Apex Court after considering the evidence led by the prosecution held that:-

".....We think that the defence of the appellants is highly probabilised by three important circumstances, namely-(i) the same was put forward immediately after the occurrence, (ii) it satisfactorily explains the injuries found on the persons, of the appellants

while the prosecution evidence fails to explain those injuries,. and (iii) the prosecution evidence itself shows that Mohar Rai could not have used Ex. III and therefore his version that that weapon was thrust on him is probablised."

The accused was given benefit of doubt therein as non-explanation of injuries to the accused created doubt on the prosecution version.

(ii) In **Laxshmi Singh Vs. State of Bihar** considering the injuries on the person of the accused, it was observed :-

"11.....Having regard to the circumstances of the case there can be no doubt that Dasrath Singh must have received these injuries in the course of the assault, because it has not been suggested or contended that the injuries could be self-inflicted nor it is believable. In these circumstances, therefore, it was the bounden duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they did not see any injuries on the person of the accused....."

It was observed that the eye witness could have given details regarding the assault on two deceased and the accused and yet he deliberately suppressed the injuries on the person of the accused and that was the most important circumstance to discredit the entire prosecution case. It was held therein that where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case. It shows that the origin and genesis of the occurrence had been deliberately suppressed which lead to the irresistible conclusion that the prosecution had not come out with a true version of the occurrence. It was held that the courts below had failed to appreciate the ratio of the Apex Court in **Mohar Rai1.**

The decision in **Puran Singh Vs. State of Punjab8 and State of Gujrat Vs. Bai Fatima9** were considered therein to note as under:-

"In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all."

It was held that in a murder case, non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inference:-

"(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version:

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

It was further observed:-

"The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosedition one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the Court to rely on the evidence of PWs. 1 to 4 and 6 more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in State of Gujarat v. Bai Fatima Criminal Appeal No. 67 of 1971 decided on March 19, 1975 : Reported in there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

(iii) In **Mitter Sen Vs. State of U.P10,** considering the infirmities in the prosecution witness, the explanation offered by the prosecution to the injuries in the course of occurrence was discarded therein at its face value.

(iv) In **Babu Ram & others Vs. State of Punjab11** relying on the principle laid down in **Laxshmi Singh2** it was observed in paragraph Nos.18 & 19 as under:-

18. It is a well-settled law that in a murder case, the non- explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:-

1. that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

2. that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

3. that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case. [See Lakshmi Singh v. State of Bihar; AIR 1976 SC 2263]

19. Further, it is important to point out that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

(v) In **Amarjit Singh Vs. State of Haryana** 2010 (6) SCC 649,4 the principles laid down in **Laxshmi Singh2 (supra)** have been followed to hold that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the defence gives a version which competes in probability with that of the prosecution one or where the evidence consists of interest or inimical witnesses.

(vi) In **V. Subramani & another Vs. State of Tamil Nadu6**, the principles with regard to the exercise of right of private defence has been considered by the Apex Court in the following words:-

"11.Only question which needs to be considered is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression `right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short `the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See

Munshi Ram and Ors. v. Delhi Administration, AIR (1968) SC 702), State of Gujarat v. Bai Fatima, AIR (1975) SC 1478, State of U.P. v. Mohd. Musheer Khan, AIR (1977) SC 2226 and Mohinder Pal Jolly v. State of Punjab, AIR (1979) SC 577. Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia v. State of U.P., AIR (1979) SC 391), runs as follows:

"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence...."

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea."

It was further held in paragraph No.12 as under:-

"12. The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See Lakshmi Singh v. State of Bihar, AIR (1976) SC 2263]. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences

and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of private defence."

(v) In a recent decision in A**nand Ramchandera Chougule Vs. Sidaraj Laxman Chougule & others7** it was held in paragraph nos. 10, 11, 12 & 16 as under:-

"10. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt.

11. The fact that a defence may not have been taken by an accused under Section 313, Cr.P.C. again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. In Sunil Kundu v. State of Jharkhand , (2013) 4 SCC 422, this Court observed:

"28...When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt."
12. The fact that an F.I.R. was lodged by the accused with regard to the same occurrence, the failure of the police to explain why it was not investigated, coupled with the admitted fact that the accused were also admitted in the hospital for treatment with regard to injuries sustained in the same occurrence, but the injury report was not brought on record and suppressed by the prosecution, creates sufficient doubts which the prosecution has been unable to answer.

16. Dayal Singh (supra) is distinguishable on its own facts as it did not relate to suppression of materials with regard to the accused during the trial in addition to the failure to investigate. A defective investigation shall be completely different from no investigation at all coupled with suppression of the injury report arising out of another F.I.R with regard to the same occurrence."

57. From the careful reading of the above decisions of the Apex Court, the legal position with regard to the effect of non-explanation of injuries of the defence

and the legitimate exercise of right of private defence can be culled out as under:-

(i) The injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. The court can draw adverse inference in case of non-explanation of injuries on the body of the accused persons by the prosecution.

(ii) But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. For example, Where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the affect of the omission on the part of the prosecution to explain the injuries.

(iii) In a case where defence version which explains the injuries on the person of the accused is rendered probable, the Court can draw an inference that the prosecution has suppressed the genesis and origin of the occurrence and has, thus, not presented the true version.

(iv) It can also be concluded that the witnesses who has denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable.

(v) Thus, the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the defence gives a version which competes in probability with that of the prosecution one.

(vi) The reason being that where the defence has successfully proved that the injuries were sustained by the accused at the time of occurrence or in the course of altercation, it can set up the plea of self defence, i.e. to state that the accused had inflicted injuries on the member of the prosecution party in exercise of the right of self defence.

(vii) However, whether in a particular set of circumstances, a person has legitimately acted in the exercise of the right of private defence is a question of fact which is to be determined on the facts and circumstance of each case. No test in the abstract for determining such a question can be laid down by the Court.

(viii) In determining this question of fact, the Court must consider all the surrounding circumstances. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea.

(ix) It is not necessary for the accused to plead in so many words that he acted in self defence. In a given case, the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record.

(x) Under Section 105 of the Indian Evidence Act, the burden of proof is on the accused who sets up the plea of self defence and in the absence of proof, it is not possible for the Court to presume the truth of the plea of self defence. Rather the Court shall presume absence of such circumstance. It is for the accused to place necessary material on record either by adducing positive evidence himself or by eliciting the necessary facts from the witnesses examined for the prosecution. Meaning thereby, an accused taking the plea of right of private defence is not necessarily required to call the evidence; he

can establish his plea by reference to the circumstances transpiring from the prosecution evidence itself.

(xi) The question in such a case would be a question on assessing the true affect of the prosecution evidence and not the question of the accused discharging any burden.

(xii) Where the right of private defence is pleaded, the defence must give a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused.

(xiii) The burden of establishing the plea of self defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

(xiv) Thus, if the accused takes the plea of self defence, he is not required to prove the allegations beyond all reasonable doubt, unlike prosecution. Rather the accused has only to create a doubt about the prosecution case and establish the probability of its defence. If the accused takes a defence which is not improbable and appears likely and there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must go to the accused unless the prosecution is able to prove its case beyond all reasonable doubt.

58. In the light of the above legal principles, to summarise the fact of the instant case, it is to be noted that the genesis of the dispute stated by the defence was an altercation which occurred in the earlier part of the day of the occurrence of the incident in question. It is averred that the dispute commenced with plucking of fresh Coriander from the field of Durga Chamar (DW-4) which resulted in the act of beating of two accused Santosh and Ashok in front of their house by the four deceased. As the accused persons had sustained injuries in the course of altercation, the Villagers attacked them in the evening when they were crossing the border of Village Mohar.

59. In this story of the defence, we can see several missing links and the story seems improbable for the reasons:-

(i) DW-4 says that two accused Chirpotan and Pancha (resident of Village Kiswahi) were plucking Dhaniya (fresh Coriander) from his field and when he stopped them, they threw it and hurled abuses at him. He then went to the house of Ramkripal Tiwari and on his advice went to the house of Kanahiya Lal Mishra to complain. He met accused Ashok and Santosh (sons of Kanahiya Lal Mishra) there and two above named persons Chirpotan and Pancha also reached there. Chirpotan called Chhiddu who came with two other armed persons and the altercation between Ashok and Santosh and two deceased ensued.

(ii) In this story, the defence could not explain as to why Chhiddu Singh who had guests in his house would come to the house of Kanahiya Lal Mishra with armed persons to enter in an altercation on a petty dispute of plucking Coriander which was not related to him. This link in the defence story is completely missing. Why would two unknown persons beat DW-4 is not explained.

(iii) As per the defence version, accused- Santosh had sustained injuries in the altercation which occurred in front of the house of Kanahiya Lal Mishra before Noon. It is not explained as to why accused Santosh was not taken to the hospital immediately after he sustained injuries in his abdomen due to fire shot by the deceased.

(iv) No report was lodged by the defence of any of the altercations or incidents occurred during day time in which Santosh had sustained injuries.

(v) DW-5 states that the Village peon was sent by the Villagers to lodge the report to the police when Santosh got injured. However, there is no mention in the report of the Village peon regarding the injuries sustained by Santosh in the firing made by the deceased persons.

(vi) In the report of Village peon (Ex.Ka-6) only this much is mentioned that four unknown persons were fighting with the Villagers and firing was going on.

(vii) There is no suggestion to PW-1, the eye witness or PW-2 Chhiddu Singh of any previous incident having occurred during the day time wherein accused Santosh sustained injuries as per own version of the defence witnesses. The defence has no explanation of these missing links in their story.

(viii) Three accused Santosh, Balram and Gaya Prasad in their statement under Section 313 Cr.P.C. though averred that the injuries on their person were caused by the deceased and, thereafter, Villagers had attacked them but none of the above accused persons had given any indication of any altercation occurred during the day time. The version of the defence about the genesis or origin of the incident, therefore, does not appear to be true.

The defence, thus, has not been able to explain or probalise their version that three accused persons had sustained injuries at the time of occurrence or in the course of incident, which occurred at around 03.30 PM near the border of Village Mohar in which four persons were brutally murdered.

It is not possible for the Court to link the injuries sustained by the accused persons on its own with the incident-in-question or assume to have been caused on account of any overt act of the deceased persons. Nothing could be elicited from the deposition of the prosecution witnesses or other prosecution evidence which would probalise the defence version or improbalise the prosecution case.

(ix) As far as the report of Village peon is concerned, as observed herein above, in our opinion at the best the said report could only be considered as an information of the incident by the PW-8 in discharge of his duties as Village peon. From the statement of PW-6, Head Moharrir, it is evident that the said report was lodged at about 16.40 hours on the oral statement of Village peon to him. A copy of the said report is exhibited as 'Exhibit Ka-6' by the Village peon who was examined as PW-8. There is no Chick report of the said information. The Head Moharir (PW-6) who stated to have lodged the said report (Ex.Ka-6) has not proved the said document nor has proved any chick report in that regard. By the mere fact that the said report was stated to have been lodged prior in point of time, it cannot be treated as a cross version or

cross FIR of the defence. Moreover, from the own version of the defence witness (DW-5), it appears that the said report was lodged by the Village peon on the instruction of accused persons Santosh and Ashok.

Heavy reliance placed by the learned counsel for the appellant on the written report exhibited as 'Exhibit Ka-6' to assert it as a cross version of the defence to exercise their right of private defence is, thus, found misplaced. Adding to the above, pertinent is to note that the investigating officer had shown ignorance about having any information of the report exhibited as 'Exhibit Ka-6' being lodged prior in point of time to the incident reported by PW-1 or in his presence. Mere registering the report of PW-1 as Case Crime No.20-A of 1999 would not be sufficient to treat it a cross-case.

60. From the above discussion, it is difficult to accept that three accused persons were attacked by four deceased before they were cornered and brutally murdered near the boundaries of Village Mohar. From the circumstances brought by the defence and the prosecution evidence, it is not established that deceased were aggressors of the crime.

61. All the aforesaid circumstances brought to the notice of the Court by the defence would neither probabilise the defence story nor provide the accused to legitimately exercise a right of private defence. The defence story of genesis of the incident does not seem to be more probable so as to demolish the whole prosecution case being improbable or false. As the injuries of the accused persons did not occur in the course of the incident-in-question, the prosecution was not required to explain the said injuries.

62. Now the only question remains is to assess the weight of the prosecution evidence to see as to whether the prosecution has succeeded in proving its case beyond all reasonable doubts.

63. From a threadbare discussion of the prosecution evidence as above we find that:-

(i) The first information report is prompt having been lodged within two hours of the incident-in-question.

(ii) PW-1 lodged the first information report by giving a report in his own handwriting which was proved by him as 'Exhibit Ka-3'. The said report contains a graphic description of the accused with weapons in their hands and the manner in which the four deceased were murdered as also the place of occurrence.

(iii) PW-1 categorically stated that he was accompanying the deceased persons with two others named as Chhiddu Singh and Sahab Singh.

(iv) His version that accused Santosh exhorted other accused persons who came in a group to attack all of them saying "और अशोक व संतोष के ललकारने पर महेश साला मिल गया है, इन लोगो के बल पर बचा है मारो सालो को, जाने न पाए" and that the accused persons opened fire; four deceased persons were chased and gheraoed by them and cornered near the boundaries of the field and murdered. Their bodies were lying in a 'Gaddha' between Bandhi, in the first information report itself is corroborated from his oral deposition as also the site plan prepared by the police who reached the spot soon after lodging of the first information report.

(v) There is no inconsistency in the oral testimony of PW-1, the medical evidence and the testimony of the Investigating Officer (PW-11) as also the reports such as inquest site plan prepared by him, with regard to the injuries of the deceased and the place of occurrence The medical evidence fully corroborates with the evidence of eye witness (PW-1) with regard to the injuries sustained by the deceased.

(vi) PW-2 Chhiddu Singh though turned hostile but his narration of the incident in his examination-in-chief is same and supports the ocular testimony of PW-1. His version with the prosecution story, when read as a whole, does not demolish the prosecution case rather supports the prosecution version of PW-1 being eye witness of the incident. His deposition though has some twist and turns and he had been declared hostile for that reason by the prosecution but his testimony as a w0hole cannot be discarded.

(vii) Presence of PW-1 or he being an eye witness is being disputed by the appellants on the ground that:-

(a) Firstly, that he left the place of incident in the morning at about 09.00 AM to attend his duties in the school where he was a teacher, even before inquest of his nephew was commenced. The said act of PW-1 is highly inconceivable and disproves his present at the scene of occurrence.

(b) Secondly, PW-1 states that on 12.01.1990, the investigating officer first prepared the site plan and then inquest had commenced. The first inquest proved to have commenced at about 07.00 AM and completed at 09.00 AM. As per version of PW-1, he immediately left the scene of occurrence to attend his school duties. On the other hand, the Investigating Officer stated that he prepared the site plan in the presence of PW-1 (the first informant) after inquest was completed and soon after reaching the place of occurrence statement of PW-1 was recorded. The statement was recorded at about 06.15 A.M. There was, thus, no time left for preparation of the site plan. One of the two witnesses, therefore, is making false statement.

64. As far as the above arguments are concerned, we may note that the PW-1 categorically states that he left the place of occurrence after his statement under Section 161 Cr.P.C. was recorded. He remained at the place of incident for the whole night. The first inquest of the deceased Chatrapal commenced at about 07.00 A.M. and his statement was recorded before that about 06.15 A.M. By that time, site plan was not prepared as there was dark. Then he says that he was not aware as to when site plan was prepared but it was prepared prior to the inquest. This statement of PW-1 in cross-examination even if found in contradiction to his own statement about the time of inquest and preparation of the site plan and with the statement of the Investigating Officer (PW-11), but this by itself cannot be said to be material contradiction which would go to the root of the matter.

Minor contradictions in the statement of witnesses are bound to occur because of the time gap between the incident and recording of their testimony. It cannot be said to be a serious infirmity which would prove fatal to the prosecution case.

65. Further the act of PW-1 leaving the place of incident at about 09.00 AM after his statement under Section 161 Cr.P.C. was recorded and the site plan was prepared, cannot be put to scrutiny being improbable or inconceivable so as to rule out his presence at the scene of occurrence.

66. This witness categorically states that his relative Santosh Singh and his brother Gulab Singh (father of deceased Arjun Singh) had reached at the spot of occurrence before he left to attend his duties. He also states that his relative Suresh Singh dropped him to the school on his motorcycle. When he left, Chhiddu Singh was present at the scene of occurrence.

67. Thus, having carefully appreciated the testimony of PW-1 and other prosecution evidences, it is not possible for us to doubt his version or narration of the incident or his version of being eye witness and the person who gave first information of the crime promptly to the police.

68. Apart from the above, nothing could be placed from the prosecution evidence which would create any dent or doubt in the prosecution story.

69. On many occasions, the Apex Court has laid down that a conviction can be based on the evidence of a solitary eye witness if his version is reliable and trustworthy. In **Veer Singh Vs. State of U.P.12, State of U.P. Vs. Satveer Singh13 and Sudip Kumar Sen Vs. State of West Bengal14**, the Apex Court has held that it is the quality of evidence and not quantity which matters in a criminal trial. Section 134 of the Evidence Act does not prescribe a particular number of witnesses to prove any act. Plurality of witnesses in a criminal trial is not the legislative intent. If the testimony of the single witness is found reliable on the touchstone of credibility, accused can be convicted on the basis of the said testimony.

70. The number of the accused persons was 15 and they came together with deadly weapon and made an unlawful assembly with the common object to cause death of the deceased persons and, in fact, in prosecution of the common object, they caused death by the deadly weapons they were carrying. Therefore, by virtue of being a member of the unlawful assembly, all the accused appellants are equally liable for causing murder of four persons.

71 . So far as the alleged right of private defence is concerned, the same has not been established. The injuries sustained by the accused side appears to have been sustained much prior to the incident in hand and such that they had to take recourse to public authorities as they had time to do so. Our view is substantiated by the judgement of the Apex Court in **Dinesh Singh Vs. State of U.P.15**. Moreover, four persons have been killed in the incident and as held in **Dinesh Singh15** right of self defence cannot be permitted to be used as retribution.

72. Having carefully appreciated all the arguments made by the learned Senior Advocates for the appellants and the prosecution evidence, we find that the prosecution has proved its version beyond all reasonable doubts. The defence, on the other hand, though took a plea of exercise of right of self defence but has utterly failed to discharge the initial burden laid on it to probalise its story or create dent or doubt on the prosecution story. The presence of accused persons at the scene of

occurrence is neither disputed nor can be doubted from any of the circumstances brought before the Court. It is proved by the prosecution that all accused persons in a pre-mediated manner formed an unlawful assembly in prosecution of the common object of such assembly and being armed with deadly weapons caused death of four persons by inflicting fatal injuries in a manner that the deceased could not escape the attack.

73. All the appellants/accused persons are, thus, found guilty of the offences under Section 302 read with Sections 149 I.P.C. as also for the offences under Section 147 and 148 IPC. Their conviction under the aforesaid provisions is found justified. The sentences awarded to the accused/appellants for the offences for which they are found guilty are minimum. No infirmity is, therefore, found in the decision of the trial court. The conviction and sentence awarded to each of the accused/appellant is hereby upheld.

74. The accused persons are on bail. Their bail bonds are cancelled and sureties are discharged. They shall surrender forthwith before the concerned court and be taken into custody and sent to jail to serve their sentence.

75. Certify this judgement to the court below immediately for compliance.

76. The compliance report be submitted through the Registrar General, High Court, Allahabad.

77. Both the appeals are, accordingly, **dismissed.**

(2020)03-05ILR A517
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1562 of 1996

Mahey Alam ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri I.M. Khan, Sri H.Khan, Sri Rajesh Kumar Singh (A.C.)

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

Criminal law- Indian Penal Code -Section 302 - Appeal against conviction.

Held :- Interested Witnesses – Statement can be relied upon in support of prosecution story. (Para 31)

Motive – Irrelevance of insignificant in case of availability of the direct witnesses. (Para 34)
Testimony of Child- Can be relied if the child has intellectual capacity to understand questions and give rational answers. (Para 37)
Minor Contradiction / Inconsistency In Evidence- Can be ignored if does not affect the core prosecution version. (Para 43)
Non-Examination of Independent Witness -Not fatal – conviction can be based on statement of sole witnesses even if a relative of deceased. (Para 48)

Appeal rejected. (E-2)

List of Cases Cited:-

1. Dalip Singh Vs. St. of Punj. (1954) SCR 145,

2. Masalti Vs. St. of UP AIR 1965 SC 202,

3. Darya Singh Vs.St. of Punj. AIR 1965 SC 328,

4. St. of UP Vs. Kishanpal (2008) 16 SCC 73,

5. Appa Vs. St. of Guj., AIR 1988 SC 698,

6. St. of AP Vs. S. Rayappa (2006) 4 SCC 512,

7. Pulicherla Nagaraju @ Nagaraja Reddy v St. of AP (2007) 1 SCC (Cri) 500,

8. Satbir Singh Vs. St. of UP, (2009) 13 SCC 790,

9. M.C. Ali Vs. St. of Kerala AIR 2010 SC 1639,

10. Himanshu Vs. St. (NCT of Delhis, (2011) 2 SCC 36,

11. Bhajan Singh and others Vs. St. of Haryana; (2011) 7 SCC 421,

12. Jayabalan Vs. U.T. of Pondicherry, 2010(68) ACC 308 (SC),

13. Dharnidhar Vs. St. of UP, (2010) 7 SCC 759,

14. Ram Bharosey Vs. St. of UP AIR 2010 SC 917,

15. Balraje @ Trimbak Vs. St. of Maharashtra, (2010) 6 SCC 673,

16. Jalpat Rai Vs. St. of Haryana AIR 2011 SC 2719,

17. Waman Vs. St. of Maharashtra AIR 2011 SC 3327,

18. Shyam Babu Vs. St. of UP, AIR 2012 SC 3311,

19. Dhari & Others Vs. St. of UP, AIR 2013 SC 308,

20. Ganapathi Vs. St. of Tamilnadu, AIR 2018 SC 1635,

21. Rupinder Singh Sandhu Vs.St. of Punjab, (2018) 16 SCC 475,

22. Shio Shanker Dubey Vs. St. of Bihar AIR 2019 SC 2275,

23. Abu Thakir Vs. St. AIR 2010 SC 2119,

24. St. of UP Vs. Nawab Singh AIR 2010 SC 3638,

25. Bipin Kumar Mondal Vs.St. of WB 2005 SCC (Crl) 33,

26. Shivraj Bapuray Jadhav Vs. St. of Karnataka (2003) 6 SCC 392,

27. Thaman Kumar Vs. St. of U.T. of Chandigarh (2003) 6 SCC 380,

28. St. of HP Vs. Jeet Singh; (1999) 4 SCC 370,

29. Gopi Ram Vs.St. Of UP, 2006 (55) ACC 673 SC,

30. R.R. Reddy Vs.St. of AP, AIR 2006 SC 1656,

31. Sucha Singh Vs.St. of Punj.; AIR 2003 SC 1471,

32. St. of Raj. Vs. Arjun Singh AIR 2011 SC 3380,

33. Varun Chaudhry Vs. St. of Raj. AIR 2011 SC 72.

34. Saddik Vs. St. of Guj., (2016) 10 SCC 663

35. Digamber Vaishnav Vs.St. of Chhattisgarh, (2019) 4 SCC 522

36. Acharaparambath Pradeepan Vs. St. of Kerala, 2007(57) ACC 293 (SC),

37. St. of Karn. Vs. Shantappa Madivalappa, AIR 2009 SC 2144,

38. St. of U.P Vs. Krishna Master, AIR 2010 SC 3071,

39. K. Venkateshwarlu Vs. St. of AP, AIR 2012 SC 2955,

40. Algupandi @ Alagupandian v St. of TN, (2012)10 SCC 451,

42. St. of UP Vs.Naresh, 2011 (75) ACC 215 (SC),

43. Gosu Jayarami Reddy & anr. Vs. St. of A.P., (2011) 3 SCC(Cri) 630,

44. Parsu Ram Pandey vs St. of Bihar AIR 2004 SC 5068,

45. Shivappa Vs.St.of Karn.; AIR 2682,

46. Ramchandaran Vs. St. of Kerala AIR 2011 SC 3581,

47. Mukesh Vs. St. for NCT of Delhi, AIR 2017 SC 2161,

48. Bhagwan Jagannath Markad Vs. St. of Maharashtra, (2016) 10 SCC 53,

49. Jarnail Singh Vs. St. of Punj., 2009 (6) Supreme 526,

50. Bhagwan Jagannath Markad Vs. St. of Mah., (2016) 10 SCC 537,

51. Ramji Singh Vs. St. of UP, 2019 (4) Crimes 585 (SC),

52. Nand Kumar Vs. St. of Chhatisgarh, (2015) 1 SCC 776,

53. Bhagwan Jagannath Markad Vs. St. of Maharashtra, (2016) 10 SCC 537,

54. Sandeep Vs. St. of UP (2012) 6 SCC 107,

55. Kripal Singh Vs. St. of Har., AIR 2013 SC 286,

56. Bhagwan Jagannath Markad Vs.St. of Mah., (2016) 10 SCC 537,

57. Sadhu Saran Singh Vs.St. of UP, (2016) 4 SCC 357,

58. Mukesh Vs. St.for NCT of Delhi , AIR 2017 SC 2161,

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

1. Heard Sri Rajesh Kumar Singh, learned Amicus Curiae appearing on behalf of appellant, Sri Ajit Ray, learned AGA for the State of UP and perused the record.

2. This Criminal Appeal has been filed against the judgment and order dated 26.08.1996, passed by Ist Additional Sessions Judge, Kanpur Nagar, in Sessions Trial No. 356 of 1994, arising out of Case Crime No. 50 of 1994, under Section 302 IPC, Police Station Bajaria, District Kanpur Nagar, whereby the accused-appellant Mahey Alam has been convicted and sentenced for life imprisonment.

3. The prosecution story in brief is that the first information report was lodged by the informant Smt. Husnu Begum, the daughter of the deceased on 19.04.1994 at about 10:15 AM in respect of the criminal incident of same day taking place at about 09:00 AM. The father of the informant namely Rafiq @ Laddoo prevented some persons including accused from playing cards/gambling at his door, whereupon the accused-appellant Mahey Alam abused Rafiq @ Laddoo and when the deceased again objected on gambling there, the accused Mahey Alam opened fire by his pistol upon the deceased Rafiq @ Laddoo which hit him on his neck. He sustained firearm injury and fell down. The informant took the injured (deceased) Rafiq @ Laddoo to UHM Hospital with the help of some local people but on the way, he died. The witnesses who saw the incident were the informant, her brother Shabab, sister Nazneen, brother-in-law Moin and one Subhan. The informant Smt. Husnu Begum lodged an oral report at Police Station Bajaria on the same day. Offence was registered against accused and chik FIR was prepared. Inquest report of the dead body was prepared, the dead body was sealed and sent for postmortem. The postmortem was conducted on 20.04.1994. The matter was investigated by the police, blood stained and plain earth was collected from the spot, the clothes of the deceased stained with blood were also taken into possession by the police and the same were sent for chemical examination. The statement of the witnesses were recorded

and charge sheet was filed under Section 302 IPC against the accused-appellant. The learned trial court has framed the charge under Section 302 IPC. The accused denied the charge and claimed trial.

4. The prosecution examined as many as six witnesses in support. PW-1 is informant and eye witness Smt. Husnu Begum, PW-2 is Shabab, who is also an eye witness, PW-3 is SI Ram Niwas Sharma, who is Investigating Officer, PW-4 is SI Satyaveer Singh. who prepared the inquest report, sealed the dead body and sent the same for postmortem along with other papers, PW-5 is Constable Ram Autar, who has prepared the chik and GD and PW-6 is Dr. Devi Prasad, who has conducted the postmortem of the deceased. The witnesses have proved the incident and the oral report as Ext. Ka-1, site map as Ext. Ka-2, memo of blood stained and plain earth as Ext. Ka-3, charge sheet Ext. Ka-4 and blood stained and plain earth as material Exts. 1 and 2, inquest report Ext. Ka-5, letter to CMO, Challan and Photo dead body and sample seal as Exts Ka- 6 to 8 and postmortem report Ext. Ka-11.

5. After hearing both the prosecution and the defence, the trial court has passed the impugned judgment convicting and sentencing the accused-appellant.

6. Feeling aggrieved by the impugned judgment, the present criminal appeal has been filed by the accused-appellant and he has challenged the impugned judgment on the ground that the same is against the law and facts and against the weight of evidence on record. The sentence awarded is too severe and, therefore, the impugned judgment is liable to be set aside and the accused-appellant is entitled for acquittal.

7. Learned counsel for the appellant has argued that the first information report is delayed and reasonable explanation has not been tendered to explain the delay. The fact witnesses are highly interested and related witnesses and no independent witness has been examined. There is improvement and contradiction and embellishment in the testimony of the fact witnesses. Some unknown person killed the deceased and out of enmity, the accused was falsely implicated. Learned counsel for the appellant has further argued that PW-2 has been examined as a child witness and he should not have been relied upon.

8. On the contrary, learned AGA has submitted that two fact witnesses who were the eye witnesses of the incident were examined and they have supported the prosecution version and the same find support from the postmortem report. The learned trial court, finding the prosecution case proved beyond shadow of any doubt, has rightly convicted the accused-appellant. There is no force in the appeal and the same is liable to be dismissed.

9. In the light of rival arguments, we proceed to analyze evidence on record. Two fact witnesses have been examined by the prosecution. PW-1 Smt. Husnu Begum (informant and eye witness) has stated that 8 months before at about 09:00 AM in the morning, the boys of her locality and the accused Mahey Alam of Kafi Mohalla were gambling by playing cards on her door. They were prevented by her father Rafiq @

Laddoo, whereupon the accused-appellant started abusing him. When her father tried to stop him, the accused fired on him by his pistol which hit on his neck. He fell down and the accused fled away from there. She and her brother-in-law took Rafiq @ Laddoo to Ursala Hospital where he was found dead. She went to the police station and lodged the FIR by giving oral information about the incident. The chik was prepared and she was read over on which she put her thumb impression. She has also stated that the incident was also seen by Shabab and Moin etc. The place where her father fell after receiving gun shot injury, blood also fell down on the earth.

10. PW-2 Shabab is aged about 11 years and he has been examined as child witness after duly testing the intellectual capacity by the court. In his statement, Shabab has stated that about one year ago, at about 09:00 AM, he was playing with his father and on his door some persons of the locality and the accused Mahey Alam of Kafi Mohalla were gambling by playing cards. His father prevented them, whereupon the accused started abusing him and on being prevented from abusing, he fired on him by his pistol. The fire hit his father who fell down. The accused ran away from there. His sister Smt. Husnu Begum and brother-in-law Moin took his father to Ursala Hospital. The incident was seen by him, sister Smt. Husnu Begum and other people of the locality. The witness has identified the accused in the court who was present at the time of statement.

11. PW-3 SI Ram Niwas Sharma (Investigating Officer) has stated that on 19.04.1994, he was posted in PS Bajaria and the case was registered in his presence. He took the statement of Smt. Husnu Begum and Moin. He went to the place of occurrence. The inquest report was prepared and the dead body was sealed by SI Balbir singh Malik and the dead body was sent for postmortem. He inspected the place of occurrence and prepared the site map on the pointing of informant. He found blood stained and plain earth on the place of occurrence and the same was taken into containers and sealed. Memo thereof was prepared by him. He has further stated that he examined witnesses Subhan, Nazneen, Shabab after inspecting the place of occurrence. After completing the investigation, he submitted charge-sheet.

12. PW-4 SI Satyaveer Singh Malik proved the inquest report and other relevant papers necessary for sending the sealed dead body for postmortem.

13. PW-5 Constable Ram Autar has stated that he prepared chik FIR on the oral information given by the informant. What she said, the same was written and after hearing the same, the informant put her thumb impression. Entry was made in GD no. 22 on the same day at 10:15 AM. Special report was also sent through Constable Radhey Shyam and the same was entered in GD No. 24 of 10:40 AM on the same day.

14. PW-6 Dr. Devi Prasad has stated that on 20.04.1994, he was posted as Medical Officer and on 10:15 AM, he conducted the postmortem of the dead body of Rafiq @ Laddoo, aged about 50 years, brought in sealed condition along with necessary papers and was identified by Constable Chandra Shekhar Yadav and Constable Vinod Kumar of PS Bajariya. He has further stated that the deceased was of average height. Rigor Mortis was present in the lower limb and it has passed from the

upper limbs. Postmortem staining was present on back and thigh. He found one firearm entry wound, 1 cm. x 4 cm. on the right side of neck on the lower part, 1 cm. right from mid line and 6 cm. below from the right medial angle. Blackening was present and the injury was internally bend, whereas on the exit side the wound was externally bend.

15. The doctor has stated that in the internal examination, it was found that the right charotic artery was torn. The doctor also found semi digested food in the abdomen, breath tube was torn, both the lungs were pale and both the compartments of heart was found empty. According to the doctor, the cause of death was shock and hemorrhage due to fire arm injury. He has further stated that the injury was sufficient to cause death and it was possible that the injury must have been caused on 19.04.1994 at about 09:00 AM.

16. It has been argued by the learned counsel for the appellant that there is delay in lodging FIR. It appears from record that the incident took place at about 09:00 AM on 19.04.1994 and the first information report was lodged orally on the same day at 10:15 AM. This fact has been proved by the informant PW-1 who has stated that after her father was declared dead in the hospital, she went to the police station and lodged the FIR by orally stating the whole incident to the police at about 10:15 AM. Her statement further finds support and corroboration from the statement of PW-5 Constable Ram Autar who prepared the chik FIR and made entry in the GD. The police station is three furlong away from the house of the informant and FIR has been lodged within one hour and fifteen minutes from the time of incident. The FIR shows that the deceased was first taken to the hospital and when he was declared dead by the doctor, the informant went to lodge FIR in the police station. As such, we find that there is no delay in lodging FIR. In fact, the first information report in this case has been lodged very promptly and the learned trial court has very rightly concluded that the promptness of the FIR shows that it was lodged soon after the incident without any consultation or deliberation.

17. The Investigating Officer has prepared site map of the place of occurrence, which has been proved as Ext. Ka-2 in which the place **A** has been shown where accused Mahey Alam was standing and from where, he shot fire on the deceased. X in circle is the place where the deceased was standing and at **B,** he sustained firearm injury. The presence of witnesses has been shown by single arrow, the direction has been shown by double arrow to which the accused ran away after commission of the offence. It has also been mentioned in the site map that the circle X is six steps away from the witnesses and one step away from the place where the deceased was standing. From circle X, blood stained and plain earth was taken by the Investigating Officer. The first information report also discloses the place of incident to be on the door of the informant and in their statements also, PW-1 and PW-2 have stated the same fact. Hence, we find that the place of occurrence has been fully established by the prosecution.

18. The learned counsel to the accused-appellant has challenged the credibility of fact witnesses on the basis of their being related witness, certain contradiction and improvement and lack of any motive for the commission of offence.

He has submitted that no independent witness has been examined and both the fact witnesses are relatives and highly interested witnesses and on their evidence no reliance could be placed by the learned trial court. It has been further submitted that PW-2 is a child witness and his testimony cannot be relied upon.

19. We will first examine the issue of related witness. It is admitted fact that both the fact witnesses are brother and sister and the deceased has been their father. The law in respect of the testimony of related witnesses has been time and again reiterated by the Supreme Court that the testimony of related witnesses cannot be discarded merely on the basis of relationship. The only requirement is that the testimony of such witness should be scrutinized cautiously and carefully. In **Dalip Singh v State of Punjab (1954) SCR 145,** while rejecting the argument that witnesses who are close-relatives of the victim should not be relied upon, the Court held as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

20. In **Masalti v State of UP AIR 1965 SC 202,** the Supreme Court observed:

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice."

21. The Supreme Court has also taken the view that related witness does not necessarily mean or is equivalent to an interested witness. A witness may be called interested only when he or she derives some benefit from the result of litigation; a decree in a civil case, or in seeing a person punished in a criminal trial. In **Darya Singh v State of Punjab, AIR 1965 SC 328, followed by State of UP v Kishanpal (2008) 16 SCC 73,** the Court held as under:

"On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

22. Again, in **Appa v State of Gujarat, AIR 1988 SC 698**, the Court has observed:

"Experience reminds us that civilized people are generally insensitive when crime is committed even in their

presence. They withdraw from both, victim and vigilant. They keep themselves away from the Court. They take crime as a civil dispute. This kind of apathy of general public is indeed unfortunate but it is everywhere whether in village life or town and city. One cannot ignore this handicap. Evidence of witnesses has to be appreciated keeping in view such ground realities. Therefore, the Court instead of doubting the prosecution case where no independent witness has been examined must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any suggested by the accused."

23. Similar view has been taken in **State of AP v S. Rayappa (2006) 4 SCC 512,** where the court observed that it is now almost a fashion that public is reluctant to appear and depose before the court especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court stated the principle as follows:

" ....by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

24. Further, in **Pulicherla Nagaraju @ Nagaraja Reddy v State of AP (2007) 1 SCC (Cri) 500,** the Supreme Court has held as under:

"In this case, we find that the trial court had rejected the evidence of PW1 and PW2 merely because they were interested witnesses being the brother and father of the deceased. But it is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise, found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted."

25. Similarly, in **Satbir Singh v State of UP, (2009) 13 SCC 790**, the Court has held as under:-

"It is now a well-settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon....."

26. In **M.C. Ali v State of Kerala AIR 2010 SC 1639; and Himanshu v State (NCT of Delhis, (2011) 2 SCC 36, Bhajan Singh and others v State of Haryana; (2011) 7 SCC 421,** it was laid down that evidence of a related witness can be relied upon provided it is trustworthy. Again, in **Jayabalan v U.T. of Pondicherry, 2010(68) ACC 308 (SC)**, the

Supreme Court has made following observation:

"We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

27. **Dharnidhar v State of UP, (2010) 7 SCC 759** referred the above observation of **Jaya Balan (supra)** and held that there is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. Similar view has been taken in **Ram Bharosey v State of UP AIR 2010 SC 917,** where the Court stated that a close relative of the deceased does not become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice.

28. Again, in **Balraje @ Trimbak v State of Maharashtra, (2010) 6 SCC 673**, it has been held that when the eye-witnesses are stated to be interested and inimically deposed against the accused, it would not be proper to conclude that they would shield the real culprit and rope in innocent person. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyze the evidence of related witnesses and those witnesses who are inimical towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

29. Subsequently, in **Jalpat Rai v State of Haryana AIR 2011 SC 2719 and Waman v State of Maharashtra AIR 2011 SC 3327**, it was observed that the over-insistence on witnesses having no relation with the victims often results in criminal justice going away. The testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. This view has been reiterated in **Shyam Babu v State of UP, AIR 2012 SC 3311, Dhari & Others v State of UP, AIR 2013 SC 308** and **Bhagwan Jagannath Markad (supra). Recently, in Ganapathi v State of Tamilnadu, AIR 2018 SC 1635**, the Court found no force in the argument that the conviction based on the evidence of family members in a murder trial is not sustainable. In **Rupinder Singh Sandhu v State of Punjab, (2018) 16 SCC 475**, it has been reiterated by the Supreme Court that relationship by itself will not render the witness untrustworthy. The Supreme Court laid down as below:

"Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the

court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. ..... A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

30. Recently, in **Shio Shanker Dubey v State of Bihar AIR 2019 SC 2275,** the Supreme Court has reiterated the law as under:

"..... a close relative cannot be characterized as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

31. Thus, in view of aforementioned decisions of the Supreme Court, it is settled position of law that the statements of the interested witnesses can be safely relied upon by the court in support of the prosecution story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons who are closely related to the deceased and inimical with the accused. When their statements find corroboration by other evidence, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then there is no reason as to why the statement of so-called 'interested witnesses' cannot be relied upon by the Court. It would be hard to believe that the close relatives shall leave the real culprit and shall implicate innocent persons falsely simply because they have enmity with the accused persons. There is no rule to the effect that the evidence of related or partisan witness is not acceptable. Association or relation does not render the evidence false and partisanship is no ground to reject the testimony given on oath.

32. In this instant case, we find after close scrutiny of the evidence of the two eye-witnesses that they have narrated the whole sequence of commission of the offence. The offence was committed on the door of their house. It was morning time and their being present on spot at the time of incident appears to be most natural. The defence theory that the witnesses did not see the criminal incident as they were not present there, is not convincing. It is a case of broad day murder and the two eye-witnesses were none other but the daughter and son of deceased and the incident took place on the door of deceased and their presence on place of occurrence is natural. There is consistency in the evidence of both the eye-witnesses without any contradiction on material point. The learned trial court

has found them trustworthy and reliable and it hardly has any impact that they are related witnesses.

33. The next submission is about motive and it has been argued that the accused did not have motive or adequate motive sufficient to cause death of deceased. The prosecution case is based on direct evidence and the settled law is that motive goes to back seat in such cases. In a number of decisions, like **Abu Thakir v State AIR 2010 SC 2119, State of UP v Nawab Singh AIR 2010 SC 3638, Bipin Kumar Mondal v State of West Bengal 2005 SCC (Criminal) 33, Shivraj Bapuray Jadhav v State of Karnataka (2003) 6 SCC 392, Thaman Kumar v State of Union Territory of Chandigarh (2003) 6 SCC 380, State of HP v Jeet Singh; (1999) 4 SCC 370**, it has been repeatedly held by the Supreme Court that motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence by a particular person. In a case of direct evidence the element of motive does not play such an important role so as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubt raised in this regard. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused.

34. We find that the Supreme Court has reiterated the aforesaid view in various decisions, such as **Gopi Ram v State Of UP, 2006 (55) ACC 673 SC, R.R. Reddy v State of AP, AIR 2006 SC 1656, Sucha Singh v State of Punjab; AIR 2003 SC 1471, State of Rajasthan v Arjun Singh AIR 2011 SC 3380, Varun Chaudhry v State of Rajasthan AIR 2011 SC 72**. In the recent judgment of Saddik Vs. State of Gujarat, (2016) 10 SCC 663, it has been held that the prosecution case could not be disbelieved on the ground of alleged absence or insufficiency of motive. Motive is insignificant in cases of direct evidence of eyewitnesses. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable, truthful and acceptable evidence is available on record sufficient to establish the guilty of accused persons.

35. We are of the view that when there is sufficient direct evidence regarding the commission of offence, the question of motive should go away from the mind of the Court. Motive is a double edged weapon and the key question for consideration in cases based on direct evidence remains whether the prosecution has convincingly and satisfactorily established the guilt of the accused beyond reasonable doubt by adducing reliable and cogent evidence. As such, in case of direct evidence, the proof of the existence of a motive is not necessary for a conviction for any offence. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record establishes the guilt of the accused.

36. The learned counsel to the accused-appellant has submitted that PW-2

is a child witness and on the basis of his statement, conviction is not legal. He has referred to the judgment of the Supreme Court in **Digamber Vaishnav v State of Chhattisgarh, (2019) 4 SCC 522,** where the accused was convicted on the basis of uncorroborated testimony of a child witness who was just 9 years in age and the Court found on the basis of evidence on record that she was not an eye-witness and therefore, the judgment of conviction was set aside. Supreme Court made following observation:

"This Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a rule of practical wisdom than law."

37. The law referred above is not new and that view has been already expressed in various judgments of the Supreme Court. Thus we find that in **Acharaparambath Pradeepan v State of Kerala, 2007(57) ACC 293 (SC), State of Karnataka v Shantappa Madivalappa, AIR 2009 SC 2144, State of U.P v Krishna Master, AIR 2010 SC 3071** and **K. Venkateshwarlu Vs. State of AP, AIR 2012 SC 2955**, it has been laid down that a child witness is competent to testify u/s 118, Evidence Act. Tutoring cannot be a ground to reject his evidence. A child of tender age can be allowed to testify if it has intellectual capacity to understand questions and give rational answers thereto. Trial Judge may resort to any examination of a child witness to test his capacity and intelligence as well as his understanding of the obligation of an oath. If on a careful scrutiny, the testimony of a child witness is found truthful, there can be no obstacle in the way of accepting the same and recording conviction of the accused on the basis of his testimony.

38. In **Algupandi alias Alagupandian v State of Tamilnadu, (2012)10 SCC 451,** the Supreme Court has laid down as follows:

"It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and that there exists no liklihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable."

39. Again, in **Gul Singh v State of MP, 2015 (88) ACC 358 (SC)**, the Supreme Court clearly held that the testimony of a child witness cannot be rejected unless found unreliable and tutored. Conviction on the basis of sole

testimony of a child witness is permissible if evidence of such child witness is credible, truthful and corroborated. Corroboration is not must. It is under rule of prudence. In the case in hand, PW-2 Shabab is 11 years old and the learned trial court has tested his intellectual capacity and was satisfied that the witness was able to understand the questions put to him and was able to give rational answers thereto. PW-2 has stated that he saw the accused firing on his father who sustained injuries. During cross-examination, he has denied that he was tutored by his sister and he has stated whatever he had seen. We find that, irrespective of his tender age, PW-2 has narrated the incident without any material contradiction or discrepancy. It was morning time and he was playing there with his father (deceased) and as such, his presence there appears to be natural and probable. Moreover, this case is not based on sole testimony of the child witness and PW-1 is another eye-witness who has proved the prosecution version.

40. Certain contradiction and discrepancy in the statements of two fact witnesses have been pointed out. PW-1 has stated that after committing the crime, the accused and others ran away from there leaving behind the playing cards and slippers at the place of occurrence and the same was taken into possession by the police. On the other hand, PW-2 has stated that the playing cards were taken with him by the accused after commission of the offence. When the IO was cross-examined, he stated that he did not find anything as such on the spot.

41. The submission of the learned counsel for the appellant is as per FIR, at the time of incident, the accused and others were gambling by playing cards on the door of the informant and after causing the incident, the accused ran away leaving behind the playing cards there. But, the site map Ext Ka-2 reveals that the place of occurrence is not on the door of the deceased. This argument is not sustainable as it has been alleged in the first information report that the informant, her father and other family members are resident of House No. 99/153. The site map shows that the door of the House No. 99/153 opens towards the place of occurrence. It makes no difference that two houses have been shown numbered as 99/153 as both the houses open towards the place of occurrence. Further, it makes hardly any difference if the playing cards were not found there. It was an open place and this possibility cannot be ruled out that the playing cards might have been collected by someone. The houses of two fact witnesses being situated there and opening thereof towards the place of occurrence, their presence at the time of incident is quite natural and it has been stated by PW-1 during her cross-examination that at the time of incident, she was standing on the door and the quarrel was taking place between her father and the accused.

42. PW-2 Shabab has stated that the playing cards were taken away by the accused after causing the incident. He was having playing cards in one hand and by the other hand he shot fire on his father. Learned counsel for the appellant has submitted that both the fact witnesses have given contradictory statement on this point. It has further been submitted that PW-2 has made improvement by disclosing the name of Miraz, Shabir and Noore that they were also playing cards at the time of incident but this fact was not stated before the Investigating Officer. This contradiction is hardly relevant as the fact that the incident

took place has been correctly narrated by the witness. It was not necessary to disclose names of the persons who were playing cards at the time of incident and by not disclosing the names of all such persons to the IO, we do not find any material improvement in the statement. The witness has stated that the fire hit on the neck of his father and he fell down. The learned counsel for the appellant has submitted that the witness has stated that he continued weeping for half an hour there and on his cry, his sister Smt. Husnu Begum and his brother-in-law came there. He has stated that on his cry, after about one hour, they came. On this basis,learned counsel for the appellant has submitted that the presence of the informant at the time of incident and she being an eye witness becomes doubtful. It should be remembered that PW-2 is a witness of a very tender age and it is always possible that such contradiction may come during cross-examination. He might not have exact calculation of timing and, therefore, he might have stated that after one hour, the informant and his brother-in-law came there. We are of the view that these contradictions are not relevant nor fatal to the prosecution version.

43. On facts, we find that the contradiction, discrepancy or improvement mentioned above are not in respect of time, place, date and manner of the commission of offence. It needs to be mentioned that where own father is victim of deadly assault and the eyewitnesses were son and daughter of the deceased, in such a situation, the witnesses are not supposed to be perfectionist to give the exact account of the incident and narrate every aspect related thereto in a uniform way. Some sort of contradiction, improvement and embellishment is bound to occur in the statement. As laid down in **State of UP v Naresh, 2011 (75) ACC 215 (SC),** in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

44. In **Gosu Jayarami Reddy and another v State of Andhra Pradesh; (2011) 3 SCC(Cri) 630**, it was observed that Courts need to be realistic in their expectation from the witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorized by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased and on what part of the body, there is some mix-up or confusion.

45. Further, in **Parsu Ram Pandey v/s State of Bihar AIR 2004 SC 5068, Shivappa v State of Karnataka; AIR 2682, Ramchandaran v/s State of Kerala AIR 2011 SC 3581**, it was held that minor discrepancies or some improvements would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the

time gap between the date of occurrence and the date on which they give their depositions in Court. In **Mukesh v State for NCT of Delhi, AIR 2017 SC 2161 and Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 53**, it was reiterated that minor contradictions in the testimonies of the prosecution witness are bound to be there and in fact they go to support the truthfulness of the witnesses. In view of the above, we are of the view that there is nothing in the deposition of the eye-witnesses on the basis of which their evidence can be discarded. We do not find any material contradiction discrepancy or improvement in the statement of the witness and there is consistency so far as narration of the criminal incident is concerned.

46. So far as the second limb of argument is concerned, we do not find it at all necessary that all the facts are required to be mentioned in the FIR. The purpose of FIR is to give information about commission of offence and it is not necessary to give every minute detail. In **Jarnail Singh v State of Punjab, 2009 (6) Supreme 526, Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 537 and Ramji Singh v State of UP, 2019 (4) Crimes 585 (SC),** it has been held that the FIR is not the encyclopedia of all the facts relating to crime. The only requirement is that at the time of lodging FIR, the informant should state all those facts which normally strike to mind and help in assessing the gravity of the crime or identity of the culprit briefly. In our view, a detail description and sequence of incident constituting the offence is not at all required to be mentioned in the FIR.

47. It has been also argued that despite the presence of independent witnesses at the time of incident, none has been examined. A reference has been taken of the FIR and statements of PW-1 and PW-2 who have stated that in addition to them and Moieen, at the time of incident, Subhan, Ramjan, Noore and Suhel were also present and were seeing the accused gambling with Sabir, Meraz and Noore. It has been submitted that none of the four persons have been examined. Three of them have not been mentioned in the FIR. Even Subhan whose name finds mention in FIR has not been examined.

48. The question is whether it is necessary for the prosecution to examine all the fact witnesses? In **Nand Kumar Vs. State of Chhatisgarh, (2015) 1 SCC 776 and Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537** Explaining the provisions of Sections 231, 311 CrPC and Sections 114 & 134 of the Evidence Act, the Supreme Court had ruled that prosecution need not examine its all witnesses. Discretion lies with the prosecution whether to tender or not witness to prove its case. Adverse inference against prosecution can be drawn only if withholding of witness was with oblique motive. In **Sandeep v State of UP (2012) 6 SCC 107, Kripal Singh v State of Haryana, AIR 2013 SC 286, Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 537, Sadhu Saran Singh v State of UP, (2016) 4 SCC 357 and Mukesh v State for NCT of Delhi , AIR 2017 SC 2161**, it has been held that if a witness examined in the court is otherwise found reliable and trustworthy, the fact sought to be proved by that witness need not be further proved through other witnesses though there may be other witnesses available who could have been examined but were not examined. Non-examination of material witness is not a

mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution.

49. The learned counsel for the accused-appellant has submitted that the prosecution witnesses have stated that there was no previous enmity between the accused and the deceased. A quarrel took place between the two on the point of gambling and it has been stated by both the eyewitnesses. PW-2 has stated that between accused and deceased, *jhnai jhnai ho rahi thi* (quarreling) as her father was preventing him from gambling on his door. PW-2 has also stated this fac. Therefore, it has been submitted that upon the heat of this quarrel and provoked by this situation, the offence was committed and the same was without intention, planning and meditation and the same is covered within the purview of culpable homicide not amounting to murder punishable under section 304 of the IPC.

50. We have given a thoughtful consideration to this argument. It is difficult to agree with this argument as there was just verbal quarrel and the deceased was opposing gambling on his door and there was no physical altercation between the two. Any family person would naturally oppose to such gambling on his door. That the accused was carrying a pistol with him on the occasion shows his criminal nature and on such small quarrel, firing by him on deceased shows the extreme culpability on his part. It is pertinent to mention that firearm injury and injury caused by explosive substance are kept on different footing from the death caused by other weapon. Causing injury by firearm on the vital part of body from close range indicates the intention to cause death and extreme culpability on the part of accused, as, the moment fire is shot, it cannot be controlled by the person and there is no concept of slow firing as the pellets will come out with the mechanically designed speed and force. In case of other cutting or stab weapon, one can claim that enough force was not applied in causing injury. Instant death was resulted by the firearm injury and in such factual situation, the culpability is assessed on the basis of weapon used and the seriousness of injury caused on the vital part of the body. We do not find any force in the argument and there is nothing wrong in the conviction of the accused for the offence of murder under section 302 IPC.

51. In view of the above we find that prompt FIR has been lodged in this case; prosecution version has been supported by the account of two eyewitnesses which further finds support and corroboration by medical evidence; the presence of both the eyewitnesses at the time of incident and with the deceased is natural and their evidence is credible, consistent and trustworthy on which reliance has been rightly placed by the learned trial court. Once, it was established by prosecution that at the time date and place, the deceased was killed by firearm injury and the injury was sufficient to cause death, the limited question for determination was the role and involvement of the accused and that has been proved by two eyewitnesses and there is nothing on record to discard their

evidence. As such, we do not find any perversity or illegality in the impugned judgment. The conviction and sentence awarded by the learned trial court is upheld. The appeal is, therefore, liable to be dismissed.

52. The Criminal Appeals is accordingly **dismissed.**

53. The accused-appellant **Mahey Alam** is directed to surrender before the learned trial court forthwith from where he shall be sent to jail to undergo the sentence.

54. Office is directed to send a copy of this order to the court below for communication and compliance along with lower court record.

(2020)03-05ILR A533
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.02.2020

BEFORE
THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Appeal No. 1689 of 2007

Manoj Kumar Verma ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
In Person, Santosh Kumar Srivastava

Counsel for the Respondent:
G.A.

Criminal Law-N.D.P.S. Act - Section 8/21 - Recovery of 320 gram Morphine and arrest of accused-appellant not supported by any public witness- No legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance- If the evidence of police officer is found acceptable, it would be an erroneous proposition that court must reject prosecution version solely on the ground that no independent witness was examined- Discrepancies, variations and contradictions in prosecution case- If the same do not go to the root of case then accused-appellant is not entitled to get benefit of the same - Police informed the accused-appellant that he has legal right to be searched before gazetted officer but he did not require so and on the consent given by accused-appellant, police searched accused-appellant, recovery of contraband was made and police prepared recovery memo thereof - Cannot be said that mandatory provision of N.D.P.S. Act has not been complied with by police. The measure of punishment should be proportionate to gravity of offence- Punishment awarded to accused-appellant by Trial Court is not excessive and is fit and proper.

A. Evidence law-Indian Evidence Act 1872- Section 3, Section 118- Only Police Officers as witnesses- No legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance.

Where the evidence of police officers is found to be credible then the Court can rely upon the same even though no independent witnesses have been examined.

B. Indian Evidence Act,1872- Section 155- If the discrepancies, variations and contradictions in the prosecution case do not go to the root of the case, then the accused is not entitled to get benefit of the same.

C. Criminal Law-NDPS Act- Section 50- Search by police officers- Police informed the accused-appellant that he has legal right to be searched before gazetted officer but he did not require so and on the consent given by accused-appellant, police searched accused-appellant- No illegality.

Where the accused refused to get himself searched before a gazetted officer and

consented to be searched by the police officers, then it cannot be said that the requirements of Section 50 of the NDPS Act have not been complied with**.** (Para 16, 17, 23, 28, 32)

Criminal Appeal dismissed.(E-3)

List of case cited:-

1. Pradeep Narayan Madqaonkar & ors Vs. St. of Maha. 1995 (4) SCC 255

2. Balbir Singh Vs. State 1996 (11) SCC 139

3. Paras Ram Vs. St. of Har. 1992 (4) SCC 662

4. Sama Alana Abdulla Vs. St. of Guj. 1996 (1) SCC 427

5. Anil @ Andya Sadashiv Nandoskar Vs. St. of Maha. 1996 (2) SCC 589.

6. Subhash Singh Thakurshyam Vs. St. (Thru CBI) (1997) 8 SCC 732

7. State of U.P. Vs. Zakaullah 1998 Cri. L.J. 863

8. Girja Prasad Vs. St. of M.P. (2007) 7 SCC 625

9. Sampath Kumar Vs. Inspr. of Police, Krishnagiri, (2012) 4 SCC 124

10. Sumer Singh Vs. Surajbhan Singh & ors, (2014) 7 SCC 323

11. Sham Sunder Vs. Puran, (1990) 4 SCC 731

12. M.P. Vs. Saleem, (2005) 5 SCC 554,

13. Ravji Vs. St. of Rajasthan, (1996) 2 SCC 175.

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. This criminal appeal has been directed against the judgement and order dated 19.4.2007 passed by Additional Sessions Judge (F.T.C.) No. 28, Barabanki in S.T. No. 98 of 2003 (Case No. 8 of 2003), State vs. Manoj Kumar Verma, under Section 8/21 N.B.P.S. Act, whereby trial court convicted the accused-appellant under Section 8/21 N.D.P.S. Act, sentencing him to undergo 10 years rigorous imprisonment with fine of Rs. 1,00,000/- and in default of payment of fine, he shall further undergo one year additional rigorous imprisonment.

2. Brief facts of the prosecution case which need to be noted for disposal of the present appeal which are as under :-

(i) On 9.1.2003, S.I. Narendra Pratap Singh, In-Charge out post Ganeshpur along with Constable Ram Asrey Saroj, Constable Amar Chandra Shukla, Constable Ajeet Kumar Pandey and Constable Jagat Narayan Singh were going to Ram Nagar in search of wanted accused. As police party reached near Mahadeva Gate, accused appellant has seen police party coming from Mahadeva side, he turned behind and tried to run away. On being suspected as miscreant, he was apprehended at the distance of 60-70 steps by police at around 9:30 PM. On being asked his whereabouts, he disclosed his identity as Manoj Kumar Verma son of Ram Bilas Verma, resident of Bansa, Police Station Masauli, District Barabanki and told that he has Morphine in his pocket and on account of this he ran away. Police informed the accused-appellant that he has a right to be searched before any gazetted officer whereupon he answered that he does not want to go anywhere and he took out a polythene from his right pocket of pant and handed over to police disclosing that it is Morphine. Recovered Morphine was taken into custody and it was 320 gram, which was properly sealed by police and mandatory provision of N.D.P.S. was complied with. Recovery memo Ex.Ka-3 was prepared by police party on spot.

3. On the basis of recovery memo Ex.Ka-3, Chick F.I.R. Ex.Ka-2 was registered in the police station concerned against the accused and entry was made in general diary, copy whereof is on file.

4. PW-4, S.I. Suresh Chandra Sen undertook the investigation of case, visited stop, prepared site plan Ex.Ka-6 and completing entire formalities of investigation, submitted charge sheet against the accused-appellant under Section 8/21 N.D.P.S. Act before the Court.

5. Trial Court, considering the evidence collected by Investigating Officer, framed charges against accused-appellant on 17.12.2008 under Section 8/21 N.D.P.S. Act to which accused-appellant denied, pleaded not guilty and claimed trial.

6. In order to substantiate its case, prosecution examined as many as five witnesses out of whom PW-2- Constable Amar Chandra Shukla, PW-3 S.I. Narendra Pratap are the witnesses of fact and rest PW-1 Constable Omkar Nath, PW-4 S.I. Suresh Chandra Sen and PW-5 Pawan Kumar Singh are the formal witnesses.

7. Subsequent to closure of prosecution evidence, Trial Court recorded statement of accused-appellant under Section 313 Cr.P.C. explaining all incriminating and other evidence and circumstances. In the statement under Section 313 Cr.P.C., accused denied prosecution story in toto and subsequently stated that he was arrested by police from his shop at about 9:00 PM and booked behind the Bar. Nothing has been recovered from his possession.

8. Trial court after appriciating the evidence of prosecution and hearing of both the parties, convicted and sentenced the accused-appellant as stated above.

9. I have heard Sri Santosh Kumar Srivastava, learned Amicus Curiae for the appellant and Smt. Parul Kant, learned AGA for the State at length and have gone through the record available on file with the valuable assistance of learned counsel for the parties.

10. Learned Amicus Curiae for appellant submits that the accused-appellant is innocent and has been falsely implicated in the present case by police. Nothing has been recovered from his possession. There is no public witness at the time of arrest of appellant. Mandatory provision of N.D.P.S. has not been complied with by the police and search was not made before any gazetted officer. There are several contradiction in the statement of witness produced by prosecution. Trial Court did not appreciate the entire evidence in right perspective.

11. On the other hand, learned AGA for the State submits that from the possession of accused-appellant, 320 gram Morphine has been recovered for which he has no valid lincense. He has been arrested by police on spot with contraband materials in so huge quantity. The said contraband material cannot be easily planted by police. It has been further submitted that recovery happens to be made at 9:30 PM, so it was not possible to police to take public witness. Since the accused-appellant himself denied to be searched before any gazetted officer, therefore, police did not take him before any gazetted officer but recovery was made by police in compliance of mandatory provision of N.D.P.S. Act. Prosecution has been fully successful in proving its case beyond reasonable doubt

and trial court has rightly convicted and sentenced the accused-appellant.

12. Now, I may proceed to consider rival submissions of learned counsel for the parties and, briefly, evidence of prosecution and some important decisions.

13. PW-2 Constable Amar Chandra Shukla deposed that on 9.1.2003, he was posted as Constable in Police Station Ram Nagar, District Barabanki and was accompanied to S.I. Narendra Pratap Singh and other constables. When he reached near Mahadeva Gate, they saw a person coming from Mahadeva Gate. Seeing the police party, he returned behind and started running back. On being suspected as miscreant, police party apprehended him at the distance of 60-70 steps at about 9:30 P.M. On being asked his name, he disclosed his identity as Manoj Kumar Verma and told that he has Morphine with him. S.I. Narendra Pratap Singh informed the accused that he has a right to be searched before any gazetted officer and he may be taken for search but he refused to go anywhere and handed over to police a polythine of Morphine taking it out from the pocket of his pant. On the consent given by accused, search of accused was made and from his possession of 320 gram Morphin was found, for which he had no valid license. Recovery memo thereof was prepared in accordance with law. Mandatory provision of N.D.P.S. Act was complied with. Police tried for public witness but nobody was ready to be a witness. Recovery memo Ex.Ka-3 and consent letter of accused-appellant Ex.Ka-4 were prepared on spot which contained a signature of accused.

14. PW-3 S.I. Narendra Pratap Singh deposed that he along with other police officials were going to Ram Nagar in search of wanted accused, when they reached near Mahadeva Gate, accused-appellant has seen the police party coming from Mahadeva Gate, he turned behind and tried to run back. On being suspected, he was apprehended by police at the distance of 60-70 steps at around 9:30 PM. On being questioned, he disclosed his identity as Manoj Kumar Verma, resident of Bansa, Police Station Masauli, District Barabanki, who told that he has some Morphine and due to fear he was running. He (PW-3) informed the accused that he has a right to be searched before any gazetted officer but accused-appellant refused to go anywhere and he took out Morphine rapped in polythine from his right pocket of his pant for which he had no valid license. Recovered Morphine was weighd and found 320 grams. Recovered material was sealed and recovery memo thereof was prepared on spot. Signature of accused was also taken on the recovery memo Ex.Ka-4.

15. PW-2 and 3 withstood sufficient lengthy cross-examination by defence but nothing adverse material could be brought so as to disbelieve their statement.

16. Admittedly, recovery and arrest of accused-appellant is not supported by any public witness for which witnesses explained that they tried the public to be witness of incident but due to fear of evil, nobdoy came forward to be witness. It is settled that generally, no public witness comes forward to be a witness against the criminals.

17. As a matter of rule, there can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or

even presence of such witness during police raid would cast an added duty on the court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of police officer is found acceptable, it would be an erroneous proposition that court must reject prosecution version solely on the ground that no independent witness was examined.

18. In **Pradeep Narayan Madqaonkar & others vs. State of Maharashtra 1995 (4) SCC 255**, it was held:

"Indeed, the evidence of the official (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigation of the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation, requires greater care to appreciate their testimony."

19. In **Balbir Singh vs. State 1996 (11) SCC 139**, the Court has repelled a similar contention based on non-examination of independent witnesses. The same legal position has been reiterated time and again by Apex Court vide **Paras Ram vs. State of Haryana 1992 (4) SCC 662, Sama Alana Abdulla vs. State of Gujarat 1996 (1) SCC 427, Anil alias Andya Sadashiv Nandoskar vs. State of Maharashtra 1996 (2) SCC 589.**

20. In **Subhash Singh Thakurshyam vs State (Through CBI) (1997) 8 SCC 732**, a Two Judge Bench of the Apex Court comprising of Hon'ble M. Mukherjee and Hon'ble K. Thomas JJ, in para 90 observed:

"....We should not forget that the time of the raid was during the odd hours when possibly no pedestrian would have been trekking on the road nor any shopkeeper remaining in his shop nor a hawker moving around on the pavements."

21. In **State of U.P. v. Zakaullah 1998 Cri. L.J. 863** in para-10, it is said:

"The necessity for "independent witness" in cases involving police raid or police search is incorporated in the statute not for the purpose of helping the indicted person to bypass the evidence of those panch witnesses who have had some acquaintance with the police or officers conducting the search at some time or the other. Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons. If the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. ***The requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of India must be presumed to be an independent person*** *until it is proved that he was a dependent of the police or other officials for any purpose whatsoever."*

22. Referring to some of the the aforesaid decisions, Court in **Girja Prasad Vs. State of M.P. (2007) 7 SCC 625** held:

"It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence." (para 25)

23. In so far as discrepancies, variations and contradictions in prosecution case are concerned, I have analysed entire evidence in consonance with submissions raised by learned counsel and find that the same do not go to the root of case and accused-appellant is not entitled to get benefit of the same.

24. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy is minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

25. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

26. In **Sachin Kumar Singhraha v. State of Madhya Pradesh, 2019 (8) SCC 371,** Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

27. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on

material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. **(See Smt. Shamim v. State of (NCT of Delhi), 2018 (10) SCC 509)**

28. Evidently, recovery and arrest of accused happens suddenly at about 9:30 PM and it was winter season. Police informed the accused-appellant that he has legal right to be searched before gazetted officer but he did not require so and he had given a consent to be searched by police and on the consent given by accused-appellant, police took search of accused-appellant, recovery of contraband was made and police prepared recovery memo thereof. Thus, it cannot be said that mandatory provision of N.D.P.S. Act has not been complied with by police.

29. F.S.L. report Ex.Ka-12 reveals that on examination of sample, it was found Heroin and accused-appellant commented nothing on F.S.L. report. In statement under Section 313 Cr.P.C. he simply stated that nothing has been recovered from his possession. He did not choos to adduse any defence to discedit F.S.L. report.

30. In view of facts and legal position discussed hereinabove, I find that Trial Court has rightly analyzed evidence led by prosecution and found accused guilty and convicted him for an offence punishable under Section 8/21 N.D.P.S. Act. Conviction and sentenced awarded by Trial Court is liable to be maintained and confirmed. No interference is warranted by this Court. Criminal appeal lacks merit and liable to be dismissed.

31. So far as sentencing of accused-appellant is concerned, it is always a difficult task requiring balance of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in individual cases.

32. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. **[Vide: Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].**

33. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or

committed, I find that punishment awarded to accused-appellant by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no question arises to interfere in the matter on the point of punishment imposed upon him.

34. **Appeal** lacks merit and is hereby **dismissed**.

35. Lower Court record along with a copy of this judgment be sent immediately to Trial Court for compliance.

36. Before parting, I provide that Sri Santosh Kumar Srivastava Advocate, Amicus Curiae for accused-appellant, shall be paid counsel's fee as Rs. 10,000/- for his valuable assistance. State Government is directed to ensure payment of aforesaid fee through Legal Remembrancer, Lucknow, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2020)03-05ILR A540
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.03.2020

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 1733 of 2012

Phool Chandra ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Afzaal Tariq Khan, Dinesh Kr. Sharma, Rajesh Kumar Dwivedi, S.H. Ibrahim, Saurabh Shankar Srivastav

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law-Code of Criminal Procedure, 1973- Section 313 - Charge framed u/s 306 IPC but conviction u/s 302 IPC while acquittal u/s 306 IPC- Those circumstances which have not been placed before the appellant at the time of recording of his statement under Section 313 of the Cr.P.C and regarding which no opportunity has been provided to him to explain could not be used against him- Even the question and evidence pertaining to the fact that death of the deceased has been caused by appellant has not been placed before the appellant - He could not have been convicted for the offence under Section 302 I.P.C. Appellant was also charged under section 306 of the IPC. - It was amply clear to the appellant that he is being tried for offence u/s 306 of the IPC and questions pertaining to committing this offence has also been put to him at the time of recording his statement under section 313 of Cr.P.C. He could not claim any prejudice or failure of justice if he is convicted for committing the offence under section 306 I.P.C.

An accused cannot be convicted of an offence regarding which he has neither been charged nor circumstances pertaining to which have been put to him under section 313 of the Cr.Pc.but he can be convicted alternately of the offence with which he was charged with and the same would not result in any prejudice

B. Criminal law-Indian Penal Code, 1860- Section 107/ 306- A person can be said to have instigated another person, when he actively suggests or stimulates him by means of language, direct or indirect. Instigate means to urge forward or to provoke, incite or encourage to do an act. The circumstances proved that the appellant was regularly beating the deceased and before her death the appellant again assaulted the deceased with fists and kicks and which therefore, left no room for the deceased except to take the extreme step of suicide.

The necessary ingredient to bring home the charge of abetment of suicide is instigation of a person to do the act.

The appeal is **partly allowed**. The conviction of the appellant under Section 302 and 201 of the I.P.C. is **set-aside** and he is **acquitted** of the charges under Section 302 and 201 I.P.C. Appellant is however now **convicted** for committing the offence under Section 306 I.P.C.and Section 498-A ,I.P.C.
(Para 32,35,46,48) (E-3)

List of case cited:-

1. Hanumant Vs. St. of M.P, MANU/SC/0037/1952

2. Sharad Birdhichand Sarda Vs. St. of Maha., AIR, 1984 SC 1622

3. Jaharlal Das Vs. St. of Orissa, MANU/SC/0586/1991 : (1991) 3 SCC 27

4. Varkey Joseph Vs. St. of Ker., MANU/SC/0295/1993

5. Trimukh Maroti Kirkan Vs St. of Maha, MANU/SC/8543/2006

6. Raj Kumar Singh Vs. St. of Raj,MANU/SC/0468/2013

7. Dharnidhar Vs. St. of U.P. & ors,. MANU/SC/0480/2010 : (2010) 7 SCC 759

8. Shivaji Sahabrao Bobade & ors,. Vs. St. of Maha, MANU /SC /0167 /1973

9. Chitresh Kumar Chopra Vs. St. (Govt. of NCT of Delhi), (2009) 16 SCC 605

10. Praveen Pradhan Vs. St. of Uttar. (2012) 9 SCC 734

11. Sanju @ Sanjay Singh Sengar Vs. St. of M.P. (2002) 5 SCC 371

12. State of W.B. Vs. Ori lal Jaiswal, 1994 (1) SCC 73

13. Kishori Lal Vs. St. of M.P. (2007) 10 SCC 797

14. Amalendu Pal @ Jhantu Vs. St. of W.B, (2010) 1 SCC 707

15. Amit Kapur Vs. Ramesh Chander ,(2012) 9 SCC 460

16. Ghusabhai Raisangbhai Chorasiya Vs. St. of Guj. (2015) 11 SCC 753

17. Dalbir Singh Vs. St. of U.P., MANU/SC/0320/2004

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard learned counsel for the appellant and learned A.G.A. for the State and perused the record.

2. This criminal appeal has been filed by appellant- **Phool Chandra** under Section 374 (2) of the Code of Criminal Procedure against the judgment and order dated 09.11.2012 passed by Additional Session Judge, Court-8, Barabanki in Sessions Trial No.163 of 2011, "**State Vs. Phool Chandra**", arising out of Case Crime No.1634 of 2010, under Sections 498A, 306, 302 and 201 of I.P.C., Police Station Deva, District Barabanki, whereby the appellant has been convicted under Section 302, 201 and 498A of I.P.C. with fine stipulation.

Brief facts which are necessary for the disposal of this appeal are that a written application on 27.10.2010 was given at 4:30 P.M. at Police Station - Kotwali Deva, District - Barabanki by Smt. Pushpa Devi stating therein that her daughter Neelam was married about 11 years ago to one Phool Chandra, R/o Village - Raindua Garhi, Police Station - Deva, District - Barabanki. Her husband, mother-in-law and father-in-law used to beat her and treat her with cruelty for

demand of dowry for which she had filed a criminal case, however, a compromise was filed therein and Phool Chandra took her daughter with him after three days of Holi. Since then her daughter Neelam was living in her matrimonial home. Accused persons used to beat her on the pretext that she had subjected them to the process of Court.

It was also stated that on 19.10.2010, Phool Chandra and others beat her daughter and also threatened her of dire consequences. The incident was seen by her relative Pyara Devi. On 24.10.2010 at about 11.30 A.M. Phool Chandra, Kalawati, Kandhai Lal, Sushil, Lallu and Shushma assaulted her daughter and threw her in Indira Canal and her dead body has been recovered from Police Station - Gosaiganj, Lucknow.

It was further stated in the written application by Smt. Pushpa Devi that at the time of *"Maar-Peet"* her sister Pyara Devi and his son Munnu tried to intervene but they were also assaulted by the accused persons. The three daughters of the deceased, namely, Prachi, Ruchi and Pooja had also seen the incident and they had also been beaten by Phool Chandra.

3. On the basis of this written information, an F.I.R. (Exhibit ka-4) was registered as Case Crime No.1634 of 2010, under Sections- 498A and 304B at Police Station- Deva, District- Barabanki against the accused persons and entry of the substance of the application was also made in the General Diary (Exhibit ka-5). Investigation of the case was entrusted to the Circle Officer City, namely, Sri Dipendra Chaudhary.

Prior to the above information made by Smt. Puspa Devi at Police Station- Deva, Barabanki, a Village Chowkidar of Charaiya Village, namely, Sardar Singh, when he was going to ease himself at Indira Canal, saw that the dead body of a woman had been trapped in the bushes and most of its part was in water. He informed the concerned police station, i.e., Gosaiganj on 27.10.2010 at about 3:10 P.M. and his information was registered in the General Diary of the police station.

4. On being informed, the dead body was identified by the mother of the deceased and inquest was done by Sub-Inspector R.P. Pandey of Police Station- Gosaiganj at about 3:50 P.M. on 27.10.2010. He also prepared Chitti C.M.O. (Exhibit ka-6), Photo laash (Exhibit ka-7), Chitti R.I. (Exhibit ka-8) and sample seal (Exhibit ka-9) for the purpose of post-morterm and also forwarded the dead body for post-morterm in the custody of Constables Paras Nath and Raj Bahadur.

5. Post-morterm on the dead body of the deceased Neelam was performed by P.W.2- Dr. Vinod Kumar Verma at District Mortuary Lucknow on 28.10.2010 at 11:10 A.M. The dead body of the deceased was found to be of average built, post-morterm staining could not be seen due to advance decomposition, skin was peeled at places, skull hair were easily detachable, maggots about 1cm. long were crawling all over face and following injuries were found on her person:-

(I) Injury No.1:- Contusion 6cm. × 4cm. on right side of forehead 3cm. above right eyebrow.

(II) Injury No.2:- Contusion 4cm. × 3cm. on left side of occipital region.

On opening ecchymosis was found present underneath all above injuries. Linear fracture was also found present on right side of frontal bone, subdural haemetoma was present all over brain and

brain was liquified. Greenish discoloration was also found present on iliac fossae.

On internal examination membranes, brain, lungs, spleen and kidneys were found congested. Left chamber of the heart was found empty while right was full. 125ml. fluid was found in stomach. In small intestine digested food and gases and in large intestine faecal matter and gases were found. Gall-bladder was found half full. Death of the deceased was stated to have occurred due to coma as a result of anti-morterm injury.

P.W.2- Dr. Vinod Kumar Verma in his evidence recorded before the trial court has stated that injury no.2 was sufficient in the ordinary course of nature to cause death and the same might have been caused on 24.10.2010 at about 11:30 A.M. He was further of the view that, as the water has not been found in the lungs, the deceased did not die of drowning. He proved post-morterm report in his writing and signatures as (Exhibit ka-1). In his cross-examination, he stated that these injuries may also be caused by hitting the stone and the time of death, written as three days in the post-morterm report, may be one day less or more.

6. The investigation of the case was eventually transferred to P.W.7- Sub-Inspector Santosh Singh, who prepared the Site Plan (Exhibit ka-10) on the pointing of informant Pushpa Devi. He also recorded the statement of Monu Kumar s/o Amarnath, Omkar s/o Ram Lakhan and Manoj Kumar and after finding sufficient evidence against appellant submitted the charge-sheet (Exhibit ka-11) against him. On the case being committed to Session Court, charges under Section 306, 498A I.P.C. and an alternative charge under Section 302 and 201 I.P.C. was framed against appellant, who denied the charges and claimed trial.

7. The prosecution in order to bring home the charges against the appellant produced following documentary evidence:-

(i) Post-morterm Report (Exhibit ka-1), (ii) Inquest Report (Exhibit ka-2), (iii) Written Application (Exhibit ka-3), (iv) Chik F.I.R. (Exhibit ka-4), (v) Copy of G.D. Qayami (Exhibit ka-5), (vi) Chitti C.M.O. (Exhibit ka-6), (vii) Photo laash (Exhibit ka-7), (viii) Chitti R.I. (Exhibit ka-8), (ix) Sample of seal (Exhibit ka-9), (x) Site Plan (Exhibit ka-10) and (xi) Charge-sheet (Exhibit ka-11).

8. Apart from the above documentary evidences, prosecution also testified following witnesses in its support:-

(I) P.W.1- Smt. Pyara Devi (informant)

(ii) P.W.2- Dr. Vinod Kumar Verma (who conducted the post-morterm)

(iii) P.W.3- Pushpa Devi (eye-witness)

(iv) P.W.4- Constable Sri Ramayan (ascribe of the F.I.R. and G.D.)

(v) P.W.5- S.I. Javed Khan (First Investigating Officer)

(vi) P.W.6- Constable Paras Nath of P.S.- Gosaiganj

(vii) P.W.7- S.I. Santosh Kumar Singh (Second Investigating Officer)

(viii) P.W.8- Chowkidar Sardar Singh (Village Chowkidar, who informed about the dead body)

9. The trial court after appreciating the evidence available on record came to the conclusion that prosecution has been able to prove its case beyond reasonable

doubt pertaining to the charges under Sections 302, 201 and 498A I.P.C. and, therefore, convicted the appellant- Phool Chandra for the same. However, the trial court was of the view that the prosecution has failed to prove the charge under Section 306 I.P.C. and, therefore, acquitted the appellant of the same.

10. The appellant being aggrieved by the judgment and order of the trial court has preferred this appeal challenging his conviction and sentence.

11. Learned counsel for the appellant submits that the trial court has committed manifest error in appreciating the evidence available on record and has convicted the appellant only on the basis of *"surmises'* and *"conjunctures'* as the prosecution has miserably failed to prove its case beyond reasonable doubt.

It is further submitted that in the facts and circumstances of the case, P.W.1- Pyara Devi does not appear to be an eye-witness of the alleged incident as she, in her statement, has stated that she went to the house of appellant on the fateful day for the first time. Highlighting the above statement of P.W.1- Pyara Devi , it is submitted that the testimony of this witness pertaining to the fact that she witnessed Phool Chandra beating the deceased on the fateful day could not be believed and, therefore, no burden by virtue of Section 106 of the Indian Evidence Act could be placed on the appellant to explain the specific facts within his knowledge.

It is also submitted that the investigating officer of the case after thorough investigation found the case of the appellant under Section 306 of the I.P.C. and the trial court, without any additional evidence placed before it, framed an alternative charge under Section 302 I.P.C. and has also convicted the appellant for the same.

It is also submitted that the case of the prosecution, as placed through its witnesses, will not travel beyond Section 306 of the I.P.C. and, therefore, the trial court has made an apparent error in convicting the appellant under Section 302 I.P.C.

It is also submitted that the settled law pertaining to the appreciation of evidence with regard to the cases based on circumstantial evidence is that all the circumstances should be proved separately, there must be a chain of circumstances and they should be so inter-connected that they will not leave any doubt in the mind of a prudent person that the offence has been committed by the accused and, in any case, the only hypothesis which may borne out of the facts, to be proved by the prosecution, should be that the crime has been committed by the accused and accused only. It has been argued that in the instant case the chain of events is broken. The principle under Section 106 of the Indian Evidence Act could not be invoked against the appellant by virtue of unreliable testimony of P.W.1- Pyara Devi and, therefore, the conviction of the appellant under Section 302 I.P.C. could not be sustained and the appellant is liable to be acquitted.

12. Learned A.G.A., however, submits that P.W.1- Pyara Devi, in the facts and circumstances of the case, is a reliable witness and she had seen the appellant beating the deceased on the fateful day at 11:00 A.M. She also stated to have gone to the house of appellant and also have seen a stick in his hand and was also pushed out of his house by appellant and thereafter could not see what had happened inside the house

and, thereafter, neither the deceased was found alive nor the appellant or his family members were seen at their house, as the house was found locked from outside. Learned A.G.A. has argued that the circumstances proved by the prosecution are so inter-connected that they do not leave any room to suspect that the crime has not been committed by the appellant and, therefore, the trial court has rightly convicted the appellant under Section 302, 201 and 498A of the I.P.C. and the appeal of the appellant is liable to be rejected.

13. Having perused the record of the trial court in the background of the submissions made by learned counsel for the rival parties, it will be fruitful to scrutnize the prosecution evidence available on record.

14. P.W.1- Pyara Devi is the *"mausi'* of the deceased- Neelam, who was living one house away from the house of Phool Chandra. She has stated that Phool Chandra and Neelam used to quarrel and fight with each other. A criminal case was also lodged by Neelam against Phool Chandra which ended in a compromise and thereafter Phool Chandra brought back Neelam and her three daughters to his house a few days after the festival of Holi. Even after that, they both were not carrying good relations and used to fight with each other. Phool Chandra had beaten Neelam on 19th of that month on which her sister (Pushpa) came to persuade Phool Chandra not to beat Neelam. However, on 24th of the same month at about 11:00 A.M. a quarrel started between them on which she went in the house of Phool Chandra and found that he was beating Neelam with fists and kicks and he also pushed her and her son out of his house and closed the door and, thereafter she informed her sister (Pushpa), who came in the night at about 8:00 P.M., but house was found locked from outside and on the next morning they came to know that Neelam has died in the canal and her dead body was found 3-4 days after the incident in Indira Canal at a place situated within the jurisdiction of Police Station-Gosaiganj, Lucknow.

15. P.W.3- Pushpa Devi is the mother of deceased- Neelam, who appears to have corroborated the evidence of P.W.1- Pyara Devi pertaining to the regular beating of her daughter by appellant- Phool Chandra and also that on 19th October, 2010 the deceased was beaten by Phool Chandra and she came to persuade him not to beat her daughter and also that on 24th October, 2010 at about 5-5:30 P.M. Pyara Devi informed her about the fact that Neelam was brutally beaten by Phool Chandra. On hearing it, she came to the village of her daughter at about 7:00 P.M. on the same day and found that there was no person present in the house of Phool Chandra, which was locked from outside. She searched her daughter everywhere and also at the bank of canal and it was after 3-4 days that she was informed that dead body of her daughter has been found at the place falling in the jurisdiction of Police Station-Gosaiganj, Lucknow and she identified the body as of Neelam.

16. P.W.2- Dr. Vinod Kumar Verma, who has conducted the post-morterm on the body of the deceased- Neelam has proved the post-morterm report (Exhibit ka-1) under his signatures and writing. The details of post-morterm report has been elaborately mentioned in para-5 of this judgment.

17. P.W.4- Constable, Sri Ramayan has proved to have written the Chik F.I.R.

(Exhibit ka-4) and also to have made a corresponding entry in the General Diary of the police station as (Exhibit ka-5).

18. P.W.5- Sub-Inspector, Javed Khan was the Chowki In-charge of Police Station- Kursi, District- Barabanki, who stated to have recorded the statement of P.W.1- Pyara Devi and converted the investigation of the case under Section 306 I.P.C.

19. P.W.6- Constable, Paras Nath Yadav is the witness, who at relevant point of time was posted at Police Station- Gosaiganj and is stated to have received the information given by Village Chowkidar Sardar Singh pertaining to the discovery of the dead body of the deceased- Neelam. He proved the inquest report (Exhibit ka-2) in the handwriting of Sub-Inspector R.P. Pandey with whom he was posted and recognized his writing and signatures. This witness has also proved the necessary papers prepared by the above mentioned Sub-Inspector R.P. Pandey for the purpose of post-morterm (Exhibit ka-6 to 9).

20. P.W.7- Sub-Inspector, Santosh Kumar Singh is the second Investigating Officer of this case, who stated to have prepared the site plan (Exhibit ka-10) on the pointing of Pushpa Devi. He after recording the statement of the witnesses and collecting other materials submitted a charge-sheet (Exhibit ka-11) against appellant under Section 306 and 498A of the I.P.C. He also stated that initially the case was registered under Section 304B and 498A I.P.C., however, during the course of investigation the same was converted under Section 306 of the I.P.C.

21. P.W.8- Chowkidar, Sardar Singh is the person, who informed the Police Station- Gosaiganj about the dead body of the deceased- Neelam found trapped in the bushes at the bank of Indira Canal. He proved the information given by him to the Police Station- Gosaiganj.

22. The law with regard to appreciation of circumstantial evidence has been clearly enunciated in the case of **Hanumant v.State of Madhya Pradesh MANU/SC/0037/1952 :** wherein Hon'ble Supreme Court has held as follows:

"12 ...It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the Accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the Accused and it must be such as to show that within all human probability the act must have been done by the Accused"

23. Hon'ble Apex Court in the case **Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR, 1984 SC 1622** has laid down that the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established;

"1. the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they

should not be explainable on any other hypothesis except that the accused is guilty;

3. the circumstances should be of a conclusive nature and tendency;

4. they should exclude every possible hypothesis except the one to be proved, and

5.there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

24. In **Jaharlal Das v. State of Orissa, MANU/SC/0586/1991 : (1991) 3 SCC 27,** it was held that even if the offence is a shocking one, the gravity of offence cannot by itself overweigh as far as legal proof is concerned. In cases depending highly upon the circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof. The court has to be watchful and ensure that the conjecture and suspicion do not take the place of legal proof. The court must satisfy itself that various circumstances in the chain of circumstances should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the Accused.

It has further been held in Para 8 of the said report that in order to sustain the conviction on the basis of circumstantial evidence, the following three conditions must be satisfied:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

25. In **Varkey Joseph v. State of Kerala, MANU/SC/0295/1993,** it was held that suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond reasonable doubt.

Therefore, keeping in view the above settled legal position the law pertaining to cases based on circumstantial evidence can be summarized in following terms:

1. The circumstances relied upon by the prosecution which lead to an inference to the guilt of the accused must be proved beyond doubt;

2. The circumstances should unerringly point towards the guilt of the accused;

3. The circumstances should be linked together in such a manner that the cumulative effect of the chain formed by joining the links is so complete that it leads to only one conclusion i.e. the guilt of the accused;

4. That there should be no probability of the crime having been committed by a person other than the Accused.

26. In **Trimukh Maroti Kirkan Vs State of Maharashtra** reported in **MANU/SC/8543/2006**, Hon'ble Supreme Court has observed as under :

"10. The demand for dowry or money from the parents of the bride has shown a phenomenal increase in last few years. Cases are frequently coming before the Courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in Court as they want to keep aloof and do not want to antagonize a neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculpate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

11. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab v. Karnail Singh MANU/SC/0585/2003 : 2003CriLJ3892). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

27. Perusal of evidence of prosecution witnesses in the light of above principles would reveal that P.W.1- Pyara Devi has categorically stated that she was living only

one house away from the house of Phool Chandra and since their marriage Phool Chandra and Neelam were fighting with each other as a matter of routine. A litigation was also started by Neelam when she lodged a criminal case against Phool Chandra, which was ultimately settled in a compromise. She has stated that on 19th October, 2010 Phool Chandra had beaten Neelam. The quarrel between them again started on 24th October, 2010 at about 11:00 A.M. and she went there alongwith her son Munna and saw that Phool Chandra was beating Neelam with fists and kicks and, thereafter Phool Chandra pushed her and her son out of the house and, thereafter she could not see, as to what had happened inside the house. It has been categorically stated by this witness that though Phool Chandra was having a *"danda'* in his hand but he was not beating Neelam with the same. She stated to have informed her sister P.W.3- Pushpa, who came in the evening and, thereafter she started searching her daughter and after 3-4 days, the dead body of Neelam was found at the bank of Indira Canal.

We have also gone through the cross-examination of this witness as she appears to be the star witness of this case and have found that in her cross-examination, she has maintained her statement of residing close to the house of Phool Chandra and also that on the fateful day after hearing noise, she went to the house of Phool Chandra and attempted to save Neelam, but after being pushed out of house she did not hear anything from the house. She has also admitted that the house of her sister P.W.3- Pushpa is *6 kos* away from her village. Her sister arrived at 7:00 P.M. on the same day and after hearing some noise on next day at 8:00 A.M. she started searching her daughter. Surprisingly, this witness has stated in the end of her cross-examination that she never went to the house of Neelam for persuading her or her husband to enter into compromise or not to fight. The statement of P.W.3- Pushpa Devi would reveal that she has only stated about the maltreatment given to her daughter by appellant Phool Chandra and has stated about the incident having occurred on 19th October, 2010 when she went to the house of Phool Chandra to persuade him not to beat her daughter and, thereafter on 24th October, 2010 she stated to have received a phone call from her sister P.W.1- Pyara Devi at 5-5:30 P.M. about the incident and arrived at the village at about 7:00 P.M. and in the next morning, she started searching her daughter. Significantly, in her evidence, she has stated that Indira Canal is flowing about 100 mtr. away from the house of appellant-Phool Chandra. She also proved the recovery of the dead body of the deceased-Neelam on 27.10.2010 at about 1:30 P.M. Police Station- Gosaiganj.

28. From the statement of these two witnesses of fact, it emerges that Phool Chandra and Neelam were not carrying good relations. Earlier, a criminal case was lodged by Neelam which ended in compromise and little after Holi, Phool Chandra took Neelam and his three daughters with him. Thereafter also, there were regular fights and quarrels between them and Phool Chandra used to beat Neelam on regular basis. On 19th October, 2010, there was some quarrel between them and P.W.3- Pushpa Devi was informed about the same by P.W.1- Pyara Devi and, thereafter on 24th October, 2010 at 11:00 A.M. Phool Chandra again started beating Neelam with fists and kicks. The statement of P.W.1- Pyara Devi pertaining to the fact that she went to the house of Phool

Chandra appears to be reliable in the facts and circumstances of the case and she appears to be a reliable and truthful witness.

Keeping in view her statement discussed herein above, what transpires is that P.W.1- Pyara Devi on 19th and 24th October, 2010, went to the house of Phool Chandra and has witnessed the incident of quarrel and *"Maar-Peet'* and thereafter she informed Pushpa Devi by telephone. Therefore, the evidence of P.W.1- Pyara Devi is also reliable with regard to the fact that there was quarrel and fight in the house of Phool Chandra on 19th and 24th October, 2010 at about 11:00 A.M. and she was pushed out by appellant and thereafter she informed P.W.3- Pushpa Devi, who came at the matrimonial house of her daughter in the evening of the same day and found that neither Neelam nor Phool Chandra or any of his housemate was available and the house was locked from outside. It is also proved on record that since the occurrence of the incident at 11:00 A.M., the appellant and his relatives were not found at their home and appellant even did not try to search the deceased.

29. At this juncture, it is also pertinent to mention that P.W.2- Dr. Vinod Kumar Verma, during the course of post-morterm, has found two contusions, one on the forehead and on the back of head (occipital region) of the deceased. Beneath both these injuries, ecchymosis was present and haemetoma was also found. According to the doctor, the death of the deceased was due to coma as a result of anti-morterm injuries. Injuries were found about three days old from before the post-morterm. According to him injury no.2 found on occipital region of the deceased was sufficient in the ordinary course of nature to cause death and also that the death of the deceased might have occurred on 24th October, 2010 at about 11:30 A.M. Significantly, he did not find any water in the lungs of the deceased and, therefore, he was of the view that deceased had not died due to drowning. It was also stated by him that this injury may be caused by hitting her head on the rocks or stone.

30. From the scanning of the prosecution evidence following circumstances appear to have been proved by the prosecution:-

(i) Deceased- Neelam was married to Phool Chandra and three daughters were born out of their wedlock.

(ii) They were not carrying good relations and deceased- Neelam had also lodged a criminal case against Phool Chandra, which ended in compromise.

(iii) Six months prior to the incident, a little after Holi, Phool Chandra brought back Neelam and his three daughters to his house.

(iv) Since the return of Neelam, Phool Chandra and Neelam again started quarreling and fighting as a matter of routine and Phool Chandra used to beat Neelam on regular basis.

(v) On 19th October, 2010, there was quarrel between Neelam and Phool Chandra and P.W.3- Pushpa Devi after being informed by P.W.1- Pyara Devi came to persuade Phool Chandra not to beat her daughter again.

(vi) On 24th October, 2010 at about 11:00 A.M., there was again a quarrel and fight between Phool Chandra and Neelam and deceased- Neelam was brutally beaten by appellant and after hearing the noise, P.W.1- Pyara Devi, who resided at a very short distance, came to the house of appellant and saw the occurrence. She was

pushed out of the house by appellant. Thereafter, she informed P.W.3- Pushpa Devi, who came to village in the same evening.

(vii) Since incident, neither Neelam nor appellant was found at their house and the house was locked from outside.

(viii) The dead body of the deceased- Neelam was recovered from Indira Canal on 27.10.2010 from a place falling within the jurisdiction of Police Station- Gosaiganj.

(ix) Indira Canal flows just 100 mtr. away from the house of Phool Chandra.

(x) As per P.W.2- Dr. Vinod Kumar Verma, the death of the deceased had happened on account of injury found on her occipital region and not from drowning and also this fatal injury may also come from jumping on some rock.

31. In normal course, all these circumstances may point towards the hypothesis that the deceased- Neelam was done to death by Phool Chandra, but keeping in view the fact that only two injuries have been found on the head of the deceased and the injury which has been found on the occipital region has been found to be fatal and was sufficient in the natural course to cause death of deceased and P.W.2- Dr. Vinod Kumar Verma has specifically stated that the injury on the occipital region of the deceased may also be caused by jumping on some rock and in that case if the deceased might have jumped in the canal and might have hit any rock, there are chances that she might have died instantly and, therefore, no water could have been found in her lungs.

32. We are conscious of the fact that we are dealing with a case based on circumstantial evidence and the peculiar facts and circumstances of the case which have been found proved are to the effect that on that fateful day when appellant was beating the deceased with fists and kicks, P.W.1- Pyara Devi went inside the house of appellant to save the deceased. However, she was pushed out of the house by appellant and, thereafter the door of the house was closed and what happened thereafter could only be in the knowledge of deceased or the appellant and there is only circumstantial evidence available beyond this point of time. But a glaring defect which has occurred during the course of trial due to the approach of trial court is that all incriminating circumstances have not been put by the trial court before the appellant at the time of recording of his statement under Section 313 of the Cr.P.C. So much so that the trial court was so negligent that even the prosecution story pertaining to the charge under Section 302 I.P.C. causing of death of deceased by the appellant has also not been put to the appellant and only evidence pertaining to the abatement of suicide by the deceased has been put by the trial court before the appellant.

33. Hon'ble Supreme Court in **Raj Kumar Singh Vs. State of Rajasthan reported in MANU/SC/0468/2013** has held as under :-

"25. In a criminal trial, the purpose of examining the accused person under Section 313 Code of Criminal Procedure, is to meet the requirement of the principles of natural justice i.e. audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the Court must take note of such explanation.

In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the Court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Code of Criminal Procedure, cannot be used against him and have to be excluded from consideration."

"31. In Dharnidhar v. State of U.P. and Ors. MANU/SC/0480/2010 : (2010) 7 SCC 759, *this Court held:*

The proper methodology to be adopted by the Court while recording the statement of the accused under Section 313 Code of Criminal Procedure is to invite the attention of the accused to the circumstances and substantial evidence in relation to the offence, for which he has been charged and invite his explanation. In other words, it provides an opportunity to an accused to state before the Court as to what is the truth and what is his defence, in accordance with law. It was for the accused to avail that opportunity and if he fails to do so then it is for the Court to examine the case of the prosecution on its evidence with reference to the statement made by the accused under Section 313 Code of Criminal Procedure."

"36. In view of the above, the law on the issue can be summarised to the effect that statement under Section 313 Code of Criminal Procedure is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 Code of Criminal Procedure cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution's evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 Code of Criminal Procedure is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 Code of Criminal Procedure.

An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become witness against himself."

34. Hon'ble Supreme Court in **Shivaji Sahabrao Bobade and Ors. Vs. State of Maharashtra** reported in **MANU /SC /0167 /1973** has held as under :-

"It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely

imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction.

In such a case, the court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Cr.P.C. the omission has not been shown to have caused prejudice to the accused.

In the present case, however, the High Court, though not the trial court has relied upon the presence of blood on the pants of the blood group of the deceased. We have not been shown what explanation the accused could have offered to this chemical finding particularly when we remember that his answer to the question regarding the human blood on the blade of the knife was 'I do not know'. Counsel for the appellants could not make out any intelligent explanation and the 'blood' testimony takes the crime closer to the accused. However, we are not inclined to rely over much on this evidentiary circumstance, although we should emphasise how this inadvertence of the trial court had led to a relevant fact being argued as unavailable to the prosecution. Great care is expected of Sessions Judges who try grave cases to collect every incriminating circumstance and put it to the accused even though at the end of a long trial the Judge may be a little fagged out."

35. In the aforesaid view of the matter, we are of the considered view that those circumstances which have not been placed before the appellant and regarding which no opportunity has been provided to him to explain could not be used against him. Thus, keeping in view the fact that even the question and evidence pertaining to the fact that death of the deceased has been caused by appellant has not been placed before the appellant, he could not have been convicted for the offence under Section 302 I.P.C.

36. Now we have to consider as to what offence has been proved to have been committed by the appellant in view of the proved circumstances. The appellant was also charged under section 306 of the IPC but has been acquitted of the same as he has been convicted for alternate charge under section 302 I.P.C. by the learned trial court.

It would be appropriate, at this stage to consider the provisions of Sections 107 and 306 of I.P.C.

Sections 306 and 107 of I.P.C. reads as under :

"S.306. Abetment of suicide:- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may

extend to ten years, and shall also be liable to fine.

S.107 - Abetment of a thing:- A person abets the doing of a thing, who---

First.--Instigates any person to do that thing; or Secondly.--Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission lakes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly.--Intentionally aids, by any act or illegal omission, the doing of that thing. Explanation 1.--A person who by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."

From a reading of the Clause Firstly of Section 107 of I.P.C., it is clear that a person who instigates another to do a thing, abets him to do that thing. A person is said to instigate another when he goads, provokes, incites, urges forward or encourage another to commit a crime.

37. A serious question that has arisen in this case is whether there is any material suggesting that the appellant had incited the deceased to commit suicide?

The Supreme Court in the case of **Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi) reported in (2009) 16 SCC 605** while dealing with the term "instigation" has held as under:

"16. ... instigation is to goad, urge forward, provoke, incite or encourage to do 'an act'. To satisfy the requirement of 'instigation', though it is not necessary that actual words must be used to that effect or what constitutes 'instigation' must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an 'instigation' may have to be inferred. A word uttered in a fit of anger or emotion without Motilal vs. State of M.P. intending the consequences to actually follow, cannot be said to be instigation. 17. Thus, to constitute 'instigation', a person who instigates another has to provoke, incite, urge or encourage the doing of an act by the other by 'goading' or 'urging forward'. The dictionary meaning of the word 'goad' is 'a thing that stimulates someone into action; provoke to action or reaction' ... to keep irritating or annoying somebody until he reacts....".

38. The Supreme Court in the case of **Praveen Pradhan Vs. State of Uttaranchal reported in (2012) 9 SCC 734** has held as under:

"17. The offence of abetment by instigation depends upon the intention of the person who abets and not upon the act which is done by the person who has abetted. The abetment may be by instigation, conspiracy or intentional aid as provided under Section 107 IPC. However, the words uttered in a fit of anger or omission without any intention cannot be termed as instigation. (Vide: State of Punjab v. Iqbal Singh ((1991) 3 SCC 1), Surender v. State of Haryana ((2006) 12 SCC 375, Kishori Lal v. State of M.P.((2007) 10 SCC 797) and Sonti Rama Krishna v. Sonti Shanti Sree ((2009) 1 SCC 554)

18. In fact, from the above discussion it is apparent that instigation has to be gathered from the circumstances of a particular case. No straitjacket formula can be laid down to find out as to whether in a particular case there has been instigation which forced the person to commit suicide. In a particular case, there may not be direct evidence in regard to instigation which may have direct nexus to suicide. Therefore, in such a case, an inference has to be drawn from the circumstances and it is to be determined whether circumstances had been such which in fact had created the situation that a person felt totally frustrated and committed suicide. More so, while dealing with an application for quashing of the proceedings, a court cannot form a firm opinion, rather a tentative view that would evoke the presumption referred to under Section 228 CrPC."

39. The Supreme Court in the case of ***Sanju @ Sanjay Singh Sengar Vs. State of M.P. reported in (2002) 5 SCC 371*** has held as under:

"6. Section 107 IPC defines abetment to mean that a person abets the doing of a thing if he firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing." Further, in para 12 of the judgment, it is held as under: "The word "instigate" denotes incitement or urging to do some drastic or inadvisable action or to stimulate or incite. Presence of mens rea, therefore, is the necessary concomitant of instigation." The Supreme Court in the case of Gangula Mohan Reddy Vs. State of A.P. reported in (2010) I SCC 750 needs mentioned here. In which Hon'ble Apex Court has held that: "abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing - Without a positive act on part of accused to instigate or aid in committing suicide, conviction cannot be sustained - In order to convict a person under section 306 IPC, there has to be a clear mens rea to commit offence - It also requires an active act or direct act which leads deceased to commit suicide seeing no option and this act must have been intended to push deceased into such a position that he commits suicide - Also, reiterated, if it appears to Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to society to which victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstances individual in a given society to commit suicide, conscience of Court should not be satisfied for basing a finding that accused charged of abetting suicide should be found guilty- Herein, deceased was undoubtedly hypersensitive to ordinary petulance, discord circumstances of case, none of the ingredients of offence under Section 306 made out - Hence, appellant's conviction, held unsustainable".

40. In the case of **State of W.B. Vs. Ori lal Jaiswal, reported in 1994 (1) SCC 73,** the Supreme Court has held as under:-

"This Court has cautioned that the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the

cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it appears to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that that accused charged of abetting the offence of suicide should be found guilty".

41. The Supreme Court in the case of **Kishori Lal vs. State of M.P. reported in (2007) 10 SCC 797** has held in para 6 as under:-

"6. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in IPC. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. "Abetted" in Section 109 Motilal vs. State of M.P. means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence."

42. In the case of **Amalendu Pal @ Jhantu vs. State of West Bengal reported in (2010) 1 SCC 707**, the Supreme Court has held as under:-

"12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the Court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without their being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.

13. In order to bring a case within the purview of Section 306 IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC. 14. The expression 'abetment' has been defined under Section

107 IPC which we have already extracted above. A person is Motilal vs. State of M.P. said to abet the commission of suicide when a person instigates any person to do that thing as stated in clause firstly or to do anything as stated in clauses secondly or thirdly of Section 107 IPC. Section 109 IPC provides that if the act abetted is committed pursuant to and in consequence of abetment then the offender is to be punished with the punishment provided for the original offence. Learned counsel for the respondent State, however, clearly stated before us that it would be a case where clause 'thirdly' of Section 107 IPC only would be attracted. According to him, a case of abetment of suicide is made out as provided for under Section 107 IPC.

15. In view of the aforesaid situation and position, we have examined the provision of clause thirdly which provides that a person would be held to have abetted the doing of a thing when he intentionally does or omits to do anything in order to aid the commission of that thing. The Act further gives an idea as to who would be intentionally aiding by any act of doing of that thing when in Explanation 2 it is provided as follows: "Explanation 2.- Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act." 16. Therefore, the issue that arises for our consideration is whether any of the aforesaid clauses namely firstly alongwith explanation 1 or more particularly thirdly with Explanation 2 to Section 107 is attracted in the facts and circumstances of the present case so as to bring the present case within the purview of Section 306 IPC."

43. The Supreme Court in the case of **Amit Kapur Vs. Ramesh Chander reported in (2012) 9 SCC 460** has held as under :

"35. The learned counsel appearing for the appellant has relied upon the judgment of this Court in Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi) ((2009) 16 SCC 605 to contend that the offence under Section 306 read with Section 107 IPC is completely made out against the accused. It is not the stage for us to consider or evaluate or marshal the records for the purposes of determining whether the offence under these provisions has been committed or not. It is a tentative view that the Court forms on the basis of record and documents annexed therewith. No doubt that the word "instigate" used in Section 107 IPC has been explained by this Court in Ramesh Kumar v. State of Chhattisgarh ((2001) 9 SCC 618) to say that where the accused had, by his acts or omissions or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, an instigation may have to be inferred. In other words, instigation has to be gathered from the circumstances of the case. All cases may not be of direct evidence in regard to instigation having a direct nexus to the suicide. There could be cases where the circumstances created by the accused are such that a person feels totally frustrated and finds it difficult to continue existence."

44. In the case of **Ghusabhai Raisangbhai Chorasiya v. State of Gujarat, reported in (2015) 11 SCC**

753, the Supreme Court has held as under :

"21. Coming to the facts of the present case, it is seen that the factum of divorce has not been believed by the learned trial Judge and the High Court. But the fact remains is that the husband and the wife had started living separately in the same house and the Motilal vs. State of M.P. deceased had told her sister that there was severance of status and she would be going to her parental home after the "Holi" festival. True it is, there is some evidence about the illicit relationship and even if the same is proven, we are of the considered opinion that cruelty, as envisaged under the first limb of Section 498-A IPC would not get attracted. It would be difficult to hold that the mental cruelty was of such a degree that it would drive the wife to commit suicide. Mere extra- marital relationship, even if proved, would be illegal and immoral, as has been said in Pinakin Mahipatray Rawal (2013) 10 SCC 48 ,but it would take a different character if the prosecution brings some evidence on record to show that the accused had conducted in such a manner to drive the wife to commit suicide. In the instant case, the accused may have been involved in an illicit relationship with Appellant 4, but in the absence of some other acceptable evidence on record that can establish such high degree of mental cruelty, the Explanation to Section 498-A IPC which includes cruelty to drive a woman to commit suicide, would not be attracted."

45. Therefore, it is clear that a person can be said to have instigated another person, when he actively suggests or stimulates him by means of language, direct or indirect. Instigate means to urge forward or to provoke, incite or encourage to do an act. If the facts of the instant case are considered in the light of the law laid down by the Hon'ble Supreme Court in the above mentioned cases, then it would appear that PW-1 Pyara Devi has stated in her evidence that Phool Chandra and Neelam used to quarrel and appellant used to beat her on regular basis . A criminal case was also lodged by Neelam against Phool Chandra which had ended in compromise and thereafter Phool Chandra brought back Neelam and her three daughters to his house a few days after Holi. Even after that they both were not carrying good relations and they used to fight with each other. Phool Chandra was in a habit of beating Neelam on regular basis and had also beaten her on 19th of that month, on which her sister (Pushpa) came to persuade Phool Chandra not to beat Neelam again. However, on 24th of the same month at about 11:00 A.M. a quarrel started between them and on hearing the noise, she went in the house of Phool Chandra and found that he was brutally beating Neelam with fists and kicks. When she attempted to save Neelam she along with her son was pushed out of his house by appellant and he closed the door of the house and, thereafter she informed her sister (Pushpa), who came in the night at about 8:00 P.M., but the house of Phool Chandra was found locked from outside and on the next morning they came to know that Neelam had died in the canal and her dead body was found 3-4 days after the incident in Indira Canal at a place situated within the jurisdiction of Police Station-Gosaiganj, Lucknow.

46. We have already held that keeping in view the fact that vital incrimating circumstances pertaining to commission of murder of Neelam has not been put to

appellant by the trial Court and otherwise also having carefully perused the evidence adduced by the prosecution and other circumstances of the case, we are of the considered view that the prosecution has not succeeded in establishing the charge under Section 302 IPC against the appellant. But this is not the case pertaining to the charge for the offence under Section 306 I.P.C. as it was amply clear to the appellant that he is being tried for this offence and questions pertaining to committing this offence has also been put to him at the time of recording his statement under section 313 of Cr.P.C. and therefore he could not claim any prejudice or failure of justice if he is convicted for committing the offence under section 306 I.P.C. The facts and circumstances available on record particularly the evidence of P.W.1- Pyara Devi when she stated in her cross-examination that "अभियुक्त के घर ताला पड़ा था। हम लोग रात भर परेशान रहे थे। सवेरे लगभग आठ बजे खबर लगी कि नीलम खत्म हो गयी, नीलम नहर मे चली गयी।" and also the statement appearing in her cross-examination that "सुबह आठ बजे हल्ले पर मेरी बहन निकली थी और फिर उसी नहर के किनारे–किनारे तलाश किया था।" suggests that the deceased had committed suicide as she might have jumped into the canal, which flows adjacent to her matrimonial House.

47. Keeping in view the above placed statement of P.W.1- Pyara Devi, who is the star witness of this case and in view of the proved circumstances placed here in before and also keeping an eye on the fact that the trial court has committed manifest error in not placing the evidence/circumstances pertaining to causing of death of deceased before the appellant, we are of the considered view that the circumstances proved by the prosecution unerringly prove the factum that the appellant was regularly beating the deceased and on 19th October, 2010, he assaulted her where on P.W.1- Pyara Devi went to the house of appellant and persuaded him not to beat her again, however, on 24th October, 2010 appellant again assaulted the deceased with fists and kicks and which therefore, left no room for the deceased except to take the extreme step of suicide. The time of death of the deceased as ascertained by the Doctor also corroborates the fact that there is close nexus between the beating given to the deceased and time of her death and, therefore, it is proved that the appellant had abated the commission of suicide by deceased- Neelam. The proved circumstances are of such a nature that there can not be any other hypothesis except that either the deceased has been done to death by the appellant or she has committed suicide on the instigation of appellant. Keeping in view the fact that the injury found on the occipital region of the deceased may also be caused by hitting stone or rock and the Indira Canal was flowing adjacent to the matrimonial house of the deceased i.e. about 100 mtr. away and also the admission of P.W.1- Pyara Devi in her cross-examination that there was a common talk in the village that deceased had gone into the canal and also the fact that it is a case based on circumstantial evidence, we are of the considered view that the circumstances proved by the prosecution is capable of only one inference that the appellant had abated the suicide committed by the deceased.

48. Now the next question which arises for our consideration is, as to whether the appellant having been acquitted for the charge under Section 302 IPC could still be convicted under section 306 IPC. In **Dalbir Singh vs. State of U.P.,**

MANU/SC/0320/2004, the facts narrated are that the accused was charged under Section 302 IPC for having committed the murder of his wife Vimla and two daughters and was further charged under Section 304-B IPC for causing dowry death and also under Section 498-A IPC, the trial Court by his judgment and order dated 20.3.1997 convicted him under Section 302 IPC and sentenced him to death. He was also convicted under Section 498A I.P.C. and was sentenced to 3 years R.I. but was acquitted of the charge under Section 304B IPC. In appeal the High Court came to the conclusion that the charge under Section 302 IPC was not established and accordingly acquitted him for the said offence. The High Court also came to the conclusion that the accused was guilty under Section 306 IPC for having abetted commission of suicide by Vimla of setting herself on fire wherein her two daughters also died. But in view of the fact that no charge under Section 306 IPC was framed against the accused, the High Court, relying upon **Sangarabonia Sreenu v. State of A.P. MANU/SC/0816/1997,** held that the accused could not be convicted for the said offence. The High Court also noticed that a contrary view had been taken in an earlier decision in **Lakhjit Singh v. State of Punjab MANU/SC/0905/1994** but choose to rely upon the later decision as the settled view of the said High Court was that if there was conflict of opinion in two decisions of Hon'ble Supreme Court rendered by benches of equal strength, it is the later decision which has to prevail. In view of conflict of opinion in two decisions of Supreme Court rendered in **Lakhjit Singh and Anr. v. State of Punjab MANU/SC/0905/1994 and Sangarabonia Sreenu v. State of A.P. MANU/SC/0816/1997** the case was placed for hearing before three-Judges Bench. The Three Judges Bench of Hon'ble Supreme Court held as under :-

" 14. Here the Court proceeded to examine the question that if the accused has been charged under Section 302 IPC and the said charge is not established by evidence, would it be possible to convict him under Section 306 IPC having regard to Section 222 Cr.P.C. Sub-section (1) of Section 222 lays down that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Sub-section (2) of the same Section lays down that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. Section 222 Cr.P.C. is in the nature of a general provision which empowers the Court to convict for a minor offence even though charge has been framed for a major offence. Illustrations (a) and (b) to the said Section also make the position clear. "

*"In **Lakhjit Singh (supra)** though Section 464 Cr.P.C. has not been specifically referred to but the Court altered the conviction from 302 to 306 IPC having regard to the principles underlying in the said Section. In **Sangaraboina Sreenu (supra)** the Court completely ignored to consider the provisions of Section 464 Cr.P.C. and keeping in view Section 222 Cr.P.C. alone, the conviction of the appellant therein under Section 306 IPC was set aside.*

*We are, therefore, of the opinion that **Sangarabonia Sreenu (supra)** was not correctly decided as it purports to lay down*

as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC."

49. Hon,ble Supreme Court thus convicted the accused under Section 306 I.P.C. instead of 302 I.P.C.

50. In view of above, the appeal filed by the appellant is **partly allowed**. The conviction of the appellant under Section 302 and 201 of the I.P.C. is **set-aside** and he is **acquitted** of the charges under Section 302 and 201 I.P.C. Appellant is however now **convicted** for committing the offence under Section 306 I.P.C. The Judgment of trial Court with regard to the conviction and sentencing of appellant under Section 498A I.P.C. would remain unaltered and is hereby confirmed.

51. Having regard to the fact that the appellant has been exonerated of the charge under Section 302 and 201 I.P.C. for the reasons that certain circumstances have not been put by the trial court before the appellant at the time of recording of his statement under Section 313 of the Cr.P.C. and the remaining circumstances prove the offence under Section 306 I.P.C., we sentence the appellant to undergo rigorous imprisonment for 10 years with a fine of Rs.30,000/-. In default of payment of this fine, the appellant would undergo further imprisonment of simple nature for one year. The fine so deposited by the appellant would be distributed in equal shares amongst the children of deceased- Neelam.

52. Appellant is in jail, if he has already undergone the sentence as modified by this Court and on deposit of the fine as directed by this Court, he will immediately be released from prison if his further detention is not required in any other case.

53. Appellant would also file a personal bond with two sureties of the like amount to the satisfaction of the Chief Judicial Magistrate concerned under Section 437A of the Cr.P.C., **within 15 days** of his release from prison.

54. A copy of his judgment be immediately sent to the trial court for compliance.

(2020)03-05ILR A561
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.04.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1768 of 1996

Bhudhar & Ors. ...Appellants
Versus
State ...Opposite Party

Counsel for the Appellants:
Sri J.S. Tomar, Sri Arvind Kumar Srivastava[A.C.]

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

Criminal law- Indian Penal Code - Sections 147, 148, 302/149 & 323/149 - Appeal against conviction.

Held :- Benefit of Doubt- Statement of witnesses and circumstances together raise strongly suspicion about the occurrence and involvement of accused. (Para 57)

Common object to murder the deceased is not proved. Hence, the benefit of doubt goes in favour of accused.

Motive – In a case of direct evidence, motive is not of much importance. (Para 61)

Appeal partly allowed. (E-2)

List of Cases Cited:-

1. Ganga Ram Sah & ors. Vs. St. of Bihar, Criminal Appeal No.1143 of 2010,

2. Lallu Manjhi & anr. Vs. St.of Jharkhand, 2003 (2) SCC 401

3. Lakshmi Singh Vs. St. of Bihar, 1976 (4) SCC 394,

4. Om Prakash Vs. St. of Har., 2014 (5) SCC 753,

5. Vadivelu Thevar Vs. St. of Madras, AIR 1957 SC 614,

6. St. of Raj. Vs. Kalki 1981 (2) SCC 752,

7. Masalti Vs St. of U.P., AIR 1965 SC 202,

8. St. of U.P. Vs. Kisan Chand & ors. 2004 (7) SCC 629,

9. Dani Singh & ors. Vs. St. of Bihar, 2004 (13) SCC 203,

10. Masalti, Lal Ji Vs. St. of U.P., 1989 (1) SCC 437,

11. St. of U.P. Vs. Dan Singh & ors., 1997 (3) SCC 747,

12. Chikkarange Gowda & ors. Vs. St. of Mysore, AIR 1956 SC 731,

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Shri Arvind Kumar Srivastava, learned Amicus Curiae for the appellant no. 2 Chander son of Lallu Ram, Shri L.D. Rajbhar and Shri Sunil Kumar Tripathi learned A.G.As. for the State respondent.

2. The present appeal has been filed by three appellants Bhudhar, Chander and Roopram, all sons of Lallu Ram, residents of Village Adilabad, Police Station Bisalpur, District Pilibhit against the judgment and order dated 09.08.1996 passed by the Special/Additional Sessions Judge, Pilibhit in the Sessions Trial No.173 of 1986 under Sections 147, 148, 302/149 and 323/149 I.P.C., Police Station Bisalpur, District Pilibhit.

3. At the outset, we may note that nine persons were named in the first information lodged on 20.11.1985 for their involvement in the incident-in-question, out of whom accused Ganga Ram died during trial. Out of remaining eight, five accused persons namely Bhudhar, Chander, Roopram, Munna and Moti were convicted by the trial court for the offences under Section 302 read with *Section 149* and Section 323 read with *Section 149* IPC and sentenced each for life imprisonment alongwith fine of Rs.5000/-; as also for six months rigorous imprisonment for the above offences. In case of default or non-payment of the fine, they have to further undergo two years rigorous imprisonment. Four accused persons namely Chander, Roopram, Munna and Moti have also been convicted under Section 147 IPC and sentenced for six months rigorous imprisonment. Accused Bhudhar has also been convicted under Section 148 IPC and sentenced for one year rigorous imprisonment. All the punishment were to run concurrently.

+ 4. However, out of five convicted accused persons, in the Connected Appeal No.1757 of 1996 two accused namely Munna and Moti had died and their appeal has been abated vide order dated 12.07.2019 by this Court. In the present appeal, the appellants Bhudhar and Roopram had died and appeal on their behalf has been abated vide order dated 19.09.2019. Thus, we are left with the challenge to the order of the conviction of only one accused person namely Chander son of Lallu Ram in the present appeal.

5. As the prosecution story unfolded, the incident in question occurred on 20.11.1985 at about 07.00 A.M. The first information report was lodged by the person namely as 'Register son of Bhikari Lal' (hereinafter referred as the 'first informant') resident of village Adlabad, Police Station Bisalpur, District Pilibhit on 20.11.1985 at about 09.30 A.M. The Chik FIR was drawn on oral statement of the first informant recorded by the Head Moharir Puran Lal posted in the Police Station Bisalpur, Pilibhit. The first informant is son of deceased Bhikari Lal. As per the averments in the first information report, some dispute regarding landed property was going on between three accused namely Bhudar, Chander and Roopram (the appellants herein who were real brothers) and their cousin Sudami Devi in Tehsil Bisalpur. In the legal proceeding, deceased Bhikari Lal was a witness from the side of Sudama Devi. The first informant states that on the previous day of the incident in the evening, an altercation took place between Bhudhar, Munna, Ram Asrey and Moti who were pressurizing the deceased not to give statement in favour of Sudama Devi. On his denial to accede to their pressure, the accused persons became inimical to the deceased. On 20.11.1985 at about 07.00 A.M., when deceased Bhikari Lal, the first informant Register and a villager namely Pusey son of Sohan were going to their fields located towards western side of the village, as soon as they reached at the field of Sadhu near the Canal, nine accused persons named above came out from the field of Moti each armed with deadly weapons and surrounded/gheraoed the victim party. Accused/appellant Chander exhorted by saying that Bhikari Lal should be taught a lesson for appearing as a witness in favour of Sudama and that he should be killed on that day. Hearing this, three persons of the victim party raised cries. Hearing their cries, Munna Lal son of deceased Bhikari Lal and their relatives namely Itwari, Sri Ram and Chotey lal ran towards the accused persons challenging them. At that point of time, the accused persons were assaulting Bhikari Lal (deceased) and Pusey with Lathi. Looking to the witnesses approaching them, Bhudhar and Ram Asrey opened fire from their guns. Deceased Bhikari Lal got hit by the fire, fell in the Canal and died on the spot. The accused persons ran away in the grove of Moti. The witnesses then took out the dead body from the Canal and kept it on the Chabutara of one Maniram. Injured Pusey was sent for treatment to the Hospital by bullock-cart. While leaving the dead body in the custody of his family members, the first informant went to the police station to lodge the report. The first informant also submitted two empty cartridges allegedly collected from the spot which were fired by the two accused persons. The Chik report drawn by the Head Moharir is endorsed with the thumb impression of the first informant and has been proved and exhibited as Exhibit Ka-'1'.

6. The prosecution produced three witnesses of fact namely (i) Register son of the deceased/first informant, (as PW-1); (ii) Munna Lal another son of deceased Bhikari Lal as PW-2 and (iii) injured Pusey as PW-3. Amongst formal witnesses, PW-4, Doctor Harish Chandra Nath had appeared in the witness box to prove the injury

report. (exhibited as Exhibit 'Ka-3') prepared by him of the injuries of the witness PW-3 Pusey. Doctor P.K. Srivastava (PW-8) proved the post-mortem report and the injuries sustained by deceased Bhikari Lal.

7. PW-7 is the Investigating Officer who proved the reports such as site plan, recovery memo of the blood stained earth and plain earth, exhibited as Exhibit Ka-'10'. He states that the statements of nine accused persons were recorded on 13.12.1985. The statement of injured witness Pusey was recorded on 03.01.1986, on the date when investigation was completed and charge sheet (proved as Exhibit Ka-'17') was submitted by him. He proved the G.D. entry of Chik FIR which had been recorded as Rapat No.14 at about 09.30 A.M. on 20.11.1985, by Head Moharir Puran Lal as Exhibit Ka-'18', as Head Constable Puran Lal died before commencement of trial. About the motive narrated in the first information report, PW-7 (Investigating Officer) states that though he made an effort to get the necessary papers relating to the dispute from Sudama Devi but those papers were not provided to him till submission of the charge sheet.

8. PW-7 further states that though he did not indicate the field of Bhikari and Register in the site plan, but location of the spot of crime has been correctly indicated therein. The village Abadi was about two furlong from the site of the incident. The place mentioned as "Chabutara of Maniram" was about 1½ half furlong from the Puliya over the Canal. He admitted that he did not mention the place where accused persons had assaulted Pusey, the injured witness. He further states that statements of the eye-witnesses of the incident were recorded by him on the spot as soon as he visited the place. He denied suggestion of Bhikari Lal (deceased) and first informant (Register) being men of criminal antecedent. He denied suggestion of FIR being Ante-timed or he having not visited the scene of the crime and states that he or any other police officer did not collect any empty cartridge from the spot of crime.

9. As noted above, the Doctors PW-4 and PW-8 proved the reports prepared by them by entering in the witness box. PW-4 proved that injured Pusey was brought to the Primary Health Centre, Bisalpur and his injuries were examined at about 12.30 P.M, the injury report was prepared in his handwriting and signature, it was exhibited as Exhibit Ka-'3'. The injuries found on the person of injured witness Pusey are relevant to be noted hereunder:-

"1. Abraded contusion 12 cm x 5 cm at left side forehead including left eye upper & lower side, eye cannot be opened due to slenderness and traumatic swelling and area round the eye ball. Kept under observation and advised x-ray of left fickle, Eye ball and forehead. Blood is present at conjunctiva.

2. Abrasion 1 cm x 0.5 cm at Rt. Eyebrow in middle fresh in duration.

3. Clotted blood present at both nostrils. But no any external mark of injury seen."

10. When confronted about the nature of said injuries, PW-4 states that it was possible that injury Nos.1 and 2 could occur by the blow of Lathi.

11. PW-8, Doctor P.K. Srivastava who conducted the post-mortem proved the medico-legal report prepared by him as Exhibit Ka-'19' in his handwriting and signature. He proved the injuries found on

the body of the deceased in external and internal examination as under:- .

"Lacerated wound on the right side of head 4cm X1/12 C bone deep 8 cm above the right ear.

2. Gun shot wound of entry 3C X 3C circular size on the right side of abdomen blackening, tatooing and scroching not found, 5cm. below the lower rists.

3. Multiple gun shot wound of exit in 5 cm x 15 cm area on the Rt. Side of chest just below the right clavicle."

12. The post-mortem was conducted on 21.11.1985 at about 02.00 P.M. The possible time of occurrence of the injuries could be 24 to 48 hours prior to the postmortem. The possible time of murder could be around 07.00 A.M. on 20.11.1985. Injury Nos.2 & 3 were typical of the firearm whereas injury No.1 could occur from a blunt object like Lathi. Ante-mortem injuries were sufficient to cause death. Injury No.2 which is entry wound of 3x3 c.m. probably had been caused from behind.

13. From the medico-legal report of the deceased, it is evident that deceased had sustained one injury on his head as the blow of Lathi; Injury Nos.2 & 3 found on the body of the deceased correspond to each other, which means the deceased had sustained one firearm injury. As far as the injuries of PW-3 Pusey are concerned, from the injury report, it is evident that in all probabilities they have been caused by the blow of Lathi which hit him on his forehead. His eyes contained traumatic swelling which could occur within 24 hours as per the statement of the Doctor. These injuries, however, were not fatal and are mentioned as 'simple' in the injury report.

14. It is noted that from the statements or reports of three formal witnesses nothing could be elicited or pointed out to create any doubt or dent in the prosecution story.

15. We are, thus, left with the ocular version of the witnesses of fact. The prosecution produced three witnesses (PW-1, PW-2 and PW-3) as eye witnesses of the occurrence, amongst whom PW-3 is an injured witness.

16. In his deposition before the Court, the first informant Register (PW-1) reiterated his version in the first information report. Giving vivid details of the incidents, he narrates that Bhudhar and Ram Asrey were carrying guns whereas Mohan and Bulaki had "Kaanta" in their hands, rest of the accused persons were carrying Lathi. They first assaulted deceased Bhikari and Pusey by Lathi and seeing the witnesses/villagers approaching them, Bhudhar and Ram Asrey opened fires which hit the deceased. As noted above, from the medico-legal report it is evident that only one fire hit the deceased. The statement of the first informant that two fires hit his father (deceased) before he fell down is, thus, not correct. Two empty cartridges found from the spot were allegedly handed over by this witness to the police but they were not tallied with the Gun of Ram Asrey which was allegedly recovered by police. It is, thus, difficult to accept the version of the first informant that both the accused B*Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149 Section 149* hudhar and Ram Asrey had

opened fire. The presence of Ram Asrey on the spot was also doubted by the trial court. With regard to other accused persons Mohan and Bulaki to whom weapons namely 'Kaanta' had been assigned, it was noted by the trial court that no corresponding injury was found. It appears that for these reasons, trial court had acquitted three accused persons namely Mohan, Bulaki and Ram Asrey of all the offences under which they were charge sheeted.

17. In the above scenario, learned counsel for the appellant vehemently argued that firstly no evidence was brought by the prosecution regarding the motive alleged in the FIR. The eye witness account of the manner of assault on the victim party is not corroborated. The injuries of the witness PW-3 may have been caused on account of falling on the ground. Five persons assailed to have attacked deceased by Lathis which they were carrying individually whereas single injury of the blunt object was found on the person of deceased. Further, the prosecution story that deceased and first informant were going to their field at about 07.00 A.M. is unbelievable, in as much as, in the internal examination of deceased, his stomach was found empty and faceal matter was present in both small and large intestine. This condition of the dead body makes the whole prosecution story untruthful about the timing of the incident. From the fact that small and large intestine both were full with faceal matter, in all probabilities death had occurred before defecation by the deceased. This situation clearly proves that the prosecution has not come with clean hands as the death had been caused during the night hours. Presence of both PW-1 and PW-2 at the scene of occurrence, thus, becomes highly doubtful. The ocular versions of PW-1 of accompanying the deceased and PW-2 of reaching on the spot of occurrence hearing the cries of PW-1, are not corroborated from the medico-legal report. The statement of PW-3, projected as injured witness, is inconsistent with other witnesses of fact as the place of occurrence is highly disputed. Moreover, the place of occurrence had not been ascertained by sending blood stained earth and plain earth for chemical examination. The act of PW-1 in bringing empty cartridges to the police station on his own substantiates the defence version about the doubt with regard to the timing and place of occurrence.

18. In the whole prosecution story there is no independent witness. Even the witnesses who allegedly reached on the spot hearing the cries of the victim party are all related to the deceased. Moreover, none of them had been produced before the Court. Further, the prosecution has not proved the genesis of the alleged unlawful assembly. Three accused persons were real brothers to whom motive has been assigned whereas other members of the accused party have no concern. The act of eyewitnesses in implicating six persons unconnected with the crime is nothing but exaggeration. False implication of fellow villagers makes the version of eyewitnesses wholly uncreditworthy. Moreso, when no injury corresponding to the weapon (Kaanta) assigned to two accused was found. Further though Lathi was assigned to five accused persons but the version of eyewitness regarding the manner of assault is difficult to believe as single blow of Lathi was sustained by deceased. The submission, thus, is that the testimony of eyewitness becomes a blatant lie and the exaggeration and embellishment in their version shake the entire prosecution case.

19. As far as PW-2 Munna Lal is concerned, it is submitted that he is a Chance witness. He has been projected by the

prosecution only to give credence to the testimony of the PW-1 only with the idea to cover up the discrepancies in his testimony.

20. As regards PW-3, it is urged that he had sustained injuries somewhere else and he was brought in the story simply to make the testimony of PW-1 creditworthy. The inherent improbabilities and inconsistencies in the statement of the three eye witnesses makes their version about the timing of the incident and place of occurrence wholly unreliable. Reliance is placed on decision of the Apex Court in **(Ganga Ram Sah & others Vs. State of Bihar)1** decided on 27.01.2017 and **Lallu Manjhi & another Vs. State of Jharkhand2** to assert that where the weapons assigned to the accused persons, (included as member of the unlawful assembly) do not correspond to the injuries sustained by the deceased, the testimony of eye-witness becomes wholly unreliable. In that event, the Court has to look for corroboration in material particulars by reliable testimony, whether direct or the circumstantial before acting upon the testimony of the eye witnesses. And where the ocular version is inconsistent with other evidence on record, it would be dangerous to believe the prosecution version of common object of the unlawful assembly to commit murder so as to convict all accused persons of the offence of murder by taking recourse to *Section 149* Cr.P.C.

21. Placing the decision of the Apex Court in Lakshmi Singh Vs. State of Bihar3 (emphasis laid on para 13 to 16), it was vehemently urged by the learned counsel for the appellant that omission on the part of the prosecution to send the blood stained and plain earth collected from the place of occurrence for chemical examination, which could have fixed situs of the assault, proves to be fatal to the prosecution case. If the defence succeeds in throwing a reasonable doubt on the prosecution case, it is sufficient to enable the Court to reject the prosecution version and, thus, to set aside the conviction. The solitary firearm injury on the person of deceased in contradiction to the statement of prosecution witnesses PW-1 & PW-2 that two accused persons namely Bhudhar and Ram Asrey had opened fires from their guns which also hit the deceased, shows the falsehood of the prosecution story. In view of the exaggerations and embellishments found in the version of the eyewitnesses P.W.-1 & PW-2, it was necessary for the prosecution to corroborate the evidence of the eye witnesses through the expert evidence of the Doctor, and since no corresponding injuries were found on the person of deceased, the prosecution was required to explain the inconsistencies. The entire genesis and origin of the occurrence put forth by the prosecution is surrounded with suspicious circumstances and negatives the truth of the prosecution case.

22. In view of the inherent improbabilities, serious omissions and infirmities in the version of the eye witnesses coupled with the fact that eye witnesses PW-1 and PW-2 are closely related to deceased being his son, there cannot be any two opinion that the prosecution has miserably failed to prove the case against the appellant beyond reasonable doubt. As the prosecution rests its story entirely on eye witness account, their version having been found uncreditworthy, the whole prosecution case falls. The trial court has committed grave error in convicting five accused persons on the shaky version of the alleged eye witnesses projected by the prosecution. Moreover, the appellant Chander herein has

been assigned only the role of exhortion in the prosecution version itself. There is no evidence that he assaulted the deceased though he was assigned Lathi, he cannot be convicted of the offence of murder under Section 302 IPC by taking recourse to *Section 149* IPC. The appellant Chander, therefore, is entitled to be acquitted of all the offences of murder and assault on deceased Bhikari and injured Pusey. The appeal deserves to be allowed.

23. Learned AGA, on the other hand, submits that there is direct evidence of the occurrence. The testimony of three eye witnesses is consistent and there is no apparent contradiction in their version about the occurrence of the incident. Five out of nine accused persons being members of unlawful assembly were rightly held to be guilty of same offence by taking recourse to *Section 149* IPC. There is no delay in lodging of the first information report. The injuries sustained by the injured witness and deceased correspond to the weapons Lathi and firearm assigned to the accused persons. The fact that no injuries of deadly weapon "Kaanta" was found on the person of deceased or injured witness by itself does not make the prosecution story doubtful. Even the presence of a person who is a member of unlawful assembly at the spot of crime without any overt act in execution of the common object of unlawful assembly to commit murder, is sufficient to implicate him and hold him guilty of murder on the principle of vicarious liability which is fundamental principle for invocation of *Section 149* Cr.P.C.. Overt act or any specific act of a member of unlawful assembly in prosecution of common object of the assembly is not necessary to be proved to hold him guilty of the crime committed by that assembly. Reliance is placed on the decision of the Apex Court in **Om Prakash Vs. State of Haryana4.**

24. Analyzing the testimony of eye witnesses produced by the prosecution, we find that as far as PW-2 is concerned, as per his own version, he was not present with the deceased and reached the place of incident hearing cries of the persons of the victim party. He also assigned weapons in the hands of the accused persons in the same manner as averred by PW-1. Even the exhortation made by appellant Chander has been narrated by him in the same words as stated by PW-1. The act of fire opened by Bhudhar and Ram Asrey (two accused person) is also narrated in the same language. The distance of house of PW-2 where he was present at the time can be culled out from the description given by him in the cross-examination as under:-

(i) the place of occurrence was located at the western side of the village in question;

(ii) Maniram Ka Chabutara was the first place to reach while coming to the village from the western boundaries;

(iii) the house of PW-1 and deceased was situated on the East-West road approaching the village at a distance of 20 paces from Maniram Ka Chabutara;

(iv) the incident had occurred at a distance from Maniram Ka Chabutara, near the Canal at the field of Sadhu located near the field of Natthu Lal Sharma;

(v) the accused person came to the spot from the grove of Moti adjacent to the field of Nathu Sharma located near the place of occurrence;

(vi) in between their house and the place of murder, there lies only one field of Natthu Lal Sharma which was vacant at the relevant point of time;

(vii) the place of incident was at a distance of 20 to 30 paces from their house where PW-2 was present when he heard the cries of the first informant.

25. PW-2 further states that the place of incident was visible though not clear from their house and when he heard the cries of "bachao-bachao", he was outside the house. He immediately ran to the place of occurrence and when he left the house he could see some persons at the place of incident, but could identify them only when he reached at the field of Nathhu Sharma. He further states that after leaving the house when he reached at Maniram Ka Chabutara, at about 12 paces away from the place of occurrence he could identify the accused persons and saw them assaulting deceased Bhikari Lal and injured witness Pusey. As soon as the accused persons saw him and he simultaneously looked at them, Bhudhar and Ram Asrey opened fire. By the time firing was made he had reached at the field of Nathhu Lal Sharma.

26. From the above description of PW-2, it is evident that there was no occasion for him to hear the words of exhortation allegedly made by appellant Chander as he was not present on the spot with the victim party since the beginning. His omnibus narration of the incident cannot but be said to be an effort of the prosecution to add weight to the testimony of PW-1.

27. From the careful analysis of version of PW-2, it is evident that neither he was present at the scene of occurrence since the beginning nor he could reach on the spot when accused persons started assault by Lathi.

28. Even accepting his version as true, at the most, it can be said that he had reached near the place of occurrence on hearing cries of his father and brother and witnessed the act of firing by the accused. From his statement, it can also be culled out that as soon as he reached the field of Natthu Sharma, the accused persons opened fire at his father and ran away. The site plan was prepared in the presence of this witness (PW-2) which also indicates his presence at the place marked by letter 'B' which lies in the middle of the field of Natthu Sharma, at a distance from the spot of occurrence. It is, thus, clear that PW-2 had no chance to witness the whole sequence of events since the beginning. It is evident from his version that neither he could distinctly see weapons in the hands of individual members of the accused party nor he could hear the words of exhortation allegedly spoken by appellant Chander in the beginning of the incident. The prosecution has projected this witness as an eyewitness though his version from the cross-examination is proved to be a hearsay evidence. His narration of the incident appears to be from the eyes of PW-1, his brother and not his own and he had seen only some part of the incident and not the whole. His testimony seems to be self-contradictory and uncreditworthy so as to form basis of the conviction.

29. Considering the above, we are left with the testimony of remaining two eye witnesses PW-1 and PW-3. We find that PW-1 in his deposition in the Court has reiterated his first account of the incident given in the first information report. His statement of the genesis of the incident, the manner in which it took place on the fateful

day, the weapons carried by the accused party and the injuries caused to deceased is same as in the FIR. He deposed in the examination-in-chief that two empty cartridges handed over by him to the police were collected from the spot and they were fired by Bhudhar and Ram Asrey from their guns and that both fires hit his father. Single firearm wound of entry has been found on the body of deceased in addition to only one blow of Lathi on his head. The argument of the defence is that ocular version of PW-1 being in contradiction to the medical evidence it is evident that this witness is telling a lie. It cannot be assumed that another shot fired by one of the accused persons missed and as such it did not hit the deceased. It is, thus, urged that the ocular version of PW-1 is to be discarded as a whole and the defence theory that deceased was brought to death in the night hours and noone had seen the incident has to be accepted.

30. We find that the statement of PW-1 (first informant) and PW-3 regarding the incident and place of occurrence is consistent and is corroborated from other material evidence such as site plan which gives complete description and the distance of the place of occurrence from the house of deceased. Thus, it cannot be said that the place of homicidal death of Bhikari lal (deceased) was not proved. The place 'A' from where the dead body was lifted by the first informant and place 'C' where deceased was shot by the accused persons as indicated in the site plan is consistent with the testimony of eye witnesses PW-1 and PW-3.

31. Both these witnesses are found consistent in their statement that deceased was first assaulted by the accused persons by Lathi and when they saw other witnesses approaching them, fire was opened by accused Bhudhar which hit deceased who fell on the ground near canal; the accused party immediately ran away towards the field/grave of Moti. The appellant Chander herein has been assigned the role of exhortation in the following words:-

"आज भिखारी लाल को सुदामा देवी के मुक़दमे मे गवाही देने का मज़ा चखा दो और जान से मार दो"

32. PW-3, the injured witness states that when accused party was assaulting deceased Bhikari Lal, many people had reached the spot. He was also attacked by Roopram (a co-accused since deceased) by Lathi when he raised cries seeing accused persons assaulting deceased Bhikari lal. According to him, Bhudhar had opened fire on the deceased which hit him and he fell on the bank of the Canal and died on the spot. The accused persons immediately fled towards the west. The witnesses then lifted the body of deceased and kept it at the Maniram Ka Chabutara. His own injuries were examined by the Doctor. From the cross-examination of PW-3, it appears that his house was near the house of deceased. He being a neighbour and injured witness, his presence at the scene of occurrence cannot be doubted. It is difficult to accept that an injured witness would falsely implicate the accused persons leaving the real assailants, more-so when there is no suggestion of any enmity of the accused persons with the injured witness PW-3.

33. It is, thus, not possible for us to accept the hypothesis of the defence that the murder had occurred during the night hours in the absence of both PW-1 and PW-3. The presence of two eye witnesses

PW-1 and PW-3 cannot be discarded being natural at the scene of occurrence. Their statement about the assault by the accused party cannot be disbelieved.

34. Thus, from a careful analysis of the evidence produced by the prosecution, the following circumstances are emerging:-

(i) The first information report is prompt having been lodged within two and a half hours of the incident.

(ii) The homicidal death of the victim Bhikari Lal had occurred in the early morning when both PW-1 and PW-3 were accompanying him while going to their fields.

(iii) The statement of eye witnesses (PW-1 & PW-3) is consistent to the extent that accused persons had beaten deceased Bhikari Lal and injured witness PW-3 from Lathi. The injuries found on the person of deceased and PW-3 injured witnesses are also proof of the said fact.

(iv) The injuries of PW-3 were examined on the same day at about 12.30 PM and the Doctor who prepared the injury report had proved that the injuries had been caused by Lathi and are, thus, related to the weapon (Lathi) assigned to the members of accused party.

(v) Firearm injuries found on the vital part of the deceased alongwith one wound of Lathi in his head and from the narrtion of the eyewitness it is clear that the deceased was first beaten by accused persons by Lathi and later was brought to death by the single fire opened by Bhudhar (appellant No.1). There is no evidence of second shot of fire made by accused Bhudhar.

(vi) Mere fact that the injuries on the person of PW-3 are minor, it cannot be accepted that his statement is not to be given the weightage of the testimony of an injured witness. From the injuries found on the body of PW-3, atleast this much is proved that he was present on the scene of occurrence.

35. However, at the same time, we find that the prosecution has not been able to explain the following circumstances:-

(i) The allegation of firing made by another accused person Ram Asrey is not proved. No explanation has been given by the prosecution about the said part of statement of the first informant PW-1.

(ii) The recovery of gun allegedly used by Ram Asrey is disbelieved by the trial court being farce.

(iii) PW-3 Pusey did not utter a single word in his examination-in-chief regarding presence of Ram Asrey at the place of occurrence or he having fired at the deceased. He rather refused to identify Ram Asrey present in the Court and stated that he could recollect only this much that there was one more person with the accused party who was standing behind his house carrying gun of his father.

(iv) In cross-examination, Pusey PW-3 states that he heard the sound of fire while running away from the place of occurrence towards west. He then changed his version by saying that he heard the sound of fire while standing on the spot and that both fires were made by Bhudhar which hit the deceased.

(v) PW-3 Pusey was interrogated by the police after approximately three months of the incident on the day when charge sheet was submitted by the Investigating Officer. No explanation has been given by the Investigating Officer for causing delay in recording statement of the injured witness PW-3 under Section 161 Cr.P.C. His version regarding involvement of Ram Asrey and role of firing attributed

to him, therefore, is unbelievable. On confrontation by the defence, this witness explained that he was interrogated by the Investigating Officer after about three months.

(vi) There is no injury corresponding to 'Kaanta' a weapon assigned to two members of the accused party and for this reason the trial court had (rightly) acquitted three accused persons doubting their presence at the scene of occurrence.

36. From the above analysis, we find that the witnesses produced by the prosecution are neither wholly reliable nor wholly unreliable. In **Vadivelu Thevar Vs. The State of Madras5**, the Apex Court had laid down the test to assess the quality of oral evidence led by the prosecution for proving or disproving a fact. It was held therein that :-

".....Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way-it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court, equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial....."

37. It was, thus, held in a case that where the testimony of witnesses of prosecution is neither wholly reliable nor wholly unreliable, the Court has to circumspect and has to look for corroboration in material particulars by reliable testimony before acting upon the testimony of such witnesses. It is equally settled that no rigid formula can be derived to assess the weight to be attached to the oral evidence which would be dependent upon the facts and circumstances of each case. No hard and fast rule or straitjacket formula can be laid to test the truthfulness of the statement of witnesses. In such a case, whole testimony of the eye witnesses alongwith surrounding circumstances has to be considered by the Court in order to separate grain of truth from the chaff. It would be a dangerous trend to discard the whole testimony of an eyewitness because the witness was speaking an untruth in some aspect. Witnesses tend to decorate by given embroidery in a story. One hardly came across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respect as well. The evidence has to be sifted with care.

38. As observed by the Apex Court in **State of Rajasthan Vs. Kalki** 1981 (2) SCC 752 normal discrepancies in evidence are those which are due to normal error of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of

occurrence, and the like, as they are always be there, however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

39. Finding us in such a situation, in the instant case while carefully scrutinizing the prosecution evidence in our effort to separate grain of truth from the chaff, we find that the accused party formed an assembly which consisted of three brothers and other villagers. They reached the place of occurrence carrying Lathi and in a pre-mediated manner in prosecution of common object of the assembly attacked the deceased by Lathi. The injured witness (PW-3) was also assaulted when he raised cries. The assembly formed by the accused persons is proved to be an unlawful assembly within the meaning of Section 141 of the Indian Penal Code. As per the eye witness (PW-1 & PW-3) account, there were nine persons who were armed with Lathis, Kaantas and guns and all of them had attacked deceased Bhikari Lal with the common object to kill him. Whereas only one injury of blow of Lathi (a blunt object) was found on the person of the deceased Bhikari lal. Injured witness PW-3 was also assaulted by Lathi when he raised cries but there was no assault on the first informant (Register). Both the witnesses PW-1 and PW-3 are also found consistent in their statement that Bhudhar opened fire when he saw other witnesses/villagers approaching them. There is single firearm wound on the person of deceased which evidently was sufficient to cause his death. The alleged second fire opened by Ram Asrey could not be proved by the prosecution. Specific role of exhortation has been assigned to the surviving appellant Chander whereas general role of assault on the victim party has been assigned to all other members of the assembly.

40. The questions, thus, have arisen before us is to ascertain as to what was the common object of the unlawful assembly and whether appellant Chander can be convicted for the offence of murder under Section 302 IPC with the aid of the provision of *Section 149* IPC.

41. To reach at any conclusion, it would be apt to go through some legal pronouncements to understand the essence of words "common object" used in *Section 149* IPC. It is well established principle of law that when the conviction is recorded with the aid of Section 149, relevant enquiry to be made by the Court is whether the accused was a member of an unlawful assembly and not whether he actually took active part in the crime or not. The Constitution Bench of Apex Court in **Masalti Vs State of U.P.6** has stated at page No.148 as under:--

"What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by s.141, ***I.P.C. Section 142*** *provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the*

common objects specified by the five clauses of ***Section 141,*** *is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141."*

42. Further at page No.149 it is said:-

"In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

43. Considering the above legal position it was considered in **State of U.P. Vs. Kisan Chand & others** 2004 (7) SCC 6297, that the common object of the unlawful assembly can be gathered from the nature of assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence**.** It is an inference to be deducted from the facts and circumstances of each case (reference para 12 of the report)

(emphasis added).

44. In a subsequent decision in **Dani Singh & others Vs. State of Bihar8**, it is said that the emphasis in *Section 149* IPC is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine the vicarious liability of the members of an unlawful assembly (consisted of five or more persons) is as to whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overact is proved against a person who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of unlawful assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141.

45. Considering the literal meaning of the "common object" it is said:-

"11.....The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common

object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.
"

46. While explaining further, it is observed that "common object" is different from a "common intention" as it does not require a prior concert and a common meeting of mind before the attack. It is enough if each (member of the assembly) has the same object in view and their number is five or more and that they act as an assembly to achieve that object. It is held that:-

"12.....The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instanti."

47. It was further explained that :-

"13. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared

by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object, but would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore"

48. The argument that since definite roles have not been assigned to the accused persons (members of the assembly) and, therefore, *Section 149* is not applicable was held as untenable considering the law laid down in **Masalti, Lal Ji Vs. State of U.P.9; State of U.P. Vs. Dan Singh & others10.** The observations made therein have been noted in paragraph Nos.'15' & '16' in the following manner:-

"15.To similar effect is the observation in Lalji v. State of U.P. (1989 (1) SCC 437). It was observed that:

"Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

"16. In State of U.P. v. Dan Singh and Ors. (1997 (3) SCC 747) it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to Lalji's case (supra) where it was observed that'

"while overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149".

49. We may also profitably note the distinction between 'common object' and 'common intention' drawn by the Apex Court in **Chikkarange Gowda & others Vs. State of Mysore**11 in paragraphs Nos.9 & 10 as under:-

"9.It is quite clear to us that on the finding of the High Court with regard to the common object of the unlawful assembly, the conviction of the appellants for an offence under Section 302 read with Section 149, Penal Code cannot be sustained. The first essential element of Section 149 is the commission of an offence by any member of an unlawful assembly ; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.

In the case before us, the learned Judges of the High Court held that the common object of the unlawful assembly was merely to administer a chastisement to Putte Gowda. The learned Judges of the High Court did not hold that though the common object was to chastise Putte Gowda, the members of the unlawful assembly knew that Putte Gowda was likely to be killed in prosecution of that common object. That being the position, the conviction under Section 302 read with Section 149, Penal Code was not justified in law.

10. So far back as 1873, in Queen v. Sabed Ali 20 Suth W R (Cr) 5 (A), it was pointed out that Section 149 did not ascribe every offence which might be committed by one member of an unlawful assembly while the assembly was existing, to every other member. The section describes the offence which is to be so attributed under two alternative forms: (1) it must be either an offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly ; or (2) an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

In Barendra Kumar Ghosh v. Emperor the distinction between Sections 149 and 34, Penal Code was pointed out. It was observed that Section 149 postulated an assembly of five or more per ons having a common object, namely, one of those objects named in Section 141, and then the doing of acts by members of the assembly in prosecution of that object or such as the members knew were likely to be committed in prosecution of that object. It was pointed out that there was a difference between common object and common intention ; though the object might be common, the intention of the several members might differ. The leading feature of Section 34 is the element of participation in action, whereas membership of the assembly at the time of the committing of the offence is the important element in Section 149. The two sections have a certain resemblance and may to a certain extent overlap, but it cannot be said that both have the same meaning.

The distinction between the two sections was again explained in a recent decision of this Court. Nanak Chand v. State of Punjab, Cr App No. 132 of 1954, D/- 25-1-1955 ."

50. From the above exposition of law, it is clear that:-

(i) Though express agreement after mutual consultation to infer "common object" of the assembly of five or more persons is by no means necessary but it is incumbent on the prosecution to prove that the offence was committed in prosecution of the "common object" which should be common to all the members of the assembly and that the said offence was committed with a view to accomplish that common object.

(ii) There may be a situation where unlawful assembly may be formed at any stage by all or few members of the assembly and it need not continue to be the same. Some others members may have just joined or adopted it. It may be modified or altered or abundant at any stage.

(iii) It is possible that members of an unlawful assembly may have community of object upto a certain point beyond which they may differ in their object and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object. As a consequence of this, the effect of *Section 149* may be different on different members of the same assembly.

(iv) An assembly which was not unlawful when it assembled may later become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one, comes into existence at the outset. The time of forming an unlawful intent is not material.

51. We may further note that the object and motive is entertained in human minds and it being merely a mental attitude, no direct evidence can be available and, like intention, object of the assembly has to be gathered from the act which the person commits and the result therefrom. There cannot be any hard and fast rule to lay down the circumstance from which the common object can be culled out. It may reasonably be collected from the nature of the assembly, arms it carries and behavior at or before or after the scene of incident. The word 'knew' used in the second part of *Section 149* implies something more than a possibility and it cannot be made to assume or presume that "it might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. The converse preposition, however, is not true. There may be cases which would come within the second part and not within the first part. The distinction between two parts of *Section 149* cannot be ignored or obliterated. In every case, it would be an issue to be determined whether the offence committed falls within the first part or it was an offence such as the member of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part.

52. Keeping this in mind, the Apex Court in **Chikkarange Gowda11** has made a distinction between first and second part of *Section 149* and held that the High Court was not justified in law in conviction under Section 302 read with *Section 149* IPC when it reached at the conclusion that the common object of the unlawful assembly was merely to administer a chastisement to deceased.

53. In light of the above legal position for invocation of *Section 149* IPC, the crucial question before us to find out in the instant case as to whether the offence of murder was committed by accused Bhudhar in prosecution of common object of the unlawful assembly which was to kill deceased Bhikari Lal or that the act of firing was his individual act only.

54. Answer to this question is necessary to fix vicarious liability on

accused-appellant Chander and convict him for the murder committed by accused Bhudhar.

55. Having analyzed the oral testimony, the whole basis of prosecution case in the surrounding circumstances noted above, we find that only this much is proved by the prosecution that accused persons came to the spot with the common object of assaulting deceased Bhikari Lal in order to teach him a lesson so that he may not enter in the witness box against them and in prosecution of their common object, they started assaulting Bhikari lal by Lathi. The deceased somehow managed to save himself and got only one blow of Lathi in his head, but his death was caused by the firing made by Bhudhar who opened the fire seeing the villagers/witnesses coming towards them. The act of Bhudhar in opening fire, in our considered opinion, seems to be his own individual act and not an act in prosecution of 'common object' of the unlawful assembly. We say so because to our minds had the accused persons formed the unlawful assembly with the common object to kill deceased Bhikari Lal, Bhudhar (who was carrying a gun) could have opened fire as soon as the accused party caught the victim party and fled the spot. It is evident that firing was opended by Bhudhar apprehending that they might be caught or attacked by the villagers who were approaching them. The act of Bhudhar appears to be spontaneous and not in furtherance of common object of the assembly.

56. We are convinced that the act of firing by Bhudhar cannot be attributed to the common object of the unlawful assembly and other members of that assembly cannot be held vicariously liable for the spontaneous act of one member of the assembly. But there cannot be a dispute that the appellant Chander was carrying Lathi which is proved from the statement of eye witnesses. The deceased was inflicted grievous injuries on his vital part (head) by the blow of Lathi. Mere fact that only one blow of Lathi was sustained by deceased, it cannot be said that the said injury cannot be attributed to the common object of the unlawful assembly. Being brother of the main assailant Bhudhar, it cannot be said that appellant Chander was not sharing the common object of the unlawful assembly to assault the deceased Bhikari Lal to teach him a lesson so that he may not appear in the witness box to depose against them.

57. Further, from the above conspectus of the facts and circumstances of the instant case, the common object of unlawful assembly can only be inferred to cause grievous injuries and not to kill the deceased. The assembly formed by five or more persons was unlawful from the beginning and they shared common object to cause grievous injuries to deceased but not to kill him and thereby committed offence punishable for "culpable homicide not amounting to murder". The act of Bhudhar in causing death of Bhikari Lal by opening fire during the course of the scuffle is found to be his own individual act and not in furtherance of common object of the unlawful assembly. The prosecution has not been able to bring any cogent evidence on record to prove that all the accused persons had shared the common object of committing murder or that they had positive knowledge that the offence of murder was likely to be committed in prosecution of that object. As the common object to kill or murder deceased is not proved and the testimony of prosecution witnesses is found doubtful in that respect, the benefit of doubt has to go in favour of the accused appellant Chander.

58. As far as the second part of *Section 149* is concerned, in the totality of the facts and circumstances of the instant case, the appellant

accused Chander can only be said to have shared the knowledge of common object of the unlawful assembly to cause grievous hurt to deceased. The knowledge that the act of unlawful assembly was likely to cause death of the deceased cannot be safely attributed to him.

59. In the instant case, the accused person came together armed with deadly weapons and started assaulting the deceased and another injured witness on the exhortation made by the appellant Chander. Up to that extent, the common object of the unlawful assembly to cause grievous injuries to the deceased with a view to teach him a lesson is proved by the prosecution. Beyond that point, the prosecution has not been able to bring any cogent evidence which would prove that other members of the unlawful assembly shared a common object or knowledge to kill deceased Bhikari Lal and in prosecution of that common object one of the accused Budher had opened fire from the gun carried by him.

60. We may note at the cost of repetition that deceased had sustained single blow of Lathi which may not be sufficient in ordinary course of nature to cause his death within the meaning of clause (3) of the Section 300 IPC. The appellant could be at best saddled with knowledge that the act of unlawful assembly might result in death of the person they attacked. It could not be assumed that he had knowledge that such a blow would cause death. He is, therefore, held liable for commission of the offence under Section 304 (part-II) of the IPC.

61. To the above extent, we do not agree with the conclusion drawn by the trial court. The trial court appears to have been swayed away by the motive assigned by the prosecution, to commit the crime. As far as the motive is concerned, it is well settled that motive is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited the accused to commit a particular crime. In a case of direct evidence, motive is not of much importance. But when motive is proved it is evidence of the evil intention and is also relevant to show that the person who had the motive to commit the crime actually committed it. Significance or relevancy of motive would primarily depend upon the facts and circumstances of a given case.

62. In the instant case, even if we accept the presence of motive assigned by the prosecution to commit the crime, it would not be a factor which can be weighed in favour of the prosecution to hold that the common object of unlawful assembly was to commit murder or kill deceased Bhikari Lal. From a careful analysis of the oral testimony of prosecution witnesses we have concluded that common object of unlawful assembly was not to cause murder of deceased but to cause grievous injuries with a view to teach him a lesson not to appear in the witness box against them. Having held that we can not give much credence or undue importance to the motive assigned to the accused party so as to tilt the balance in favour of the prosecution or against accused appellant Chander so as to hold him liable for committing the offence of murder.

63. In light of the above discussion, in the totality of facts and circumstances of the instant case, we modify the judgement of the trial court to convict the accused appellant Chander being guilty of an offence under Section 304 (Part-II) IPC. In

our considered opinion in the facts and circumstances of this case, the common object of unlawful assembly being one of causing grievous hurt with the deadly weapon by hitting deceased on his vital part (head), would make the appellant vicariously liable for conviction of an offence punishable under Section 304 (Part-II) IPC and a sentence of 7 years rigorous imprisonment with fine of Rs.10,000/- is to be awarded to him for the said offence. The conviction of appellant Chander for the offence under Section 147 IPC is, however, found justified. The sentence of six months rigorous imprisonment for the said offence awarded by the trial court to appellant Chander is hereby upheld. Both the above punishments are to run concurrently.

64. We are told that the appellant Chander has undergone some part of the sentence awarded to him by the courts below. He was earlier granted bail but is languishing in jail since 05.09.2019 in pursuance to the Non-bailable warrant dated 30.04.2019 issued by this Court in the present appeal. For the period of sentence undergone by appellant Chander, he is entitled to be given remission.

65. Computing the total period of the sentence undergone by appellant Chander, he be kept in the jail to serve out the remainder of sentence, if any. He shall be entitled to be released from jail only after serving out the sentence of 7 years rigorous imprisonment (maximum punishment awarded to him) and also on deposit of fine of Rs.10,000/-.

66. In case of non-deposit of fine imposed as above, the appellant Chander would be liable to serve further six months rigorous imprisonment.

67. With the above, the Appeal No.1768 of 1996 is partly allowed.

68. Certify this judgement to the court below for compliance.

69. Compliance report be submitted through the Registrar General, High Court, Allahabad.

(2020)03-05ILR A581
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.02.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1826 of 1997

Vidya Sagar Dwivedi ...Applicant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri M.C. Chaturvedi, Sri V.P. Srivastava, Sri Vikas Tiwari

Counsel for the Opposite Party:
D.G.A., Sri I.K. Chaturvedi, Sri J.S. Sengar, Sri Vinod Kumar Sahu, Sri Virendra Singh Parmar, Sri Hari Om Singh

Criminal law- Indian Penal Code - Sections 302/504 - Appeal against conviction.

Held :- Relative witnesses- The testimony cannot be disbelieved because they have enmity with the accused. (Para 50)

Chance Witnesses- The testimony cannot be rejected only on the ground of a chance witness. (Para 52)

Minor Contradiction / Inconsistency In Evidence- Cannot be ignored if does not affect the core of the prosecution.

Motive – Does not play important role in case of direct evidence. (para 70)

Appeal rejected. (E-2)

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4.Dilawar Singh VsSt.of Delhi (2007) 12 SCC 64 1,

5. Ashok Kumar Chaudhary Vs. St. of Bihar, 2008 (61) ACC 972 (SC),

6. Mukesh Vs. St. for NCT of Delhi, AIR 2017 SC 2161,

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8. Ravi Kumar Vs. St. of Punj., AIR 2005 SC 1929,

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12. St. of UP Vs. Sheo Lal, AIR 2009 SC 1912,

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23. M.C. Ali Vs. St. of Kerala AIR 2010 SC 1639,

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25. Bhajan Singh & ors. Vs. St. of Haryana; (2011) 7 SCC 421,

26. Jayabalan Vs. U.T. of Pondicherry, 2010(68) ACC 308 (SC),

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30. Jalpat Rai Vs. St. of Haryana AIR 2011 SC 2719,

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34. Ganapathi Vs. St. of T.N., AIR 2018 SC 1635,

35. Rupinder Singh Sandhu Vs. St.of Punj., (2018) 16 SCC 475,

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37. Bhagwan Jagannath Markad Vs. St. of Maharashtra, (2016) 10 SCC 537,

38. Ramji Singh Vs. St. of UP, 2019 (4) Crimes 585 (SC),

39. Raj Kishore Jha Vs. St. of Bihar, 2003(47) ACC 1068 (SC),

40. Chittarlal Vs. St. of Rajasthan, (2003) 6 SCC 397,

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42. Kallu Vs.St. of Haryana, AIR 2012 SC 3212,

43. St. of UP Vs. Naresh; 2011 (75) ACC 215) (SC),

44. Gosu Jayarami Reddy and another Vs.St. of A.P.; (2011) 3 SCC(Cri) 630,

45. Parsu Ram Pandey Vs. St. of Bihar AIR 2004 SC 5068,

46. Shivappa Vs. St. of Karnataka; AIR 2682,

47. Ramchandaran Vs. St. of Kerala AIR 2011 SC 3581,

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49. Bhagwan Jagannath Markad vs St. of Maharashtra, (2016) 10 SCC 53,

50. Bijoy Das Vs. St. of W.B., (2008) 4 SCC 511,

51.Jayabalan Vs.U.T. of Pondicherry, 2010 (68) ACC 308 (S)

52. Narain Singh Vs. St. of Haryana, (2004) 13 SCC 264,

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54.Laxman Vs. St.of Maharashtra, (2002) 6 SCC 710,

55.St.of Karnataka Vs. Sheriff; AIR 2003 SC 1074,

56.Gulam Hussain Vs. St.of Delhi, AIR 2000 SC 2480,

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58. St. of UP Vs.Nawab Singh AIR 2010 SC 3638,

59. Bipin Kumar Mondal Vs. St. of W.B. 2005 SCC (Crl) 33,

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61. Thaman Kumar Vs. St.of Union Territory of Chandigarh (2003) 6 SCC 380,

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63. Gopi Ram v St. Of UP, 2006 (55) ACC 673 SC,

64. R.R. Reddy v St. of AP, AIR 2006 SC 1656,

65. Sucha Singh v St. of Punj.; AIR 2003 SC 1471,

66. St. of Rajasthan v Arjun Singh AIR 2011 SC 3380,

67. Varun Chaudhry v St. of Rajasthan AIR 2011 SC 72,

68. Saddik Vs. St. of Guj., (2016) 10 SCC 663,

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

1. Heard Sri V.P. Srivastava, learned Senior Advocate, assisted by Sri Vikas Tiwari learned Advocate for the appellant, Sri V.S. Parmar and Sri Hari Om Singh learned Advocates for the complainant and Sri L.D. Rajbhar and Sri Prem Shankar Mishra learned AGA for the State-respondents.

2. This criminal appeal has been preferred against the judgment and order dated 23.10.1997, passed by District and Sessions Judge, Hamirpur, in Sessions Trial No. 299 of 1994 (State vs. Vidya Sagar Dwivedi), arising out of Case Crime No. 126 of 1994, under Sections 302/504 IPC, Police Station Kotwali, District Hamirpur, whereby the accused-appellant has been convicted and sentenced to rigorous imprisonment for life under Section 302 IPC.

3. Brief facts of the case is that the incident took place on 08.06.1994 at about 10:00 PM in the night at Village Tikrauli, Police Station Kotwali, District Hamirpur near the house of Ram Das Pal. The informant Jagjeet and the accused-appellant Vidya Sagar Dwivedi are residents of that village. On the date of incident, there was Tilak Ceremony of Tula Ram (son of informant), wherein his guests had come. His elder son namely Babu Lal (deceased) went to invite the guests for dinner who were staying in the neighbor house of Ramdas Pal and Rambharose. The informant Jagjeet and his brother Raghuveer were sitting on the Chabutara in front of their house. There was light of petromax and electricity. When Babu Lal reached to the electric pole near the house of Ram Das Pal, accused Vidya Sagar Dwivedi came with his licensee double barrel gun and said to Babu Lal using abusive language that "have you gone mad as you have not invited us in the Tilak". Saying this, the accused-appellant Vidya Sagar Dwivedi fired on Babu Lal by his licensee double barrel gun in order to cause death of Babu Lal. The fire hit Babu Lal in his armpit and he fell down. Thereafter, the informant and his brother reached there and they challenged the accused, whereupon, he ran away. The condition of Babu Lal was serious and he was immediately taken to Government Hospital, Hamirpur by a tractor. In the hospital, Babu Lal was examined and he was referred to Halat Hospital, Kanpur and from Halat Hospital, Kanpur, the injured was referred to Lucknow. On 22.06.1994 at about 08:40 PM, Babu Lal died because of the injuries caused by the accused Vidya Sagar.

4. Prior to the death of the injured, the informant Jagjeet after admitting the injured in Halat Hospital Kanpur, came back to Hamirpur on 11.06.1994 and got the written report inscribed by Kamlesh and gave the same to Kotwali, Hamirpur at 2:10 PM in the noon and on that basis, the offence was registered and chik FIR was prepared for the offence under Sections 307, 504 IPC. The Statement of Babu Lal was also recorded on 15.06.1994 in the Halat Hospital, Kanpur. On 23.06.1994, in the night at about 12:30 AM, the police prepared the inquest report of the deceased before the Panches along with the necessary letters and papers and the dead body was sealed and sent for postmortem. The postmortem was conducted in Lucknow on 24.06.19. The informant sent the death report of Babu Lal to the police through one Shyam Lal Sahu of the village and on that basis, the offence was converted under Sections 302 and 504 IPC. The Investigating Officer prepared the site map of the place of occurrence, took over possession of petromax and prepared memo thereof and delivered it back in the presence of the witnesses. The statement of Jagjeet, Ram Kishore, Prem Narayan were recorded by the Investigating Officer. Thereafter, the charge sheet was submitted against accused for the offence under Section 302 IPC. The charge was framed against the accused for the offence under Section 302 IPC who denied charge and claimed trial.

5. The prosecution examined as many as 13 witnesses in support of the prosecution case. PW-1 is Jagjeet, who is informant and eye witness. PW-2 Prem Narain, PW-3 Kamlesh, PW-4 Raghuvir are the witnesses of fact. PW-5 Tula Ram Sahu is a witness of inquest and memo of petromax delivered to police by him. PW-6 Dr. U.C. Sinha has proved the injury report of deceased. PW-7 Dr. T.N. Agarwal has conducted the postmortem of the deceased.

PW-8 SI Tulsi Ram Dohre, PW-9 SI Shri Krishna Vidyarthi, PW-10 Constable Ram Jeevan Bind, PW-11 Head Constable Ram Sanehi Pal, PW-12 Constable Brijesh Kumar Singh and PW-13 SI Tribhuwan are the formal witnesses and have proved the police papers.

6. After completion of the prosecution evidence, the statement of accused-appellant Vidya Sagar Dwivedi was recorded under Section 313 Cr.P.C., wherein he has stated that the statements of the fact witnesses are false and they have given the false evidence because of group rivalry in the village and jealousy. He has also stated that in the *Tilak*, a ceremonial firing took place by the guests of the informant and the deceased sustained injuries and to save the guests, the informant has falsely implicated him in the present case. The defence examined Thakur Das as DW-1 in defence.

7. The learned trial court after hearing the prosecution and defence and considering the material available on record has passed the impugned judgment convicting and sentencing the accused appellant Vidya Sagar Dwivedi for the offence under Section 302 IPC.

8. Aggrieved by the impugned judgment, the accused-appellant has preferred this criminal appeal on the ground that the points which were raised by defence, were not considered by the learned trial court. The eye witnesses produced by the prosecution did not prove the case beyond shadow of doubt and the learned trial court has wrongly appreciated the evidence. It was also not considered that the accused was not having inimical relations with the accused. There was no motive for the commission of crime. The prosecution evidence is entirely different from the medical evidence and the conclusion arrived at by the learned trial court is illegal and arbitrary and the impugned judgment is liable to be quashed and the accused-appellant is entitled for acquittal.

9. Learned counsel for the accused-appellant has argued that the accused-appellant was falsely implicated in the present case and it was a case of ceremonial firing and by the firing of the relatives, the deceased sustained injuries and died. Further submission is that the incident took place on 08.06.1994 at about 10:00 PM in the night and the FIR has been lodged on 11.06.1994 at about 02:10 PM in the noon. Therefore, there is inordinate delay in lodging the FIR and the delay has not been explained by the prosecution. it has also been submitted that there is lack of adequate motive with the accused-appellant to commit the offence and all the fact witnesses who have been examined by the prosecution are relatives and closely associated with the complainant side and they gave false evidence to save their relatives. There is discrepancies and contradictions in the statements of the witnesses and on that account also, the prosecution version is doubtful.

10. On the other hand, learned AGA and the learned counsel for the complainant have submitted that the learned trial court after due appreciation of the evidence on record and finding that four eye witnesses have proved the prosecution case, convicted and sentenced the accused-appellant.

11. It appears necessary that the evidence given by the prosecution before the learned trial court may be referred in

order to appreciate the legality and correctness of the findings of the learned trial court.

12. PW-1 Jagjeet is the informant and eye witness who has stated on oath that the accused Vidya Sagar Dwivedi belongs to his village. One year before, there was Tilak Ceremony of his younger son Tula Ram and the relatives from Chandpurwa had come and they stayed in the house of Ram Das and Ram Bharose. After the Tilak Ceremony, the informant and his younger brother Raghuveer were sitting on their door. Petromax and electricity lights were there. At about 10:00 PM in the night, his elder son Babu Lal went to invite the guests for dinner to the house of Ram Das Pal. Accused Vidya Sagar Dwivedi met him on the door with his double barrel licensee gun. The accused used abusive language using castist words and said Babu Lal that *"have you gone mad and not invited us in the Tilak Ceremony."* Thereafter, in order to kill the deceased, the accused fired on him by his gun which hit the deceased on his armpit. Babu Lal fell down. The incident was seen by the informant, his brother Raghuveer, Prem Narain and Ram Kishore in the light of electricity and petromax. Babu Lal was taken to the District Hospital, Hamirpur by tractor. His condition was serious and therefore, the informant did not go to lodge FIR. Babu Lal was taken to Halat Hospital, Kanpur, where he was put under treatment. Thereafter on 11.06.1994, he lodged FIR by getting the written report scribed by Kamlesh. The witness has further stated that because of the injuries, Babu Lal died in Lucknow Hospital. The witness has proved the written report as Ext. Ka-1.

13. PW-2 Prem Narain (eye witness) has stated that he knows Vidya Sagar (accused) who belongs to his village. One year before, on 08.06.1994, there was Tilak Ceremony of Tula Ram and the guests had come for Tilak Ceremony and they were staying in the house of Ram Das and Ram Bharose. He was attending the guests. At about 10:00 PM, in the night, Babu Lal (deceased) reached the door of Ram Das Pal to invite the guests. There was light of petromax and electricity. The accused Vidya Sagar Dwivedi came there with a double barrel licensee gun and started using abusive language saying why he did not invite him in the Tilak Ceremony and thereby insulting a "Brahmin". Thereafter, the accused fired with intention to kill Babu Lal and the fire hit him. The incident was seen by Jagjeet, Raghuveer, Ram Kishore and him. They all challenged the accused, whereupon, he fled away. Babu Lal was taken to District Hospital on tractor where from he was referred to Kanpur and from there, he was taken to Lucknow. Because of injuries, he died in Lucknow hospital.

14. PW-3 Kamlesh (inscriber of the written report) has stated that at about one year before, he had come to village Tikrauli to see his grandfather Ram Aadhar, who was seriously ill. There, guests had come for Tilak Ceremony of Tula Ram, the brother of Babu Lal. The guests were staying in the house of Ram Das. At about 10:00 PM, when Babu Lal reached on the door of Ram Das Pal. There was light of electricity and petromax. On the way, accused Vidya Sagar Dwivedi fired by his gun on Babu Lal on his stomach who sustained injury and fell down. Because of the injuries, after 14-15 days, Babu Lal died in the hospital. Babu Lal was first taken to District Hospital, Hamirpur. The FIR was lodged by Jagjeet. He scribed the report and after hearing the same, Jagjeet put his thumb impression on the report. The

witness has stated that the name of the son of Ram Aadhar is Ram Prasad and he saw the incident from the house of Ram Aadhar and when Babu Lal sustained fire arm injury, he was near the house of Ram Das Pal.

15. PW-4 Raghuveer is also an eye witness. He has stated that on the date of incident, there was Tilak Ceremony of his nephew Tula Ram and for that the guests from Chandpurva had come and were staying in the house of Ram Das and Ram Bharose Sahu. He and his brother Jagjeet and other relatives were sitting on the Chabutara of his house. After the Tilak Ceremony, Babu Lal went to invite the guests for dinner. At that time, it was 10:00 PM in the night. There was electric light on the pole and patromax was also lightening. Babu Lal hardly reached to the door of Ram Das Pal, the accused Vidya Sagar Dwivedi, who was coming from the side of his house started abusing him by castist words and said, "have you gone mad and not called me, a "Brahaman," in the Tilak Ceremony." The accused was carrying a double barrel licensee gun and saying that Babu Lal had insulted a Brahamin, with the intention to kill, fired on Babu Lal. Babu Lal sustained injuries on his armpit. On hearing the sound of fire, he and his brother Jagjeet reached on the spot. The incident was seen by Prem Narain, Kamlesh and Binda also. On being challenged, accused Vidya Sagar Dwivedi ran away from there. Babu Lal was taken to District Hospital, Hamirpur by tractor, from where he was referred to Kanpur Halat Hospital. After three days, finding some improvement in the condition of the deceased, the report was lodged.

16. PW-5 Tula Ram has proved the inquest report and has stated that the inquest report was prepared before him on which he signed and thereafter the dead body was sent for postmortem. He gave two petromax to the SO as he asked for the same and the memo was prepared and he also signed on it. Thereafter the petromax was delivered back to him. At the time of evidence, petromax was placed before the trial court and the same was proved.

17. PW-6 Dr. U.C. Sinha, Surgeon, U.H.M. Hospital, Kanpur has stated that on 08.06.1994, he was posted as EMO, District Hospital, Hamirpur. In the night, at about 11:30 PM, Babu Lal Sahu aged about 25 years son of Jagjeet Sahu of village Tikrauli was brought to the hospital by Raghuveer Sahu and he was examined by him. He found following injury on the body of Babu Lal :

(1) Fire arm entry wound 2cm. x 1.5 cm. x cavity deep in stomach in oval shape on the front side and below the left ribs margin, 3 cm away from the middle line. The margin of the injury was torn and bending towards inside. There was blackening and tattooing. The nearby hairs were scorched. The injury was bleeding. X-ray was advised and the injured was admitted in the hospital.

18. The doctor has stated that the injury was fresh and was caused by fire arm which was kept under observation. The police was informed. He proved the medical report and stated that the injury was possibly caused on 08.06.1994 at 10:00 PM in the night. The injury must have been caused from the distance of 2 to 3 feet.

19. PW-7 Dr. T.N. Agarwal conducted postmortem of the dead body of Babu Lal on 23.06.1994. The dead body was sent by

SO, Police Station Cant, Lucknow. Babu Lal had died in the Command Hospital, Lucknow on 22.06.1994 at about 08:40 PM. Rigor Mortis was not found in the *upper extremity* and it was present in the lower extremity. Four pellets were recovered during postmortem which were put in an envelope and sealed. Following ante-mortem injuries were found on the body of deceased Babu Lal:

(1) 10 cm long wound with nine stitches on the upper left part of the abdomen.

(2) incised wound stitched internally with imprints of stitching externally 18 cm long extending from ..... to cm below ebulliences.

(3) Stitched wounds of 1.5 cm long with three stitches present on lateral aspect of chest 15 cm. below the left axilla.

(4) Five stitched wounds, 5 cm long present on lateral aspect of left side chest 8 cm below left axilla.

(5) Two incised wounds each with two stitches with indwelling of connected drainage flag present one on left side and other on right side of abdomen 3 cm above iliac on either side.

(6) Stitched wound with stitching of protrude intestine 3 cm in diameter present one on left side and other on right side of abdomen.

(7) septic wound 1.5 x 1.5 cm .....(not readable paper being torn)

The doctor has stated that the injuries found on the body of the deceased were sufficient to cause death.

20. PW-8 SI Tulsi Ram has stated that on 23.06.1994, he was posted as Sub Inspector, Police Station Cant. With reference to Report No. 15 of 10:30 AM of that date, he went to Command Hospital mortuary with Constable Brijest Kumar Singh for preparing the inquest report. The people and relatives of family who were present in the mortuary were made *Panch* witnesses of the inquest. He prepared the inquest report and sealed the dead body and prepared the other papers proved as Exts. Ka-7 to Ka-9 and sent the dead body for postmortem.

21. PW-9 IO Shri Krishna Vidyarthi has stated that on 13.06.1994, he got the investigation of the case, went to the place of occurrence on 13.06.1994 and recorded the statements of Jagjeet, Ramkishore, Prem Narain and inspected the place of occurrence. On 15.06.1994, he recorded the statement of the injured Babu Lal and of witness Reghuveer. On 22.06.1994, the accused Vidya Sagar Dwivedi had surrendered before the court. Thereafter the investigation was taken over by Sri T.P. Banaudha, SHO. He has further stated that he went to the place of occurrence but he did not get any blood there as it was a public way and the blood was already destroyed. He prepared the site map of the place of occurrence on the identification of the informant Jagjeet. The witness has also proved the chik FIR as secondary witness.

22. PW-10 Constable Ram Jeevan Bind has stated that on 11.06.1994 at about 02:10 PM in the noon, the informant Jagjeet gave a written report on the basis of which the offence was registered and chik FIR was prepared.

23. PW-11 Head Constable Ram Sanehi has proved the written report regarding the death of Babu Lal in the Hospital which was entered into the GD Report No.14 at 11:00 AM on 24.06.1994 and the offence was converted into that of Section 302 IPC.

24. PW-12 Constable Brijesh Kumar Singh has stated that he took the dead body with relevant papers and letter of CMO and

delivered the same for postmortem. Thereafter he submitted postmortem report in the police station.

25. PW-13 Inspector Tribhuan has stated that in the year 1994, he was In-charge Inspector of PS Kotwali, Hamirpur. On 11.06.1994, the case was registered in his presence. Initially it was investigated by SI R.K. Vidyarthi. On 24.06.1994, the death report of Babu Lal was given by Shyam Pal Shahu and the offence was converted into Section 302 IPC. On 26.06.1994, he took over the investigation and recorded the statements of some of the witnesses, obtained the injury report of Babu Lal from Jagjeet Sahu and inner wear of the deceased and memo was prepared and was sealed before the witnesses. The clothes of the deceased were also sealed. The witness has proved the clothes and has stated that he recorded the statement of witnesses of inquest report and other witnesses and thereafter submitted charge sheet. He has been recalled and re-examined as CW-1 and he stated that on 15.06.1994, he recorded the statement of injured Babu Lal in the Halat Hospital. At that time the injured was conscious. The witness has submitted a copy of his statement which was recorded by him in the case diary and the same was proved by the witness as Ext. Ka-14.

26. After the statement recorded under Section 313 Cr.P.C. of the accused appellant Vidya Sagar Dwivedi, DW-1 Constable Thakur Das was was examined who proved the GD report dated 09.06.1994 which he brought and submitted on being summoned by the court.

27. The first argument of the learned counsel to the accused-appellant is that the FIR has been lodged on the fourth day from the date of incident and as such, it is grossly delayed. From the perusal of the written report on the basis of which offence has been registered and chick FIR has been prepared, we find that the incident took place on 8.6.1994 at 10 PM and the FIR has been lodged on 11.6.1994 at 2.10 PM. In the FIR, it has been stated that in the incident, Babu Lal sustained firearm injuries and his condition was critical and serious. He was taken to District Hospital, Hammirpur and finding his conditions to be serious, he was referred to Helat Hospital, Kanpur where he was kept under treatment. PW-1 informant Jagjeet has stated that he was referred to Military Hospital, Lucknow on the fourth day. He has stated that he came back on the fourth day to his village and and got the written report scribed by Kamlesh and lodged FIR by giving the report to the Police. He has stated that because the condition of Babu Lal was serious, he could not go to lodge FIR earlier. It is pertinent to mention that the injured remained in treatment and on 22.6.1994, he died during treatment. His death and his being under treatment continuously till he died further shows his serious condition after he got injured in the incident.

28. The Supreme Court has time and again expressed the view that delay in lodging FIR is not relevant if the prosecution has explained the delay by giving reasonable explanation. Thus, **Marudanal Augusti v State of Kerala 1979 CAR (SC) 296** , the Supreme Court has observed:

"The entire fabric of the prosecution case would collapse if the FIR is held to be fabricated or brought into existence long after the occurrence and any number of witnesses could be added

without there being anything to check the authenticity of their evidence."

29. In **Meharaj Singh v State of UP (1994) 5 SCC 188,** it was laid down by the Court:

"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story."

30. Again, in **State of HP v Gian Chand (2001) 6 SCC 71** followed by **Dilawar Singh v State of Delhi (2007) 12 SCC 641,** the Supreme Court expressed the view as under:

"Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in either coming before the police or before the court, the courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case."

31. In **Ashok Kumar Chaudhary v State of Bihar, 2008 (61) ACC 972 (SC)** and **Mukesh v State for NCT of Delhi, AIR 2017 SC 2161** and **Mallikarjun v State of Karnataka, 2019 (4) Crimes 468 (SC)**, it has been held that in lodging of FIR, if causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging FIR and the delay would not adversely affect the case of the prosecution.

32. In the case in hand, it is clear that the son of the informant sustained firearm injury and was taken to District Hospital and from there he was referred to Halat Hospital, Kanpur. In such situation, the primary consideration of the family was to first ensure best available treatment to the injured. The Supreme Court has laid down in **Ravi Kumar v State of Punjab, AIR 2005 SC 1929** that the concern of the relatives of the victim of deadly assault is first to save life of the victim. PW-1 has stated that the condition of the deceased was serious and therefore, he could not go to lodge FIR. We find that in the facts and circumstances of the case, there is no delay in lodging the FIR and, for the sake of argument, if it is assumed that there is delay in lodging FIR, the prosecution has adequately and reasonably explained the delay.

33. It has been further argued by the learned counsel that the incident took place

in the night at 10 PM and there was not enough light to identify the assailant. The Supreme Court has clarified the law on this point in various judgments and has laid down that a witness, who is accustomed to live in darkness, poor light or no light, and acquainted with the accused, can identify the accused even in darkness. In **Kalika Tewari v State of Bihar, JT 1997(4) SC 405,** the Supreme Court held,

"The visible capacity of urban people who are acclimatized to fluorescent light is not the standard to be applied to villagers whose optical potency is attuned to country made lamps. Visibility of villagers is conditioned to such lights and hence it would be quite possible for them to identify men and matters in such lights."

34. In **Ram Gulam Chowdhary v State of Bihar, 2001(2) JIC 986 (SC),** it was argued that it was not possible for the eye witnesses to have identified the accused persons in poor light of lantern in the night. The Supreme Court rejected the argument and remarked that *"as the incident took place in village and the visibility of villagers are conditioned to such lights and it would be quite possible for the eye witnesses to identify men and matters in such light."*

35. In **Sheoraj Bapuray Jadhav v State of Karnataka, (2003) 6 SCC 392**, in a trial u/s 302/34 IPC, accused persons were known to prosecution witnesses. Occurrence had taken place at about 11.00 PM, two days prior to the new moon day. Parties were used to live in the midst of nature and accustomed to live without light. Further, they were close relatives and living in the neighboring huts. Similarly, in **State of UP v Sheo Lal, AIR 2009 SC 1912**, the murder had taken place at night and the source of light was not indicated in the FIR and the accused and the eye witnesses were closely related. It has been held by the Supreme Court in both the cases that the evidence of eye witnesses cannot be discarded on the basis of non-disclosure of source of light or insufficiency of light as well-acquainted persons can be well identified in darkness. In **Durbal v State of UP, 2011 CrLJ 1106 (SC) and Hari Singh v State of UP, AIR 2011 SC 360**, Where the parties belonged to the same village and were well known to each other, it has been held that merely because torch not taken into possession by the IO would not mean that witnesses were not credible and conviction under Section 302 IPC was held proper.

36. In this case, it has been mentioned in FIR that there was Tilak Ceremony of the younger brother of the deceased. All the fact witnesses have stated during trial that because of the Tilak Ceremony, there was enough light all around of electric and petromax and they saw the accused causing fire on deceased by his double barrel gun by which the deceased sustained serious injury. The fact of Tilak Ceremony of the younger brother of the deceased has not been denied by the defence. On the contrary, it has been defence version that in ceremonial firing on the occasion of Tilak, the deceased sustained injury of firearm. Two petromax was taken into possession during investigation by IO and delivered back to the younger brother Tularam and it also supports the version of prosecution regarding the source and availability of light on the place of occurrence at the time of incident. We find no contradiction in the statements of fact witnesses on this point. As such, there is no force in the submission of the learned counsel to the accused-appellant.

37. Other argument is regarding presence and credibility of the eye-witnesses. The submission of the learned counsel for the accused-appellant is that out of four witnesses of fact examined by the prosecution, PW-1 Jagjit is informant who is father of deceased and PW-4 Raghuveer is his real brother and he is the only witness, besides informant, whose name finds mention in the FIR. They are related and highly interested witnesses and their testimony requires strict scrutiny before placing reliance. The name of PW-2 Prem Narain is not named in FIR whereas, PW-4 Kamlesh is scriber of written report and he belongs to other village, not mentioned in FIR as eyewitness, whose presence at the time of incident is doubtful, and in any case he is only a chance witness and cannot be relied.

38. So far as the argument in respect of related witness is concerned, in the fact and circumstances of the case, they are the most natural witnesses. They are brothers and they live together. The Tilak of the son of informant had taken place and the guest and relatives were gathered there in whose presence the incident took place. It was month of June also and the time of incident being 10 PM, it cannot be said that the people must have gone to sleep or their presence out side the house is any how unnatural.

39. The law in respect of the testimony of related witnesses has been time and again reiterated by the Supreme Court that the testimony of related witnesses cannot be discarded merely on the basis of relationship. The only requirement is that the testimony of such witness should be scrutinized cautiously and carefully. In **Dalip Singh v State of Punjab (1954) SCR 145**, while rejecting the argument that witnesses who are close-relatives of the victim should not be relied upon, the Court held as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

40. In **Masalti v State of UP AIR 1965 SC 202**, the Supreme Court observed:

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice."

41. The Supreme Court has also taken the view that related witness does not necessarily mean or is equivalent to an

interested witness. A witness may be called interested only when he or she derives some benefit from the result of litigation; a decree in a civil case, or in seeing a person punished in a criminal trial. In **Darya Singh v State of Punjab, AIR 1965 SC 328,** followed by **State of UP v Kishanpal (2008) 16 SCC 73,** the Court held as under:

"On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

42. Again, in **Appa v State of Gujarat, AIR 1988 SC 698,** the Court has observed:

"Experience reminds us that civilized people are generally insensitive when crime is committed even in their presence. They withdraw from both, victim and vigilant. They keep themselves away from the Court. They take crime as a civil dispute. This kind of apathy of general public is indeed unfortunate but it is everywhere whether in village life or town and city. One cannot ignore this handicap. Evidence of witnesses has to be appreciated keeping in view such ground realities. Therefore, the Court instead of doubting the prosecution case where no independent witness has been examined must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any suggested by the accused."

43. Similar view has been taken in **State of AP v S. Rayappa (2006) 4 SCC 512,** where the court observed that it is now almost a fashion that public is reluctant to appear and depose before the court especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court stated the principle as follows:

" ....by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

44. Further, in **Pulicherla Nagaraju @ Nagaraja Reddy v State of AP (2007) 1 SCC (Cri) 500**, the Supreme Court has held as under:

"In this case, we find that the trial court had rejected the evidence of PW1 and PW2 merely because they were interested witnesses being the brother and father of the deceased. But it is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise, found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted."

45. Similarly, in **Satbir Singh v State of UP, (2009) 13 SCC 790**, the Court has held as under:-

"It is now a well-settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon....."

46. In **M.C. Ali v State of Kerala AIR 2010 SC 1639; and Himanshu v State (NCT of Delhis, (2011) 2 SCC 36, Bhajan Singh and others v State of Haryana; (2011) 7 SCC 421,** it was laid down that evidence of a related witness can be relied upon provided it is trustworthy. Again, in **Jayabalan v U.T. of Pondicherry, 2010(68) ACC 308 (SC),** the Supreme Court has made following observation:

"We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

47. **Dharnidhar v State of UP, (2010) 7 SCC 759** referred the above observation of **Jaya Balan (supra)** and held that there is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. Similar view has been taken in **Ram Bharosey v State of UP AIR 2010 SC 917,** where the Court stated that a close relative of the deceased does not become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice.

48. Again, in **Balraje @ Trimbak v State of Maharashtra, (2010) 6 SCC 673**, it has been held that when the eye-witnesses are stated to be interested and inimically deposed against the accused, it would not be proper to conclude that they would shield the real culprit and rope in innocent person. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyze the evidence of related witnesses and those witnesses who are inimical towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

49. Subsequently, in **Jalpat Rai v State of Haryana AIR 2011 SC 2719** and **Waman v State of Maharashtra AIR 2011 SC 3327**, it was observed that the over-insistence on witnesses having no relation with the victims often results in criminal justice going away. The testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of

the offence. This view has been reiterated in **Shyam Babu v State of UP, AIR 2012 SC 3311, Dhari & Others v State of UP, AIR 2013 SC 308 and Bhagwan Jagannath Markad (supra).** Recently, in **Ganapathi v State of Tamilnadu, AIR 2018 SC 1635,** the Court found no force in the argument that the conviction based on the evidence of family members in a murder trial is not sustainable. In **Rupinder Singh Sandhu v State of Punjab, (2018) 16 SCC 475,** it has been reiterated by the Supreme Court that relationship by itself will not render the witness untrustworthy. The Supreme Court laid down as below:

"Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. ..... A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

50. Thus, in view of aforementioned decisions of the Supreme Court, it is settled position of law that the statements of the interested witnesses can be safely relied upon by the court in support of the prosecution story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons who are closely related to the deceased and inimical with the accused. When their statements find corroboration by other evidence, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then there is no reason as to why the statement of so-called 'interested witnesses' cannot be relied upon by the Court. It would be hard to believe that the close relatives shall leave the real culprit and shall implicate innocent persons falsely simply because they have enmity with the accused persons.

51. So far as the non-mentioning of the other two eye-witnesses in the FIR is concerned, it makes hardly any difference. In **Jarnail Singh v State of Punjab, 2009 (6) Supreme 526, Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 537 and Ramji Singh v State of UP, 2019 (4) Crimes 585 (SC)**, it has been held that the FIR is not the encyclopedia of all the facts relating to crime. The only requirement is that at the time of lodging FIR, the informant should state all those facts which normally strike to mind and help in assessing the gravity of the crime or identity of the culprit briefly. In **Raj Kishore Jha v State of Bihar, 2003(47) ACC 1068 (SC)** and **Chittarlal v State of Rajasthan, (2003) 6 SCC 397,** it has been laid down that mentioning of names of all witnesses in FIR or in statements u/s 161 CrPC is not a requirement of law. Such witnesses can also be examined by prosecution with the permission of the court. Non-mentioning of the name of any witness in the FIR would not justify

rejection of evidence of the eye-witness.

52. PW-3 Kamlesh has been said to be chance witness as he belongs to another village Banjauli and it has been said that he was not a guest on the occasion of Tilak. In his statement, he has stated that he had gone to village Tikrauli at the time of incident to see his grandfather Ramadhar who was running sick. He has further stated that he saw the incident from the house of Ramadhar. The witness has stated that he also comes from the family of deceased and he is a cousin brother. He has denied the suggestion given to him during cross-examination that he was not present there and did not see the incident. In **Ramesh v State of UP, 2010 (68) ACC 219 (SC) and Kallu v State of Haryana, AIR 2012 SC 3212**, it has been laid down that it is not the rule of law that chance witness cannot be believed. The reason for a chance witness being present on the spot and his testimony requires close scrutiny and if the same is otherwise found reliable, his testimony cannot be discarded merely on the ground of his being a chance witness. Evidence of chance witness requires very cautious and close scrutiny. The witness has not been challenged from the side of defence on the point of sickness of his grandfather nor on the point that he lives in the same locality. Therefore, we find that the presence of the witness is natural. He has given vivid description of the incident in which the accused caused firearm injury to the deceased. He has also stated that he scribed the written report on the dictation of Jagjeet who after hearing the same, put his thumb impression. He has further stated that he had gone to Hospital at Hammirpur with injured and had also gone to Police Station with informant to lodge the FIR.

53. We also find that the other fact witnesses have narrated the incident in the like manner and there is no unusual contradiction, discrepancy or improvement in their evidence. They all have stated that the moment the deceased reached to the door of the house of Ram Das Pal, the accused met him, challenged him angrily for not inviting him on Tilak which was an insult of a brahmin like him and shot fire causing injury by the double barrel gun he was carrying with him. All the witnesses have stated that there was sufficient light of electricity and petromax at the place of occurrence and this fact appears to be correct in view of occasion of Tilak Ceremony of the younger brother of deceased.

54. Place of occurrence has been shown by the IO in the site map prepared by him during investigation which is Ext. Ka-10 which was prepared as pointed out by the informant and other witnesses. There is a pathway from north to south and on both sides of the pathway, houses of the inhabitants of that locality have been shown which includes the house of informant where Tilak Ceremony took place and the house of Ramdas Pal and Rambharose where the guests were staying. The informant and his brother Raghuveer and others were sitting on the chabutara shown as **B** which is situated in front of the house of informant and seemingly, the place of incident shown as **A** is visible from there and is situated at about 50 steps away and this has been also stated by PW-1 in his statement. From the house side, the deceased went towards the house of Ramdas Pal where the guests were staying, to invite them for dinner. Seeing that the deceased fell down on sustaining injury, informant and his brother rushed to the place. The IO has demonstrated appropriately the places from where the witnesses saw the accused firing on deceased and the number of houses shown on both sides and in view of Tilak Ceremony, many more persons must have

seen the incident. IO has also shown the electric poll and the places where petromaxes were lighting. It has been argued from the side of defence that no pellet or blood stains were recovered from the place of occurrence which creates doubt whether such incident took place there. PW-9 SO Sri Krishna Vidyarthi (IO) who has prepared and proved site map has stated that he got the investigation on 13.6.1994 and on inspection of spot, he did not find any blood stains as more than 7 days were passed and the place of occurrence being a pathway, blood stains were destroyed. We find that the explanation given by the prosecution is convincing as on the fourth day from the date of incident, the FIR was lodged and place of occurrence being on the pathway, the blood stains must have been destroyed. All the four witnesses have proved the place of occurrence as mentioned in the site map prepared by the IO. As such, we do not find any force in the submission on this point and the place of occurrence has been fully established.

55. Certain discrepancies, improvement and contradictions have been pointed out in the statements of fact witnesses. It has been said that in the FIR, it has been written that the Tilak was to take place, but, all the witnesses have stated that Tilak Ceremony was over when the incident took place. PW-1 has been cross-examined on this point and he has stated that he does not see any difference between the two. We find that all the fact witnesses have stated that when the incident took place, the Tilak Ceremony was over and the deceased was going to invite the guests for dinner. It has been further pointed out that PW-1 has stated that *when the Inspector took statement of the deceased in Kanpur Halat Hospital, the FIR was not lodged* whereas, CW-1 has stated that he took the statement of deceased on 15.6.1994 in the presence of Raghuveer and the injured was conscious and on his statement, Raghuveer also signed. The FIR was lodged on 11.6.1994. The defence has not clarified during cross-examination that PW-1 stated so with reference to the statement of deceased which was recorded by CW-1. It should also be taken into consideration that the witness is rustic, illiterate villager and he may not have any idea on such technical matter. CW-1 has not been put any question regarding presence of PW-1 at the relevant time when the statement of deceased was recorded. Apparently, the statement given by PW-1 referred above in 'italics' is not correct and appears to have been given in some confusion and it cannot be given any weight as it does not go to the root of the prosecution case.

56. It has been also pointed out that PW-3 Kamlesh has stated that for lodging FIR, he, Jagjeet, his son Ramcharan and his brother Raghuveer had gone to Police Station. Whereas, PW-4 Raghuveer has stated that Jagjeet went back to Hammirpur to lodge FIR and he stayed in Kanpur Hospital. PW-1 Informant has also stated that with him, Kamlesh also went to Police Station to lodge FIR. GD report dated 11.6.1994, Ext. Ka-12, also makes mention that Jagjeet with Kamlesh came and gave written report scribed by Kamlesh on the basis of which offence was registered against accused for the offence under section 307/504 IPC. Had Raghuveer been also accompanying, the same must have found mention in the GD. We find that the statement of PW-3 Kamlesh is to that extent is incorrect and mistaken. But this mistake hardly impacts the credibility of witness.

57. It needs to be mentioned that where own son of 25 years in age who was in army and the eyewitnesses were in close relation of the victim, in such a horrendous situation, the witnesses are not supposed to be perfectionist to give the exact account of

the incident and narrate every aspect related thereto in cyclostyle form. Some sort of contradiction, improvement and embellishment is bound to occur in the statement. As laid down in **State of UP v Naresh; 2011 (75) ACC 215) (SC)**, in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

58. In **Gosu Jayarami Reddy and another v State of Andhra Pradesh; (2011) 3 SCC(Cri) 630**, it was observed that Courts need to be realistic in their expectation from the witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorized by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased on what part of the body there is some mix-up or confusion.

59. Further, in **Parsu Ram Pandey v/s State of Bihar AIR 2004 SC 5068, Shivappa v State of Karnataka; AIR 2682, Ramchandaran v/s State of Kerala AIR 2011 SC 3581,** it was held that minor discrepancies or some improvements would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on which they give their depositions in Court. In **Mukesh v State for NCT of Delhi, AIR 2017 SC 2161 and Bhagwan Jagannath Markad v State of Maharashtra, (2016) 10 SCC 53**, it was reiterated that minor contradictions in the testimonies of the prosecution witness are bound to be there and in fact they go to support the truthfulness of the witnesses. In view of the above, we are of the view that there is nothing in the deposition of the eye-witnesses on the basis of which their evidence can be discarded.

60. The learned counsel has submitted that it was specific case of defence as stated in the statement under section 313 that the deceased sustained injuries in ceremonial firing on the occasion of Tilak. PW-3 Kamlesh has stated that there was ceremonial firing on the occasion of Tilak and his statement supports the defence version. We find that the defence version in fact goes to corroborate at least the fact that the deceased sustained firearm injuries on the place, date and time of incident. Except PW-3, other witnesses of fact, PW-1, PW-2 and PW-4, have denied that any ceremonial firing took place. Even if it so happened, it is not possible to jump to a conclusion that the deceased sustained injuries in ceremonial firing, particularly when all the four eye-witnesses have categorically stated that they saw the accused firing on the deceased who sustained injuries and fell down.

61. Another submission is with regards to the credibility of the dying declaration which has been recorded by IO.

The submission of the learned counsel is that the dying declaration has been recorded by IO which is not admissible and cannot be relied upon. It has been also submitted that there is no certification of the doctor regarding mental and otherwise fitness of the of the injured at the time of giving statement to the IO. Para 115 of the Police Regulation has also not been complied with.

62. In **Bijoy Das v State of West Bengal, (2008) 4 SCC 511** and **Jayabalan v U.T. of Pondicherry, 2010 (68) ACC 308 (SC)**, **it has been held** that it is settled law that a dying declaration is an important piece of evidence under section 32(1) of the Evidence Act and if a dying declaration is found to be true and voluntary and is not a result of tutoring or prompting or a product of imagination then there is no need for corroboration by any witness and conviction can be recorded on its basis alone. In **Narain Singh Vs. State of Haryana, (2004) 13 SCC 264**, the Supreme Court explained the sanctity of dying declaration and said that a person on the verge of his death has a special sanctity as at that solemn moment a person is most unlikely to make any untrue statement. The shadow of impending death is by itself guarantee of the truth of the statement of the deceased regarding the circumstances leading to his death. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person.

63. In **State of Gujarat Vs. Jayrajbhai Punjabhai Varu, AIR 2016 SC 3218**, the Supreme Court has laid down the principle for appreciation of dying declaration and has remarked that the courts have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. The Court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the Court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction.

64. In **Laxman v State of Maharashtra, (2002) 6 SCC 710**, a Five-Judge Bench of the Supreme Court has held that certificate by doctor as to mental fitness of the deceased is not necessary in all cases because certificate by doctor is only a rule of caution. Voluntary and truthful nature of the declaration can be established otherwise also. But it must be proved that the maker was in a position to make dying declaration and it is not a result of tutoring or imagination. Recording of dying declaration by Magistrate is not mandatory and the same can be recorded by any person. It is also not necessary that Magistrate must be present, although to provide authenticity a Magistrate is usually called. No oath is required for dying

declaration. A dying declaration cannot be rejected merely because it is not recorded in question and answer form but in the narrative form. Dying declaration can be made by gestures also. If evidence shows that he/she was conscious and in stable position, dying declaration cannot be discarded because of grave injury. The Court observed:

"The justice theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may effect their truth."

65. In **State of Karnataka v. Sheriff; AIR 2003 SC 1074 and Gulam Hussain v State of Delhi, AIR 2000 SC 2480,** it has been held that a dying declaration can also be recorded by police personals and it cannot be discarded merely because it has been recorded by a police personnel. Evidence of state of mind can be given by witnesses who heard and saw the dying declaration being given by the injured.

66. Applying the principle of law discussed above, we find that the statement of the deceased was recorded by the IO in the hospital in this case in presence of the eye-witness PW-4 Raghuveer who signed on the statement. CW-1 who has proved the dying declaration as Ext. Ka-14 has stated that the injured was in a conscious state of mind. The dying declaration shows that the injured narrated the whole incident and stated that when he was going to invite guests for dinner after Tilak Ceremony, the accused Vidya Sagar met in front of the house of Ramdas with a double barrel gun, used abusive language and out of old enmity fired on his stomach from very close distance in order to kill him. He sustained injury. His father and uncle rushed towards him. He then became unconscious. It is established by evidence on record that the deceased remained hospitalized for treatment and died in the hospital after 14 days. The dying declaration was recored on 15.6.1994 and after 7 days, the injured died in the hospital.

67. The learned trial court has considered the statement of the deceased to be dying declaration and there appears to be no illegality in it. It has been argued that while recording the said dying declaration, the IO has not complied with the requirement of Para 115 of the Police Regulation which requires it to be recorded in presence of two respectable witnesses obtaining their signature or thumb impression and the same should be signed by the deceased also. There are two reasons that we are not inclined to attach any importance to this guideline provided in Para 115 of the Police Regulation. Firstly, it cannot have an overriding effect on statutory provisions, and secondly, it cannot be made applicable to a statement recorded by the IO under section 161 of the Criminal Procedure Code for which the signature of the witness is not required to be taken. There is yet another reason why we do not deem it necessary to attach any importance to it as in this instant case, the conviction is not based on the dying declaration and there are four eye-witnesses who have proved the prosecution version and the

dying declaration also finds support from their statement. It is all about attaching the amount of importance to a dying declaration. We hold that all dying declaration recorded by any body, in any manner, may be even oral are relevant and admissible in evidence and it depends on the facts and circumstances of every case how much importance it deserves to be given. If the dying declaration is recorded by magistrate or doctor with medical certification about mental fitness of the maker, certainly, it will be relied upon to convict the accused. If the dying declaration is not duly recorded or oral, it will be considered in order to render support to the prosecution case. The evidentiary value may differ, but in no case it can be ignored unless found to be false or tutored. The learned trial court has rightly pointed out that the IO who recorded the dying declaration had no enmity with the accused and there is no reason to discard the same. We find that the dying declaration is quite in consonance with what has been stated by the eye-witnesses to prove the prosecution case during trial and therefore, the same can be validly relied upon.

68. It has been also submitted by the learned counsel to the accused-appellant that Ext. Ka-4 is injury report and on the back page thereof, brother of deceased namely, Tularam has made an endorsement in writing on the date of incident addressing the Emergency Doctor, District Hamirpur for medical examination of his brother (deceased) stating that he has sustained firearm injury during marpeet. Firstly, Tularam has been examined as PW-5 as witness of inquest. No explanation has been sought by defence from him in his cross-examination. It is not the case of defence even that the deceased sustained injury in any marpeet on the date, place and time of incident. On the contrary, the case of the defence has been that the deceased sustained injury in ceremonial firing. We have already discussed this aspect and have found that there is no evidence on record to support the defence version of ceremonial firing.

69. It has been also mentioned by the learned counsel to the accused-appellant that DW-1 Thakurdas has been examined who has proved GD no. 2 of 9.6.1994 of 00.35 AM of midnight as Ext. Kha-1 stated that ward boy Mataprasad of District Hospital, Hamirpur gave a memo in the Police Station to the effect that Babulal having sustained serious injury of firearm has been admitted for treatment in the Emergency of District Hospital for treatment on 8.6.1994 at 11.30 PM. The IO (PW-9) has denied this fact in his cross-examination. Even if it is correct, it further supports the date and time of incident. The report of the Hospital is a routine report in such situation. Maximum, it can be said that required attention was not paid by the police even though the said memo was indicative of commission of offence against the injured. This may be a lapse committed by the police, but, it can hardly render any advantage to the accused.

70. It has been also argued on behalf of the accused-appellant that there was no motive available to the accused to cause death of the deceased, nor it has been explained by the prosecution what was the enmity between the accused and deceased as mentioned in the dying declaration. On being asked about it, PW-9 IO has stated that he could not ask about it as the condition of the deceased was not good and he was physically in trouble. The learned trial court has pointed out that both accused

and deceased were in Army and were of equal age and accused being Brahmin was annoyed for not being invited in the Tilak of the younger brother of deceased and felt insulted he committed this offence. We are of the view that it may be a reason for the commission of the offence by the accused. But, what was in the mind of accused and why he caused death of the deceased, can be explained only by the accused as the victim of the deadly assault did not survive to explain anything. Caste and group rivalry or neighborhood jealous, as it normally exists in society, may also have prompted the accused to commit offence. Moreover, the question of motive is not relevant in this case as the case is based on direct evidence. In a number of decisions, like **Abu Thakir v State AIR 2010 SC 2119, State of UP v Nawab Singh AIR 2010 SC 3638, Bipin Kumar Mondal v State of West Bengal 2005 SCC (Criminal) 33, Shivraj Bapuray Jadhav v State of Karnataka (2003) 6 SCC 392, Thaman Kumar v State of Union Territory of Chandigarh (2003) 6 SCC 380, State of HP v Jeet Singh; (1999) 4 SCC 370**, it has been repeatedly held by the Supreme Court that motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence by a particular person. In a case of direct evidence the element of motive does not play such an important role so as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubt raised in this regard. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused.

71. We find that the Supreme Court has clearly opined in various decisions, such as **Gopi Ram v St. Of UP, 2006 (55) ACC 673 SC, R.R. Reddy v State of AP, AIR 2006 SC 1656, Sucha Singh v State of Punjab; AIR 2003 SC 1471, State of Rajasthan v Arjun Singh AIR 2011 SC 3380, Varun Chaudhry v State of Rajasthan AIR 2011 SC 72** and in the recent judgment of **Saddik Vs. State of Gujarat, (2016) 10 SCC 663,** it has been held that the prosecution case could not be denied on the ground of alleged absence or insufficiency of motive. Motive is insignificant in cases of direct evidence of eyewitnesses. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable, truthful and acceptable evidence is available on record sufficient to establish the guilty of accused persons.

72. We are of the view that when there is sufficient direct evidence regarding the commission of offence, the question of motive should go away from the mind of the Court. Motive is a double edged weapon and the key question for consideration in cases based on direct evidence remains whether the prosecution had convincingly and satisfactorily established the guilt of all or any of the accused beyond reasonable doubt by adducing reliable and cogent evidence. As such, the proof of the existence of a motive is not necessary for a conviction for any offence. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record establishes the guilt of the accused. In the case in hand, evidence shows that motive in terms of annoyance and insult for not being invited in Tilak has been alleged. As such and in view of the

case law discussed above, we find no force in the submission with regards to absence of adequate motive.

73. It has been also argued by the learned counsel to the accused-appellant that the deceased died after 14 days from the date of incident and as such, the case is covered under section 304 IPC and the accused could be punished only for the offence of culpable homicide not amounting to murder. The learned counsel has also draw attention towards the cross-examination of PW-7 Dr. T.N. Agrwal who conducted postmortem of the dead body of the deceased in which he has stated that there was 250 ml puss found in the body of deceased and it developed in septicemia which resulted in death of the deceased. He has therefore, argued that the cause of death cannot be attributed to firearm injury.

74. We gave thoughtful consideration to this argument and perused the postmortem report and statement of the doctor. The deceased remained in treatment in three hospital and clearly best treatment was ensured to him. He died during treatment after 14 days. We find that the Doctor has stated that 4 pellets were recovered from abdominal wall from the back of lever and it shows that the pellets penetrated the abdomen and lever. Apparently, for the exit of recovery, the deceased was operated on abdomen massively which is clear from the seven stitched would found on abdomen, intestine and around. Naturally, it was necessary for the proper treatment to save the life of deceased. The Doctor has stated that the deceased died because of shock and septicemia because of firearm injury and the injury was sufficient to cause death.

75. It is pertinent to mention that firearm injury and injury caused by explosive substance are kept on different footing from the death caused by other weapon. Causing injury by firearm on the vital part of body from close range indicates the intention to cause death and extreme culpability on the part of accused, as, the moment fire is shot, it cannot be controlled by the person and there is no concept of slow firing as the pellets will come out with the mechanically designed speed and force. In case of other cutting or stab weapon, one can claim that enough force was not applied in causing injury. The death resulted during continuous treatment because of firearm injury and in such cases, operation is always complicated and can result in further complication and if death occurs, the reason can only attributed to the firearm injury caused by the accused. In such factual situation, the gap between injury and death is not decisive and the culpability is assessed on the basis of weapon used and the seriousness of injury caused on the vital part of the body. We do not find any force in the argument and there is nothing wrong in the conviction of the accused for the offence of murder under section 302 IPC.

76. On the basis of above discussion, we find that the delay in lodging FIR is natural in the facts and circumstances of the case and well explained. The defence version of ceremonial firing though not based on any evidence on record, indicates acceptance on the part of accused-appellant that the deceased sustained firearm injury which is further proved by medical and postmortem report. Entry wound was found of very close range on the stomach of the deceased which is certainly vital part of body. The doctor conducting postmortem has stated that four pellets were recovered from the dead body and the ante-mortem injury found on the body of deceased was sufficient to cause death. Four eye-witnesses whose presence near the place of occurrence has been found to be natural have proved the prosecution case and their

testimonies find support from the dying declaration of the deceased. There is no contradiction, improvement or embellishment in their ocular account on any material aspect such as time, date, place and manner of occurrence and the eye-witnesses are trustworthy and spontaneous in their narration of the incident. We find that there is no perversity or illegality in the impugned judgment and sentence. The Criminal Appeal is liable to be dismissed.

77. The Criminal Appeal is accordingly **dismissed**.

78. The accused-appellant **Vidya Sagar Dwivedi** is directed to surrender before the learned trial court forthwith where from he shall be sent to jail to undergo the sentence.

79. Office is directed to send a copy of this order to the court below for communication and compliance along with lower court record.

(2020)03-05ILR A604
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2020

BEFORE
THE HON'BLE SIDDHARTH, J.

Criminal Appeal No. 1826 of 2004
Connected with
Criminal Appeal No. 1994 of 2004

Satish & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:

2. Criminal Appeal No. 1826 of 2004 has been preferred by Satish Babu, Jagat Narain, Kunwar Bahadur, Desh Raj, all sons of Raja Ram and Bharat @ Bhartendra Babu son of Desh Raj against the judgment and order dated 11.03.2004 and order dated

Sri Ranvir Singh, Sri Rajjan Singh Yadav, Sri Ram Suphal Shukla

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

Criminal law- Indian Penal Code -Sections 147, 504, 506(2), 308/149 - Appeal against conviction.

Held :- Non consideration of Defence – Section 313 IPC No internal damage in the brain of injured was found by the doctor. (Para 27) Conviction stands vitiated. (Para 27)

Appeal allowed. (E-2)

List of Cases Cited:-

1. Vijay Panduram Thakre Vs. St. of Mah., (2017) 2 SCC (Crl.) 356

2. Vikram Johar Vs. St. of U.P.& anr., 2019 (14) SCC 207.

3. Balwantbhai B. Patel Vs. St. of Guj..

4. Jainul Haque Vs. St. of Bihar, 1974 AIR SC 0-45.

5. Reena Hazarika Vs. St. of Assam MANU/SC/1249/2018

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri Rajjan Singh Yadav, learned counsel for the appellants in **Criminal Appeal No. 1826 of 2004** and Sri Ram Suphal Shukla, learned counsel for the appellants in **Criminal Appeal No. 1994 of 2004** and Sri S.S. Tripathi, learned Additional Government Advocate appearing on behalf of State in both the appeals and perused the lower court record.

23.03.2004 passed by Additional Sessions Judge/ Fast Track Court, Auraiya in S.T. No. 212 of 2002.

3. Criminal Appeal No. 1994 of 2004 has been preferred by Krishna Swaroop son of Raja Ram and Rohit son of Desh Raj, against the common judgment and order dated 11.03.2004 and order dated 23.03.2004 passed by Additional Sessions Judge/ Fast Track Court , Auraiya, in S.T. No. 212 of 2002.

4. The appellants in both the appeals have been convicted and sentenced under Section 147 IPC for two years rigorous imprisonment and a fine of Rs. 10,000/- each; under Section 504 IPC to two years rigorous imprisonment each; under Section 506(2) IPC to six months rigorous imprisonment and fine of Rs. 2,000/- each and under Section 308/149 IPC to three years rigorous imprisonment and fine of Rs. 2,000/- each. All the sentences have been directed to run concurrently. Both the appeals arise out of common trial.

5. The prosecution case is that the informant is resident of Napur and is employed in Bank of Indore, branch- Kachnav Kala, District- Bhind. On account of his prosperity the other villagers harbour jealously against him. They keep on plotting against the appellant for beating him. Marriage of his younger brother was fixed 07.03.2000 and in the morning accused, Rohit son of Desh Raj, threatened his brother, Hari Mohan, of life by pointing a country made pistol on his chest but because of the marriage ceremony in the house they kept quiet. On 09.03.2000 after seeing off relatives, the members of his family were sitting in the house at 09:20 p.m for dinner when Rohit son of Desh Raj along with Jagat Singh, Krishna Swaroop, Kunwar Bahadur, Satish Babu, Desh Raj, all sons of Raja Ram and Bharat son of Desh Raj came to his house. Bharat had gun in his hand and other persons were armed with l*athi* and *farsa*. Satish Babu and Jagat Narayan caught hold of his hand and Bharat son of Desh Raj made blow on his head by the butt of the gun and all the accuseds started saying that today they will kill him. He cried for help and then Ashwani Kumar son of Ramphal Dohrey and Hoti Lal resident of Purwa Adot and many other villagers came and saved him. The accuseds after beating him and hurling abuses ran away.

6. Report of this incident was registered at Police Station on 09.03.2000 as Case Crime No. 100 of 2000, under Sections- 147, 323, 504, 506 IPC. The injuries of the informant were examined by the doctor and he was referred for x-ray of his head. Fracture was found on the head of the informant, Narendra Chaudhary. The Investigating Officer after investigation submitted charge sheet and charges under Sections- 147, 323, 325, 504, 506 and 308 IPC were framed by the trial court. The accuseds denied the charges and sought trial.

7. P.W-1, Narendra Chaudhary, the informant of the case, in his examination-in-chief repeated the allegations mentioned in the FIR. In his cross-examination P.W-1 admitted that he is not aware on which post accused, Satish, is employed in police force. Accused, Jai Narain, is employed in P.A.C. He does knows where accsueds, Kishan Swaroop, Kunwar Bahadur and Bharat are employed. He admitted that the house of the accuseds are after the ten feet street near his house. He stated that his family takes water from well and public tap which is situated on the gate of Jagannath.

Thereafter he stated that the aforesaid tap is situated on the gate of the accuseds but his family never takes water from the same. He failed to reply from where his family members take water. He alleged that the accuseds throw stones in his house and this is resulted into dispute with his brothers with accused, Bharat about two years ago in the month of July, 1998 but not in his presence. No FIR was lodged regarding the aforesaid incident and also the incident dated 07.03.2000. On 07.03.2000 no altercation took place but accused, Rohit pointed a pistol on the chest of his brother and threatened him but not before him. He came to his house four days prior to the incident on leave. He came to his house on 03.03.2000 but did not met the accuseds on 04.03.2000, 05.03.2000, 06.03.2000, 07.03.2000 and 08.03.2000. He saw them at 06:00 p.m on 09.03.2000, i.e., the date of incident. There was some function in their house and therefore all of them had gathered in their house. He admitted that P.W-2, Ashwani Kumar, is his brother-in-law and Hoti Lal is his uncle (mama). He stated that there were two injuries on his body and not one, as stated in FIR. When he reached the hospital he realized that he has suffered two injuries. The blood stains on the earth were present where he got injured but the Investigating Officer did not took the same in his possession. Apart from causing him injuries the accuseds beated his father, Ram Sewak Chaudhary and Hari Mohan. But by what weapon they were beaten he does not knows. They also suffered injuries. Father suffered injuries on mouth and the brother was slapped. He admitted that he did not mentioned these facts in the FIR.

8. P.W-2, Ashwani Kumar, stated in his examination-in-chief that accuseds, Satish Babu and Jagat Ram, caught the hand of P.W-1, Narendra Chaudhary and abused him and accused, Bharat, caused blow on his head by the butt of the gun. In his cross-examination he admitted that P.W-1, Narendra Chaudhary, is his brother-in-law *(behnoi)*. He was present at the time of incident in the house when the incident dated 07.03.2000 took place at 10 - 10:30 am. He recognizes the accuseds. The accuseds had come from south direction. At the time of incident, Hoti Lal, Mama of P.W-1, was sitting along with him. He accompanied P.W-1, to the police station on motorcycle. He was driving and P.W-1 was sitting on the motorcycle. Hoti Lal was also sitting and holding him from behind. They went to police station and after giving application at the police station went to the hospital. Hoti Lal was medically examined. On 14.03.2000 accused, Rohit Desh Raj, Bharat, Satish, Jagat Narain, Kishan Swaroop and Kunwar Bahadur, came to his house in village Tulsipur and threatened him that in case he gives statement in favour of P.W-1 they will kill him. He testified that Bharat had gun in his hand he cannot say which accused had lathi and which had farsa in his hand. There was only injury on the head of the P.W-1 and no other injury on his body.

9. P.W-3, Hoti Lal, mama of P.W-1, stated that on 07.03.2000 accused, Rohit, pointed a country made pistol on the chest of Hari Mohan and threatened him of life. On the date of incident 09.03.2004 the accuseds came to the house of the P.W-1. Accused, Bharat, had gun in his hand and other accuseds had *lathi-danda, farsa* etc., in their hands. Accuseds, Jagat and Satish, caught hold of hand of P.W-1. Accused, Bharat, caused injury on the head of the injured by the butt of his gun. There was only one injury on the head of P.W-1. Application was given by P.W-1 at the police station and FIR was lodged.

10. P.W-4, Head Constable, Anokhe Lal, proved the chik FIR. He further stated that he saw the injury on the head of the

injured and got his signatures on the chik report.

11. P.W-5, Dr. V.V. Prakash, Senior Radiologist, stated that the injured came alone and was not accompanied by any policemen. His right parietal bone was found fractured and he gave his report accordingly.

12. P.W-6, Dr. R.B. Arya, found one lacerated wound 8.5 cm x 1 cm x bone deep 10 cm above right ear on scalp with fresh bleeding present on the body of the injured. Second injury was found to be pain in the back but no injury was found.

13. P.W-7, Sub-Inspector, Harendra Singh Yadav, proved the investigation of the case conducted by him.

14. P.W-8, Constable, Babu Lal Yadav, proved the signature of Sub-Inspector, Devendra Dixit on the charge sheet submitted before the court. He proved that Devendra Dixit had died and therefore he is proving his signature on the charge sheet

15. The statement of the accuseds were recorded under Section 313 CrP.C and all of them have stated that P.W-2, Ashwani Kumar and P.W-3, Hoti Lal are *sala and mama* of P.W-1 respectively and they have given false evidence before the court. They further stated that the family of P.W-1 is envious of prosperity of their family members and therefore they have been falsely implicated in this case on 09.03.2000. The bis the utensils of the cooks, used in marriage of the brother of P.W-1, were kept on the public tap and P.W-1 stumbled on the utensils in the night and fell on them which is resulted in head injury by falling over the utensils. On account of envy he has falsely implicated the accuseds in this case. They denied going to his house and causing injury. The investigation by Investigating Officer was stated to be illegal.

16. The trial court found that offences under Sections 323 and 325 IPC are not made out against the accuseds and as such acquitted them of the charges under the aforesaid sections. However they have been punished for committing offences under Sections 147, 504, 506 (2), 308/149 IPC.

17. Counsel for the appellant has submitted that the implication of all the appellants for offences under Section 308 IPC read with Section 149 IPC is not justified. His submission is that general and sweeping allegations have been levelled against all the accuseds when the role of causing blow on the head of P.W-1 has been assigned only to Bharat. Satish and Jagat Narain, have been assigned the role of catching the hand of the injured. The incident is of night and no source of light has been mentioned nor found during investigation by Investigating Officer and how the assailants were recognized in the night has not been explained. The common object of all the accuseds has not been established. Mere presence of accuseds, except Bharat, does not proves the allegation of unlawful assembly and the implication of the appellants for offence under Section 147 IPC is not justified. There is no motive of the crime except jealousy of the accuseds with the injured. On 07.03.2000 only accused, Rohit threatened the brother of P.W-1 and there also no other motive was assigned for the act of the co-accused, Rohit. Motive still has its corroborative value even when direct testimony is available. When the accused, Bharat, caused the injury to P.W-1 on his head by butt of the gun, he raised

alarm and then P.W-2 and P.W-3 reached the scene of incident but they did not saw anyone on the scene of incident. The testimony of P.W-1 has not been corroborated any witness of fact. The implication of the appellants under Section 504 and 506 IPC is not justified since only on account of mere allegation that accuseds abused the complainant the ingredients of Section 504 and 506 are not satisfied. The insult must be of such degree that it should provoke a person to break public place or commit any other offence. The Investigating Officer has not recovered any blood stained clothes or blood stains on earth from the place of incident when P.W-1 has admitted that blood has fallen on the earth. The prosecution case does not stands proved but the accuseds have been illegally convicted and sentenced.

18. Learned A.G.A on the other hand has submitted that the offence alleged against the appellants stand fully proved. Witness of fact have proved that all the accuseds came with weapons. Bharat was having gun and others were armed with lathi and farsa. Two of them, namely, Jagat Narain and Satish Babu, caught hold of the hands of the informant and Bharat gave a blow from the butt of the gun on his head. On the scream of the injured P.W-2, Ashwani Kumar and P.W-3, Hoti Lal, came on the spot. The medical examination of the injured was conducted on the same day on 11:25 p.m and the doctor found the injury fresh. Fracture on parietal bone of the injured was found. The injury was found to be grievous by the doctor, P.W-6. The offence under Sections 147, 149, 308, 504 and 506(2) IPC are fully made out against the appellants.

19. After hearing the rival contentions the first argument of the counsel for the appellants that for implication under Sections 147 and 149 IPC mere presence of all the accuseds, except accused, Bharat, did not make them member of an unlawful assembly unless the participate in the act of rioting or do some overt act with necessary criminal intention or share common object of unlawful assembly needs consideration. The Apex Court in the case of ***Vijay Panduram Thakre vs. State of Maharashtra, (2017) 2 SCC (Crl.) 356*** has held as follows:-

Section 149 IPC reads as under:

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence." As is clear from the plain language, in order to attract the provision of the Section, following ingredients are to be essentially established.

(i) There must be an unlawful assembly.

(ii) Commission of an offence by any member of an unlawful assembly.

(iii) Such offence must have been committed in prosecution of the common object of the assembly; or must be such as the members of the assembly knew to be likely to be committed.

If these three elements are satisfied, then only a conviction under Section 149, I.P.C., may be substantiated, and not otherwise. None of the Sections 147, 148 and 149 applies to a person who

is merely present in any unlawful assembly, unless he actively participates in the rioting or does some overt act with the necessary criminal intention or shares the common object of the unlawful assembly.

In the facts of the present case, we find that common object of the assembly, even if it is presumed that there was an unlawful assembly, has not been proved. The expression 'in prosecution of the common object' occurring in this Section postulates that the act must be one which have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. This expression is to be strictly construed as equivalent to in order to attain common object. It must be immediately connected with common object by virtue of nature of object. In the instant case, even the evidence is not laid on this aspect. As pointed out above, the courts below were influenced by the fact that one of the injuries on the person of Ashok was on his head which became the cause of death and from this, common object is inferred.

In ***Mukteshwar Rai v. State of Bihar****, the accused persons were alleged to have formed an unlawful assembly, gathered in a village and set some houses on fire and ransacked. Two persons died as they got burnt and two could not be traced. This Court agreed with the finding of the High Court as to formation of the unlawful assembly. But as to the finding that the common object of the unlawful assembly was to commit murder took somewhat a different view and observed:*

"The specific overt acts attributed to A-1 and five others who are said to have actively participated in setting the fire and thrown some of the victims into the fire stand disbelieved. It may also be noted that none of the P.Ws. Is injured and we find from the judgment of the High Court that none of the witnesses say that any one of these appellants were armed. The learned Judge has extracted the incriminating part in each of the witnesses against these appellants. It stated that these accused were identified by those respective witnesses mentioned therein in discussing the case against each of th accused. There is nowhere any mention that any one of these appellants were armed. In such a situation the question is whether these appellants also had a common object of committing the murder. We have given earnest consideration to this aspect. Taking a general picture of the case and after a close scrutiny of the evidence we find that two persons were charred to death. This must have been the result of setting fire to those houses. With regards the other two missing persons it cannot be concluded that they were murdered in the absence of any iota of evidence. Under these circumstances we find it extremely difficult to hold that a common object of the unlawful assembly was to commit murder." We would also like to quote the following passage from ***Thakore Dolji Vanvirji & Ors. v. State of Gujarat.***

20. In the present case it is to be decided whether all the accuseds would be constructively liable. So far as accused, Bharat, is concerned he has been assigned the role of causing blow on the head of the injured by butt of a gun. Satish Babu and Jagat Narain, have been assigned the role of catching hold of the injured, P.W-1, but there is no evidence against the remaining accuseds about any overt act on their part which may constitute offence under Sections 149 and 147 IPC. All the eye-witnesses have made general allegations

against the other accuseds of accompanying the accused, named above, with *lathi-danda and farsa.* No doubt Section 149 IPC is vide in its sweep but in fixing the membership of the accuseds in unlawful assembly and in finding the common object, mere presence in any unlawful assembly does not make them participants in rioting by sharing common object and having necessary criminal intention. Therefore the conviction of all the appellants for offences under Sections 149 and 147 IPC does not appears to be justified. The prosecution has not been able to sustain the charge of rioting. Prosecution has to establish that there was unlawful assembly as defined in Section 141 IPC, that the accuseds were members of that assembly as defined in Section 142 IPC, that force of violence was caused by such assembly or by any member thereof and that it was used in prosecution of the common object of the assembly. The burden of proving the charge lies on the prosecution. Notwithfstanding the large number of persons accused for rioting and consequent difficulty of prosecution to name the specific act of particular accused, the court must see that all the ingredients required for unlawful assembly and rioting are strictly proved by the prosecution before convicting the accuseds.

21. Regarding the conviction of the accuseds for offence under Sections 504 and 506 IPC, the Apex Court in the case of ***Vikram Johar vs. State of Uttar Pradesh and Another, 2019 (14) SCC 207*** has held that follows:-

21. We need to notice Sections 503, 504 and 506 for appreciating the issues, which has come up for consideration, which are to the following effect:-

"503. Criminal intimidation.-- Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.-- A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

504. Intentional insult with intent to provoke breach of the peace.--Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

506. Punishment for criminal intimidation.-- Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

If threat be to cause death or grievous hurt, etc.--And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall

be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

22. .....

23. In paragraph No.13 of the judgment, this Court has noticed the ingredients of Section 504, which are to the following effect:-

"13. Section 504 IPC comprises of the following ingredients viz. (a) intentional insult, (b) the insult must be such as to give provocation to the person insulted, and (c) the accused must intend or know that such provocation would cause another to break the public peace or to commit any other offence. The intentional insult must be of such a degree that should provoke a person to break the public peace or to commit any other offence. The person who intentionally insults intending or knowing it to be likely that it will give provocation to any other person and such provocation will cause to break the public peace or to commit any other offence, in such a situation, the ingredients of Section 504 are satisfied. One of the essential elements constituting the offence is that there should have been an act or conduct amounting to intentional insult and the mere fact that the accused abused the complainant, as such, is not sufficient by itself to warrant a conviction under Section 504 IPC."

24. In another judgment, i.e., Manik Taneja and Another Vs. State of Karnataka and Another, (2015) 7 SCC 423, this Court has again occasion to examine the ingredients of Sections 503 and 506. In the above case also, case was registered for the offence under Sections 353 and 506 I.P.C. After noticing Section 503, which defines criminal intimidation, this Court laid down following in paragraph Nos. 11 and 12:-

"11. Xxxxxxxxxxxx A reading of the definition of "criminal intimidation" would indicate that there must be an act of threatening to another person, of causing an injury to the person, reputation, or property of the person threatened, or to the person in whom the threatened person is interested and the threat must be with the intent to cause alarm to the person threatened or it must be to do any act which he is not legally bound to do or omit to do an act which he is legally entitled to do.

12. In the instant case, the allegation is that the appellants have abused the complainant and obstructed the second respondent from discharging his public duties and spoiled the integrity of the second respondent. It is the intention of the accused that has to be considered in deciding as to whether what he has stated comes within the meaning of "criminal intimidation". The threat must be with intention to cause alarm to the complainant to cause that person to do or omit to do any work. Mere expression of any words without any intention to cause alarm would not be sufficient to bring in the application of this section. But material has to be placed on record to show that the intention is to cause alarm to the complainant. From the facts and circumstances of the case, it appears that there was no intention on the part of the appellants to cause alarm in the mind of the second respondent causing obstruction in discharge of his duty. As far as the comments posted on Facebook are concerned, it appears that it is a public forum meant for helping the public and the act of the appellants posting a comment on Facebook may not attract ingredients of criminal intimidation in Section 503 IPC."

22. Now reverting back to the case in hand we find that there is general allegation against the accuseds that after the co-

accused, Bharat, injured P.W-1 and he screamed all the accuseds abused and threatened him of life and went away. There is no allegation that such threat consisted of some injury to his person, reputation of property, or they did so with intent to cause alarm to P.W-1 or to cause him to do any act which he was not legally bound to do or omit to do any act which he was legally entitled to do as a means of avoiding the execution of such threat. Therefore the allegation under Sections 504 and 506 IPC were also not made out against all the appellants.

23. The offence under Section 308 IPC has also been found proved by the trial court against the appellants. There are ocular testimonies of three witnesses of fact in this regard. In law a person commits an offence under Section 308 IPC if he does not act with such intention or knowledge and under such circumstances that, if he thereby caused death he would be guilty of culpable homicide not amounting to murder. In the present case if considered this offence with the motive of only jealousy the offence under Section 308 IPC against accused, Bharat stands proved and not against the other accuseds. The injury of fracture on the left parietal bone of the injured has been found and it is sufficient to bring the case of appellant, Bharat, under Section 308 IPC, because had the injured died, he could have been convicted under Section 304 IPC.

24. Now regarding the offence of catching hold this court finds that such allegations are often made in cases to falsely implicate number of accuseds where the number of injuries on the injured party do not corelate with the number of accuseds. In the present case only one injury on the head of the appellant was found but there were 7 persons implicated by the prosecution. Two of them namely, Satish Babu and Jagat Narain, have been assigned the role of catching hold of injured, P.W-1. The Apex Court in the case of ***Balwantbhai B. Patel vs. State of Gujarat*** has held accordingly and set aside the judgment of conviction recorded by the High Court.

25. Regarding the role of exhortation assigned to the accuseds it has been found that it is a week type of evidence as held by the Apex Court in the case ***Jainul Haque vs. State of Bihar, 1974 AIR S***C 0-45. The Apex Court has held in the above noted case that eye-witnesses are prone to exaggerate thing and to involve as many accuseds as possible. The evidence exhortation is, in very nature of things, a week piece of evidence. There is quite often tendency to implicate some persons, in addition to the actual assailants by attributing to that person role of exhortation to the assailants to assault the victim. Unless the evidence in this respect is clear, cogent and reliable no conviction for abetment can be recorded against the person assigned the role of exhortation. In the present case no clear evidence regarding the manner and actual words of exhortation was proved by the prosecution. Hence the role of exhortation assigned to the co-accuseds cannot be accepted. In the present case there is another important aspect of the case. All the accuseds in their statements under Section 313 Cr.P.C have stated that there was jealousy on the part of injured which has resulted into their false implication. Similar allegation has been leveled by the injured against the accuseds stating that since he was employed in the bank and his family was prosperous therefore the accuseds were jealous and they caused the alleged offence against

him. Both the sides have set up this motive of offence as jealousy only and nothing more. Although there is ocular testimony of three witnesses proving the fact of the accused, Bharat, causing head injury by the butt of gun to the injured P.W-1, but the defense of the accuseds that the injured himself suffered injury by falling on the utensils kept on the public tap in the night and on account of falling over the heavy utensils brought by halwai in marriages he suffered a solitary injury on his temporal bone. This injury was utilized by the injured to false implicate the appellants in this case since there was already relationship of jealousy between the two parties and the injured got and occasion to falsely implicate seven persons in this case. The defense of the accuseds under Section 313 Cr.P.C has not been examined at all by the trial court before convicting and sentencing the appellant. Nothing has been recorded by the trial court whether the defense set up by the accuseds inspires confidence or not. Its probability or improbability has also not been considered by the trial court. It has only recorded the finding that no effective oral or documentary evidence have been produced by the accuseds to prove that the injured suffered injuries after falling on the utensils kept on the public tap.

26. The Apex Court in the case of ***Reena Hazarika vs. State of Assam MANU/SC/1249/2018*** has held regarding the requirement of Section 313 Cr.P.C

"16. Section 313, Code of Criminal Procedure cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an Accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial Under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath Under Section 313(2), Code of Criminal Procedure The importance of this right has been considered time and again by this Court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the Accused takes a defence after the prosecution evidence is closed, Under Section 313(1)(b) Code of Criminal Procedure the Court is duty bound Under Section 313(4) Code of Criminal Procedure to consider the same. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an Accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken Under Section 313 Code of Criminal Procedure, in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the Accused taken Under Section 313 Code of Criminal Procedure and to either accept or reject the same for reasons specified in writing."

27. Although the trial court has refused to consider the defence of the accuseds under Section 313 Cr.P.C on the ground that there is no oral or documentary evidence in support of the same but this court in exercise of apellate jurisdiction can consider the same. The finding of the court below that there is defence without supporting evidence hence defense of the

accuseds set up under section 313 Cr.P.C cannot be considered, is not in accordance with requirement of law. The Apex Court in the case of Reena Hazarika (Supra) has clearly held that the statement of the accuseds under Section 313 Cr.P.C is not a substantive evidence but whether the defence setup therein is acceptable or not has to be considered. Whether the defense is acceptable or not or whether it is compatible or incompatible with the evidence available is an entirely different matter. If there is no consideration at all of the defense taking under Section 313 Cr.P.C., in the given facts of the case, the conviction stands vitiated.

28. In the present case the defence set up was that the injured fell on utensils of halwai in the night and suffered one injury of fracture on his left temporal bone therefrom. No internal damage in the brain of the injured was found by the doctor. It was a simple fracture on parietal bone. The utensils utilized by halwai while preparing food for large number of persons are mostly of heavy metals and have different type of edges and by abruptly falling on such utensils injury on head can occur. It is not absolutely impossible. Due to sudden fall the injury suffered by P.W-1 on head can be suffered by such fall on heavy utensils of halwai. From the statements of P.W-1 it is clear that he has avoided replying to the question from where his family brings the water. The public tap has been admitted to be situated on the gate of the house of the accuseds. It is not improbable that on the public tap infront of the house of the accuseds the utensils were being washed or kept for being washed and the injured stumbled against them and fell on them resulting in injury over his head. He has admitted that the accuseds were jealous of his family and accuseds have said that injureds was jealous of them and therefore there is possibility of false implication of appellants in this case by P.W-1. The trial court has not considered this aspect of defense.

29. After considering the totality of fact and circumstances on record this court find that at the most offence under Section 308 IPC was made out against the accused, Bharat, but on account of non-consideration of the defense of the accused under Section 313 Cr.P.C., the same can also not been sustained.

30. The judgment and order of this trial court is set aside. The office is directed to send back record of the court below along with copy of this judgment and order within three weeks.

31. The criminal appeal is ***allowed***.

(2020)03-05ILR A614
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.02.2020

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

Criminal Appeal No. 1852 of 1991

Mohd. Ishaq & Ors. ...Appellants (In Jail)
Versus
The State of U.P. ...Respondent

Counsel for the Appellants:
Sri Satish Trivedi, Sri Ajay Kumar Pandey

Counsel for the Respondent:
A.G.A.

Criminal law- Indian Penal Code -Sections 304B, 201, 498A - Dowry Prohibition

Act,1961- Section 3/4 — Appeal against conviction.

Held :- Benefit of doubt- Where witnesses and circumstances considered together raised strongly suspicion about the occurrence and involvement of accused. (Para 33)

Appeal allowed. (E-2)

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

1. Sri Satish Trivedi, learned Senior Advocate assisted by Sri Ajay Kumar Pandey, learned counsel for the appellants is present.

2. By way of instant criminal appeal, challenge has been made to the validity and sustainability of the judgment and order of conviction dated 24.09.1991 passed by Special Judge, Moradabad, in Session Trial No.411 of 1987, State of U.P. Vs. Mohd. Ishaq and others, arising out of Case Crime No.82 of 1987, under Sections 304B, 201, 498A I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station- Behjoi, District- Moradabad, whereby the surviving appellant nos.2 and 3 has been sentenced to undergo rigorous imprisonment for life under Section 304B I.P.C., five years rigorous imprisonment under Section 201 I.P.C., two years rigorous imprisonment under Section 498A I.P.C. and two years rigorous imprisonment under Section 3/4 Dowry Prohibition Act. All the sentences were directed to run concurrently.

3. Heard Sri Ajay Kumar Pandey, learned counsel for the surviving appellant nos.2 and 3 Mohd. Mushtaq and Mohd. Asghar, Sri Krishna Pahal, learned A.A.G. assisted by Sri Om Narain Tripathi, learned A.G.A. for the State and perused the record of this appeal.

4. Relevant facts of this appeal, as gathered from record, appear to be that Haji Mian Jan, informant PW-1 lodged the written report at Police Station Behjoi, District Moradabad (now District Sambhal) against the present appellants and his family members regarding fact that Khurshida Begum, daughter of the informant was married to Mohd. Ishaq some time ago but she was thrown out from her in-laws' house, therefore, she filed a case under Section 125 Cr.P.C. before the court below wherein maintenance to the tune of Rs.150/- was granted to her against which a revision was filed by Mohd. Ishaq before the Sessions Judge, Moradabad. It so happened, in revision a compromise took place that the husband of the deceased promised that he will keep his wife with peace and dignity in future. The Sessions Judge allowed to take his wife back to his home on 20.5.1985. It so happened that on 15.02.1986, the informant received a letter whereby fact of cruelty both mentally and physically being perpetrated upon the deceased was disclosed then the informant's son along with other relatives arrived at the house of the in-laws of his daughter on 17.02.1986 where they were badly treated and returned. Later on, the informant also visited the house of the in-laws of his daughter and he too was maltreated and returned. Thereafter, report was made to various higher authorities of the police, details whereof are made in the first information report itself. As the first information report proceeds further, it indicates that one Abdul Salam @ Sukha master, a neighbour of the informant came to him and told around at 8:00 a.m. on

25.03.1987 that the informant's daughter expired on 15.03.1987 and this death has been caused on account of non-fulfillment of dowry demand and consequent perpetration of cruelty and in order to cause disappearance of evidence, she was buried. Request was made for lodging the report and taking appropriate action. The written report is Ext. Ka-1.

5. Record further reveals that contents of the written information were taken down in the concerned Check FIR at Case Crime No.82 of 1987 under Sections 302, 201, 498A I.P.C. and 3/4 Dowry Prohibition Act, Police Station Behjoi, District Moradabad, on 26.03.1987 at 09:35 p.m. Check FIR is Ext. Ka-11.

6. On the basis of entries so made in the check F.I.R., a case was registered against the appellants in the relevant G.D. at the aforesaid Case Crime Number at Police Station Behjoi, under aforesaid Sections of I.P.C. and Dowry Prohibition Act against the appellant. General diary copy is on record.

7. After registration of the case, the investigation ensued and the same was entrusted to Circle Officer concerned who pursuant to the lodging of the first information report proceeded to the spot and facilitated for preparation of the inquest of the deceased. The inquest of the deceased Khurshida Begum was held by the Circle Officer concerned. It commenced at 11:00 a.m. and completed at 01:00 p.m. on 28.03.1987. Inquest report is Ext. Ka-14.

8. In the opinion of the inquest witnesses and the Investigating Officer concerned, it was suggested that post mortem of the dead body of Khurshida Begum be ensured in order to ascertain real cause of death. Therefore, relevant papers were prepared such as letter to CMO by R.I. Ext. Ka-13, photonash Ext. Ka-15, letter to R.I. Ext. Ka-16, Police Form 13 challan dead body Ext. Ka-17, letter to CMO Ext. Ka-18, and specimen seal Ext. Ka-19.

9. Thereafter, the dead body was sent for post mortem examination in the mortuary at Moradabad where post mortem examination on the cadaver of the deceased Khurshida Begum was done by the doctor on 29.03.1987 at 12:30 p.m. wherein he noted the following ante mortem injuries:

1. Contusion 4 cm x 3 cm on the left side neck upper part and on cutting blackish clotted blood present under the injury.

2. Contusion 4 ½ cm x 3 cm on the right side neck upper part and on cutting blackish clotted blood present under the injury.

3. Contusion 6 cm x 6 cm on the right side occipital region of head and on cutting blackish clotted blood present under the injury.

10. In the opinion of the doctor, cause of death was due to asphyxia as a result of throttling. This post mortem examination report is Ext. Ka-20.

11. In the meanwhile, the investigation continued. The Investigating Officer in the process recorded statement of various persons including the informant. He also prepared site plan of the place of occurrence Ext. Ka-21 and graveyard Ext. Ka-23.

12. Since relevant papers pertaining to the investigation and the post mortem report were admitted to the defence itself, therefore, no formal witnesses from the

prosecution side was produced in proof of the same, thus papers were marked in exhibits. After doing the needful, the Investigating Officer filed charge sheet against the appellant Ext. Ka-22.

13. Pursuant thereto committal proceeding took place and after compliance with Section 207 Cr.P.C., the case was committed to the court of Sessions from where it was transferred to the IX-Additional Sessions Judge, Moradabad, for conduction of trial and disposal of the case, after numbering it as Sessions Trial No.411 of 1987 State Vs. Mohd. Ishaq and others. Learned trial Judge heard the prosecution and the appellants on point of charge and was prima-facie satisfied with the case against the appellants, accordingly, framed charges under Sections 302/34, 201, 498A I.P.C. and 3/4 of Dowry Prohibition Act. Charges were read over and explained to the appellants who abjured charges and claimed to be tried.

14. In turn, the prosecution was required to adduce its testimony in support of the charge brought against the appellants to prove their guilt, whereupon the prosecution produced the following witnesses whose reference is being sketched hereinbelow.

15. Mian Jan PW-1, Irshad Ahmad PW-2, Mohd. Salim PW-3, Nasheer Ahmad PW-4 and Laddan PW-5 are witnesses of fact. We have already discussed all the police papers and relevant papers were admitted to the defence, therefore, formal proof was dispensed with.

16. After that much, evidence for the prosecution was closed and statement of the appellants was recorded under Section 313 Cr.P.C. wherein they claimed to have been falsely involved on account of enmity in this case.

17. Except as above, no other testimony, whatsoever, has been adduced by the defence, therefore, evidence for the defence was also closed and the case was posted for arguments.

18. The learned trial Judge, Moradabad, after appraisal of facts and consideration of the merit of the case and evaluating the evidence on record, returned aforesaid finding of conviction and awarded sentence vide impugned judgment and order dated 24.09.1991.

19. Hence, this appeal.

20. At the outset, learned counsel for the appellants has submitted that in this case, all the ingredients of Section 304B are not applicable against the present surviving appellants namely Mohd. Mushtaq and Mohd. Asghar, for the specific reason that their role for controlling the working of the entire family in the shape of dominance was insignificant in the presence of the mother-in-law, father-in-law and husband of the deceased Khurshida Begum. There is not a single whisper and iota of evidence or any consistent attendant circumstance which may also allude to inference that both the surviving appellants voluntarily and tacitly ever indulged in any act of demand of dowry from the deceased, informant or the parents of the deceased. To say that the present appellants, both brothers of the husband of the deceased had connived with the rest of the family members; the father-in-law, the mother-in-law and the husband of the deceased and they were persistently sticking to the demand of dowry, not only this but also the factum of cruelty being

perpetrated by the surviving appellants, cannot be accepted to have been satisfactorily proved / established by the prosecution as was required of it.

21. Once the fact of perpetration of cruelty is missing against particular appellants then conjectures and surmises alone would not work to fill in the gap created by the prosecution at a stage when specific role was imputed to have been played in the demand of dowry and perpetration of cruelty against the only accused the father-in-law, the mother-in-law and the husband. Nothing such or specific imputed on the point to the present appellants.

22. Two witnesses of fact namely Mian Jan PW-1 and Irshad Ahmad PW-2, father and brother of the deceased have been examined before the trial court, they have not spelled even a single word about any specific role in the shape of perpetration of cruelty or demand of dowry being made at their instance but the surviving appellants were married at the time of the incident and they had separate living with their family and they would not be beneficiary of the transaction and were not directly interested in raising any demand on account their disinterestedness in any dowry what to about its demand. Offence under the provisions of dowry death as such is not made out. There was no point in concealing or causing disappearance of the evidence regarding commission of the dowry death as such no offence under Section 201 I.P.C. is made out either. On that point also, finding of conviction is based on conjectures and erroneous analysis of fact and not supported by any cogent material available on record because there is no specification against the present two surviving appellants that they ever played any particular role. Allegations against them are vague and of trivial nature.

23. Once the case does not fall within four corners of Section 304B I.P.C. and the point of perpetration of cruelty and dowry demand soon before the occurrence by and on behalf of the accused being missing, the essential ingredient (of Section 304B I.P.C.) is virtually not existing since beginning against the present surviving appellants. May be that it is found to have been working for the other accused against whom specific role has emerged in the testimony of witnesses but it is not so against the present two surviving appellants who are none other than the two brothers of the husband of the deceased.

24. It is tendency in the cases pertaining to dowry death that the entire family is roped in. The court is required to act cautiously; be circumspect about false involvement of the accused. It is a case of false and vague allegations against the present two surviving appellants. There is virtually nothing against the present surviving appellants bringing their case under Sections 498A, 304B, 201 I.P.C. and 3/4 Dowry Prohibition Act.

25. Learned trial Judge failed to take stock of the aforesaid factual as well as legal aspects of this case which were very much apparent to it and erroneously recorded conviction against the appellants in casual manner, which finding is not based on material on record. The prosecution has miserably failed to prove its case beyond all reasonable doubt.

26. Per contra, Sri Krishna Pahal, learned A.A.G. for the State has has submitted that the trial court has rightly

acted on the evidence available before it and has rightly applied the principles of the presumption as envisaged under Section 113B of the Indian Evidence Act, 1872. The incident took place within seven years of the marriage of the deceased and the death in question as per post mortem examination report is unnatural and testimony of the prosecution witnesses is replete with fact that the in-laws side of the deceased demanded dowry, thus perpetrated cruelty upon the deceased Khurshida Begum. Merely because no specification has been made regarding demand of dowry and perpetration of cruelty, insofar as against the present two surviving appellants are concerned, that would not alone exonerate them of charges inter-alia under Section 304B I.P.C.

27. It is the admitted position that the post mortem examination report has been admitted to the defence and they cannot question the nature of the ante mortem injuries caused on the body of the deceased Khurshida Begum. Once it being so, the burden of proof bounced back to the appellants to come out specifically as to how it was caused on the body of the deceased. It is not proved and cannot be accepted under circumstances that the present appellants were residing separately at the time of occurrence. The charge sheet was rightly filed against the present appellants and all the ingredients of perpetration of cruelty are equally applicable to all the accused under prevailing facts and circumstances of the case. The trial court was justified in recording conviction and passing sentence against them.

28. We have also considered the above submissions pros and cons made by both the sides.

29. In the light of rival submissions and the claim of the appellants and the prosecution, the moot point that arises for adjudication of this appeal relates to fact whether the testimony of the prosecution witnesses of fact is innocuous and the charges framed against the appellants have been proved beyond reasonable doubt ?

30. We have carefully scrutinized the record and the testimony of the aforesaid two witnesses of fact namely PW-1 and PW-2 and have also scanned testimony of PW-3, PW-4 and PW-5. We would not indulge unnecessarily in roving scrutiny and exhaustive interpretation of facts as involved in this case. However, we can unhesitatingly observe that all the above five prosecution witnesses, if taken to be true, and normal construction is raised about the very import of their testimony on the point of demand of dowry then it is found to be not specific against the present surviving appellants. Whatever, we come across, is fact that mother-in-law, father-in-law in company with the husband of the deceased played vital role in demanding of dowry and perpetration of cruelty on the deceased but the present appellants have not been whispered by the prosecution witnesses about any specific role being played in the commission of the offence. The involvement of the appellants cannot be said to be either direct or indirect in this case. Things are, on the contrary, vague and general insofar as the role of the two appellants is concerned.

31. It has come in the testimony of the prosecution witnesses that all the brothers of the husband of the deceased have their own separate living though in the same house. It means that the control and the dominance over the family of the deceased was very much confined to her husband,

mother-in-law and father-in-law and it did not travel beyond it. Now this being accepted and proved position, how can it be said that the present appellants ever exercised influence upon the deceased in raising demand of dowry. Mere conjectures and guess can be made at this stage that they might have sided with the aforesaid mother-in-law, father-in-law and the husband of the deceased but that conjecture cannot be accepted to be the established position, which was required to be proved as such under the relevant provisions of the Indian Evidence Act. That being so, any sort of presumption for committing dowry death as the accused as envisaged under Section 113B Indian Evidence Act, 1872 would be derogatory to the principles contained under the Indian Evidence Act itself.

32. Therefore, the approach adopted by the trial court is not based on material on record. To raise such presumption under Section 113B of the Indian Evidence Act against the appellants is not justified. Rest of the ingredients may be present but the fact that soon before her death, the deceased was subjected to cruelty is not specifically proved against the present appellants, for the reason that in the same house, they were residing in different portion and that being established position (emerging in testimony), how can it be said that the present appellants also colluded and connived with the other family members in view of fact that they were not beneficiary of the outcome of dowry (demand). The circumstances are cogent and conspicuous. They speak for themselves and need no explanation as such. We unequivocally are of the view that the trial court did not approach cautiously and properly to this virtual aspect abundantly supported position supported by evidence on record and wrongly recorded finding of conviction under Sections 304B, 201, 498A I.P.C. and 3/4 Dowry Prohibition Act against the two surviving appellants which is not justified.

33. It is settled principle of criminal jurisprudence that in cases where evidence and circumstances when weighed substantially and taken cumulatively raised strong suspicion about the manner and style of the occurrence that it was so caused by the accused-appellants, then benefit of doubt would be the only reasonable outcome of judicial scrutiny and this benefit of doubt always works in favour of the accused (appellants).

34. The learned trial court could not appraise substantive facts and testimony of this case in right perspective and considered things from narrow angle without properly scrutinizing the same on its entirety and intrinsic potency, instead it read testimony and circumstances only on its face value, whereas, proper scrutiny of fact vis a vis testimony on record would have brought truth on the surface. It is very easy to consider and examine testimony recorded in examination in chief, whereas, the Court has to cautiously contemplate on the entire testimony as a whole and particularly as emerging from the cross examination and then to proceed to record finding on merit for arriving at just conclusion.

35. We may record our satisfaction that arguments extended on behalf of the present appellants carry force and the same are approved and sustained by us. Consequently we hold in unambiguous term that the prosecution has not been able to prove its case beyond reasonable doubt against the two surviving appellants namely

Mohd. Mushtaq and Mohd. Asghar. Thus charges framed against them become doubtful and they are entitled to the benefit of doubt.

36. In the wake of above discussion, we may sum up that the finding of conviction recorded by the trial court is on the face erroneous and perverse and the same cannot be sustained in the eye of law. Therefore, the judgment and order of conviction and sentence dated 24.09.1991 passed by Special Judge, Moradabad, in Session Trial No.411 of 1987, State of U.P. Vs. Mohd. Ishaq and others, arising out of Case Crime No.82 of 1987, under Sections 304B, 201, 498A I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station- Behjoi, District- Moradabad, is hereby set aside. Accused-appellants are acquitted of all charges as above. Accordingly, the instant appeal is allowed.

37. In this case, the accused-appellants Mohd. Mushtaq and Mohd. Asghar are already on bail. They need not surrender in this case. Their bail bonds cancelled and sureties discharged. However, they shall furnish surety bonds in compliance with Section 437A Cr.P.C.

38. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

(2020)03-05ILR A621
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.02.2020

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE ALI ZAMIN, J.

Criminal Appeal No. 2117 of 2002

Rakesh & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri A.B.L. Gour, Sri Saurabh Gaur

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

Criminal law- Indian Penal Code - Sections 147, 504, 506(2), 308/149 - Appeal against conviction.

Held :- Ingredients of Section 307 IPC- Firearm injury – Not found on vital part of body of injured – Injury not caused with intention to kill – Hence not liable for punishment under section 307 IPC. Trial Court judgment modified to conviction under Section 324 I.P.C.

Appeal partly allowed. (E-2)

List of Cases Cited:-

1. St. of H.P. Vs. Pardeep Kumar & ors., (2018) 13 SCC 808.

2. Bhajan Singh @ Harbhajan Singh & ors. Vs. St.of Har., 2011 (4) Supreme 639.

3. Sadayappan @ Ganesan Vs. State, represented by Inspector of Police, 2019 SCC OnLine SC 610.

(Hon'ble Ali Zamin, J.)

1. Heard Sri A.B.L. Gaur, learned Senior Counsel assisted by Sri Saurabh Gaur for the appellants and the learned A.G.A. for the State.

2. This appeal has been preferred being aggrieved from the judgement and order dated 22.05.2002 passed in Session Trial No.62 of 1998 (State vs. Rakesh and others) arising out of Case Crime No.2 of 1997, under Sections 323, 324, 307 read

with Section 34 and 504 I.P.C., Police Station Mursan, District Aligarh by which learned Additional Sessions Judge, Court No.13, Aligarh has convicted the accused-appellants and sentenced each appellant to undergo life imprisonment and fine of Rs.10,000/- under Section 307/34 I.P.C. and in default of payment of fine further to undergo one year simple imprisonment, three months rigorous imprisonment and fine of Rs.500/- for each offence under Sections 323 and 504 I.P.C. In default of fine to undergo simple imprisonment for a month to each under Sections 323/34 and 504 I.P.C.

3. During the pendency of the appeal appellant no.4 Brindavan died and appeal against him has been dismissed as abated vide order dated 10.04.2019. Hence, this appeal is confined only against the applicant no.1 Rakesh, appellant no.2 Gopal and appellant no.3 Mohan.

4. According to prosecution on 08.01.1997 injured Deshraj was looking after his crops in the field, when at about 12:00 hours of the day Rakesh, Gopal, Mohan sons of Brindavan and Brindavan came there and forcefully started filling fodder (kutti) from his burgi (small turret). On his objection accused persons started abusing and beating the injured Deshraj, accused Gopal fired shot from his illegal country-made pistol which hit his left leg. Mohan beat him with stick (lathi). Ram Mohan reached the spot otherwise they would have killed him. Jagdish son of Siya Ram, Shiv Shankar son of Bhagwandas, Chokhey Lal son of Jhabba Ram and others have witnessed the incident. Accused Jagdish is resident of Navipur and other accused are resident of village of the injured.

5. On the basis of written report (Ext.Ka-1) lodged by informant Komal Prasad on 08.01.1997 at 12:30 P.M. chik F.I.R. (Ext.Ka-4) was registered u/s 323, 504, 324 and 307 I.P.C.. Investigation of the case was entrusted to S.I. S.M. Husain (P.W.7) and G.D. entry (Ext.Ka-5) was also prepared on the same day. Injured Deshraj was sent to P.H.C., Mursan after preparing the majrubi chitthi along with constable Bhure Singh, where Dr. Ramveer Singh (P.W.5) examined the injured on 08.01.1997 at 1:30 P.M.and prepared injury report Ext.Ka-3, according to which following injuries were found on the body of the inured.

1. Gun shot wound of entry of size 2 c.m. x 1.5 c.m. muscle deep left thigh middle side 16 c.m. above medial end of left knee below palpable. No wound of exit Advised x-ray.

2. Contusion of size 2.5 c.m. x 1.5 c.m. back of right shoulder joint above supramedial angle reddish in colour.

3. Contusion 6 c.m. x 2 c.m. right side of chest back just below inferior angle reddish in colour.

4. Contusion 2 c.m. x 1 c.m. left side back and supramedial angle.

Injury no.1 kept under observation and advised x-ray. Injury nos.2, 3 and 4 are simple in nature. Injury no.1 is caused by fire arm weapon while injury nos.2, 3 and 4 are caused by hard and blunt object.

6. Investigating Officer observing necessary formalities prepared spot map (Ext.Ka-6) on the pointing of the informant Komal Prasad (P.W.1) and after completing the investigation filed charge sheet (Ext.Ka-7) under Sections 323/34, 324/34, 307/34 and 504 I.P.C. against accused persons before the court of C.J.M., Aligarh, who took cognizance of the case and committed accused to the court of sessions for trial where the Case Crime No. 2 of 1997 was registered as Session Trial No.62

of 1998, from where it was transferred to the court of Additional Sessions Judge-13th, who framed charge under Section 323/34, 324/34, 504 and 307/34 I.PC. against the accused persons.

7. Prosecution to prove charge against the accused persons produced seven witnesses. P.W.1 Komal Prasad infomrant, P.W.2 Deshraj injured and Ram Mohan (P.W.3) are the witnesses of fact, P.W. 4 Dr. R.P. Gupta conducted x-ray, P.W.5 Dr. Ramveer Singh conducted medical examination of the injured, P.W.6 Sri Ram, scribe of chik and G.D. and P.W.7 S.M. Husain I.O. are the formal witnesses. After examination of prosecution witnesses, statement of the accused persons were recorded under Section 313 Cr.P.C. In their statement under Section 313 Cr.P.C., they have stated that on account of enmity case proceeded against them. Accused persons have produced D.W.1 Dr. V.P. Gupta in their defence.

8. After hearing the parties and perusal of the record the Additional Sessions Judge-13th, Aligarh passed the impugned judgement and order, hence this appeal.

9. Learned counsel for the appellants submits that according to prosecution Gopal had country-made pistol, Mohan had 'Lathi', Brindavan and Rakesh were unarmed. Accused persons beat Deshraj with leg and fists. Gopal fired from country-made pistol upon the injured, Mohan beat him with 'Lathi'. In the first information report Jagdish, Shiv Shankar, Chokhey Lal are alleged eye witnesses of the incident but no independent witness has been produced by the prosecution, only son and grandson interested and related witnesses have been produced which casts a doubt on the prosecution case. Next submission is that according to injured from a distance of near about one and half hand accused Gopal had fired shot at him and as per medical jurisprudence if injury is caused within a distance of five feet then blackening and tattooing will be present but as per injury report Ext.Ka-3 in the present case no blackening and tattooing has been found. Further alleged injury is not found through and through injury. In that situation pellets would have been found in the injury. But as per X-Ray report (Ext.Ka-2.), no abnormality has been found, therefore, he submits that injury as alleged is also not proved. He further submits that as per injury report fire arm injury has been found on the left thigh, therefore, it cannot be said that there was intention to kill the injured. He also submits that accused Gopal was admitted in Bagla Civil Hospital, Hathras on 08.01.1997 at 08.15 A.M. and he was discharged on 10.01.1997 at 09.00 A.M., which is proved by D.W.1 Dr.V.P.Gupta, therefore, accused Gopal was not present at the alleged time of the incident. Lastly, he submits that injured P.W.2 Deshraj has accepted that his wife had purchased six bighas land from Jagdish although he has denied knowledge of agreement to sell of the land executed by Panna Lal in favour of Jagdish and the agreement executed by Panna Lal in favour of Jagdish was cancelled by the High Court. But he has admitted that in respect of the six bighas land, which was purchased by his wife, Panna Lal has executed a sale deed before the incident in favour of accused and their sister Rajvati. Thus, it becomes clear from the evidence that there was enmity between the parties and that is why the accused persons have been falsely implicated in the case.

10. Per contra learned A.G.A. submits that it is a case of broad day light incidence. Prompt F.I.R. has been lodged regarding the incident. Doctor has opined that fire arm injury has been caused to the injured. Prosecution version is supported

by medical evidence also. From the evidence on record the causing of the incident by the accused persons is proved. Witnesses have stated that with intention to kill, accused Gopal had fired upon the injured. By chance the injury was caused on a non-vital part but intention of causing fatal injury is clear. Learned trial judge has rightly convicted and sentenced the appellant and no interference is required by this Court.

11. As per first information report (Ext.Ka-4) incident occurred on 08.01.1997 at 12.00 hours of the day regarding which information was given at 12.30 P.M. on 08.01.1997. P.W.6 Sri Ram has stated that on the written report of informant Komal Prasad had registered Case Crime No.2 of 1997, under Sections 323, 504, 324, 307 I.P.C.of which chik no.2 of 1997 is in his writing and signature and has been proved by him as Ext.Ka-4. Relating to it an entry was made in the G.D. at serial no.24 on 08.01.1997 to which also he has proved as Ext.Ka-5. From his cross-examination nothing has been extracted so that inference may be drawn that on 08.01.1997 at 12.30 P.M. he did not register Case Crime No. 2 of 1997, under Sections 323, 504, 324, 307 I.P.C..

12. According to written report (Ext.Ka-1), the incident had occurred at about 12.00 hours of the day on 08.01.1997. This fact has been supported by P.W.1 Komal Prasad. In cross-examination too at page 17 of the paper book he has stated that the incident occurred at 12.00 hours of the day. He had proceeded for Police Station at 12.00 hours of the day and reached the Police Station at 12.30 P.M. He has further stated that Police Station from his village is at a distance of 1/2 km. and he took his father on foot taking him on a cot. He has also stated that in scribing the report 4-5 minutes were taken. From his cross-examination nothing has been extracted so that an inference can be drawn that incident did not occur at about 12.00 hours of the day. Injured P.W.2 Deshraj also has stated that near about three years before the incident had occurred at 12.00 hours of the day. In cross-examination he has stated that the investigating officer recorded his statement at about 12.30 P.M.. P.W.3 Ram Mohan has also stated that near about four years earlier, the incident had occurred at 12.00 hours of the day. From cross-examination of P.W.2 Deshraj and Ram Mohan nothing has been extracted so that any adverse inference can be drawn. Thus, on the point of occurrence of incident at 12.00 hours of the day and lodging first information report at 12.30 P.M. prosecution evidence is consistent, corroborative to each other.

13. As per chik report (Ext.Ka-4), distance of Police Station from the place of incident is 05 kms.. P.W.1 Komal Prasad in his cross-examination has stated that Police Station from his village is at a distance of 1/2 km. Thus, as per statement of the informant and chik report there is difference regarding distance of Police Station from the village but from the prosecution evidences as discussed above, it is established that first information report has been registered at 12.30 P.M.. Regarding occurrence of incident the witnesses have stated the time of incident on the basis of estimation as is evident from Ext.Ka-1 also, in which the time of incident has been mentioned as about 12:00 hours of the day. Therefore, on the basis of difference of distance between Police Station and village as observed above registration of the case at 12.30 P.M. cannot be doubted. Thus, in the facts and

circumstances of the case, it is established that regarding incident at 12:00 A.M. F.I.R. has been lodged promptly without deliberation and consultation.

14. Admittedly, P.W.1 Komal Prasad is the son of injured Deshraj and P.W.3 Ram Mohan is the son of informant Komal Prasad. Therefore, witnesses produced by the prosecution are related to each other.

15. In the case of **State of Himachal Pradesh vs. Pardeep Kumar and others, (2018) 13 SCC 808,** Hon'ble Supreme Court in paragraph 5 of the judgment has held as under:

"5... So far as examination of independent witnesses in support of the prosecution case is concerned all that would be necessary to say in this regard is that examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case..."

16. In the case of **Bhajan Singh @ Harbhajan Singh & Ors. vs. State of Haryana, 2011 (4) Supreme 639,** Hon'ble Supreme Court in para 26 of the judgment has held as under:

"26. Evidence of a related witness can be relied upon provided it is trustworthy. Such evidence is carefully scrutinised and appreciated before reaching to a conclusion on the conviction of the accused in a given case."

17. In **Sadayappan @ Ganesan vs. State, represented by Inspector of Police, 2019 SCC OnLine SC 610**, the Hon'ble Supreme court in para 11 of the judgment has held as under:

"11. Criminal law jurisprudence makes a clear distinction between a related and interested witness. A witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. The witness may be called "interested" only when he or she derives some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished."

18. In view of the above law laid down by Hon'ble Supreme Court we have to carefully scrutinize and appreciate evidence of witnesses as to whether they are trustworthy as well as whether witnesses will derive some benefit from the result of litigation in seeing the accused persons punished.

19. On going through the evidence of P.W.1 Komal Prasad, P.W.2 Deshraj and P.W.3 Ram Mohan we find that the witnesses are not likely to derive any benefit if accused are punished.

20. P.W.1 Komal Prasad has stated that he knows Maya Devi. Maya Devi had lodged report against him under Sections 323, 324 I.P.C.. He has also stated that a 'Marpeet' was committed with him regarding which he had lodged report, thereafter Maya Devi also lodged report. In the case of Maya Devi, Gopal was witness and in his report he was accused. He has also stated that on the basis of report by Mohan a case is pending under Section 307 I.P.C. against him, his son and his brother of which also there is cross case pending against Mohan. He has further stated that he knows Jagdish of his village but he has no knowledge whether Panna Lal had executed any agreement to sell for ten and

half bighas land in favour of Jagdish. He has admitted that his mother's name is Asharfi Devi and 28 years before the incident his mother Asharfi Devi had purchased land from Jagdish. It is not in his knowledge that any case is pending regarding this land between Jagdish and Panna Lal. He has also stated that it is wrong to say that he has purchased this ten and half bighas land from Jagdish. True fact is that he has purchased seven and half bighas land from Jagdish. It is not in his knowledge that this seven and half bighas land was sold to accused persons and their sister Rajvati. He has also stated that regarding that land litigation is pending between Panna Lal and him. He has not arrayed accused persons as party in the case.

21. P.W.2 Deshraj in cross-examination has also stated that name of his wife is Asharfi Devi. He does not know Panna Lal. He has no knowledge about his land in the village and it is also not within his knowledge that Panna Lal executed a sale deed of seven and half bighas land in favour of Jagdish. His wife purchased six bighas land from Jagdish thirty years before the incident. He has no knowledge about the litigation on this land between Panna Lal and Jagdish and he has denied that Jagdish lost the case from the court of Munsif, Hathras and the High Court and has stated that the case was dismissed in default. He has further stated that it is not in his knowledge that the agreement to sell executed by Panna Lal in favour of Jagdish was cancelled by the High Court or not. He has admitted that before the incident in respect of six bighas land which was purchased by his wife Asharfi Devi a sale deed was executed by Panna Lal in favour of accused and their sister Rajvati. On purchase of his land by the accused persons he did not feel any ill-will because they had purchased the same legally. He has also stated that accused persons are not in possession after purchase of the land. Land is in possession of 'Supurdgar'. Above statements of witnesses P.W.1 Komal Prasad and P.W. 2 Deshraj show that there was a litigation between informant and accused about the land purchased by the wife of the injured and criminal cases between Komal Prasad and Mohan are pending. Thus, it is inferred that the witnesses had inimical terms with the accused.

22. It is well settled that enmity is a double edged weapon and it cuts both sides. On the basis of enmity on the one hand one can be falsely implicated and on the other hand one can cause incident also. Therefore, keeping in mind, we have to analyse the evidence of prosecution witnesses.

23. P.W. 1 Komal Prasad has stated that his father was on the field at 12.00 hours of the day to look after the field. Gopal, Mohan, Rakesh and Brindavan of the village were taking fodder from 'Burgi' on his filed. When his father objected they started abusing and beating him with legs, fists and 'Danda'. Gopal with intention to kill fired with illegal country made pistol, the shot hit the injured on left leg, Mohan beat him with a lathi. Receiving of fire arm injury by Deshraj in the left leg and other injuries on account of beating by accused persons is supported by the injury report (Ext.Ka-3) proved by P.W.5, Dr. Ramveer Singh. He has also stated that Shiv Shankar, Ram Mohan, Chokhey Lal and Jagdish reached the spot. He also reached the spot. In cross examination this witness has stated that if the Investigating Officer has not recorded in his statement regarding fire by

Gopal with intention to kill and reaching the witnesses on the spot then he cannot tell any reason. It indicates that before the court this witness has improved his version regarding firing by accused with intention to kill. He has also stated that it is true that he wrote in his report that he had reached the spot. He has also stated that at the time of incident he was at his 'Gher' (boundary). The place of incident from his 'Gher' (boundary) is 3-4 fields away. He reached the spot on hearing noise. He had reached the place of incident at the time of committing 'Marpeet'. He had seen the accused committing 'Marpeet' in the way. He has given description with regard to taking out fodder from the 'Burgi'. From his statement it is inferred that the place of incidence is not far away from his 'Gher' (boundary). In case of 'gher' being situated near the place of incident and the incident has occurred in the field, incident can be seen by him. Therefore, his statement appears to be true that he had seen the incident while on the way and he also reached the spot. No other material has been elicited from his cross-examination so that his statement regarding abusing, beating by fists and legs by accused persons, causing 'Lathi' and fire arm injury to injured Deshraj by Mohan and Gopal respectively can be doubted. Thus, on careful scrutiny of his testimony, we find that even if the witness P.W.1 Komal Prasad had inimical terms with the accused, his evidence regarding abusing and causing leg and fists, 'Lathi' and fire arm injury by accused Rakesh, Mohan and Gopal respectively is trust worthy and reliable.

24. P.W.2 Deshraj is the injured and an important witness of the case. He has stated that he was looking after his field at about 12.00 hours of the day. At that time Brindavan, Rakesh, Gopal, Mohan came to his field and forcefully started taking 'Kuti' (fodder) from his Burgi. Deshraj objected and then accused persons abused him and started 'Marpeet' and Gopal with intention to kill fired upon him. The shot hit his left leg. The other accused persons beat him by 'Lathi', legs and fists. On his alarm Ram Mohan, Komal, Shiv Shanker, Jagdish, Chokhey Lal came there.

25. He has stated that if the Investigating Officer has not recorded his statement that Gopal had fired upon him with intention to kill then he cannot tell any reason of it. He has also stated that he told the Investigating Officer that Ram Mohan and Komal came to the spot and saved him. If the Investigating Officer has not recorded this in his statement then he cannot tell any reason for it. In above discussion, we have found Komal Prasad is a witness of incident and he reached the spot also, hence, even if in his statement it has not been recorded by the Investigating Officer, witnessing and reaching the place of incident of Komal Prasad cannot be doubted. Witnessing the incident by P.W. 3 Ram Mohan has been disclosed in the FIR itself which has been lodged promptly and is his cross-examination nothing has been extracted so that his presence on the spot can be doubted, therefore, witnessing and reaching the place of incident of P.W.3, Ram Mohan is also established.

26. P.W. 2 Deshraj the injured at page 29 of the paper book has stated that firstly accused persons abused then committed 'Marpeet' with him and during 'Marpeet' Gopal fired upon him. He has also stated that Mohan had a 'Lathi', Rakesh had nothing but he was beating him with legs and fists. Brindavan was also unarmed, he was beating him then Gopal fired on him the shot hit his thigh which is corroborated

by the injury report (Ext. Ka-3). The statement of this witness regarding abusing and firing by Gopal and beating by 'Lathi' by accused is consistent with the written report (Ext.Ka-1). He has also stated that hearing the sound of fire, the witnesses came to the spot. The witnesses were already coming and going. The witnesses, who were coming and going on the way among them Komal Prasad and Ram Mohan were coming to the field itself. Shiv Shanker, Chokhey Lal and Jagdish were going to the market. He has also narrated the incident in detail on asking by the defence. The core case of the prosecution is not shaken from the cross-examination with regard to abusing by accused persons, beating by fists and legs by accused person, beating by 'Lathi' by accused Mohan and causing fire arm injury by the accused Gopal. Thus, on a careful analysis of the whole statement as discussed above, even if the accused and injured P.W.2 Deshraj had inimical terms his evidence regarding the incident is trust worthy and reliable.

27. P.W.3 Ram Mohan has also supported the prosecution version. From his cross-examination nothing material has been elicited so that his presence on the spot and his testimony regarding the incident can be doubted.

28. Defence has also produced D.W.1 Dr. V.P. Gupta in order to prove that accused Gopal was not present at the time of incident and this witness has stated that Gopal Sharma, the accused, was admitted in the hospital on 08.01.1997 at 8:15 A.M. and discharged on 10.01.1997 at 9:00 A.M. He has admitted in cross examination that in the Admission Register time of admission is not mentioned. On the bed head ticket name and address is not written in his hand writing. He has also stated that loose bundle of bed head tickets remains with the pharmacist. It is also stated that Mukesh Kumar who has written the name and address is still in service. According to him the patient had freedom of movement from which it can be inferred that the accused Gopal was not an indoor patient. He has also stated that he does not supervise patient at all times because patient remains in the ward and he does outdoor duty. Therefore, from the statement of this witness, it cannot be said that presence of accused Gopal at the time of incident was impossible. Accordingly, we find no substance in the contention of learned counsel for the appellant that Gopal was not present at the time of incident.

29. According to prosecution a fire arm injury in the thigh of Deshraj was caused by Gopal. P.W. 5 Dr.Ramveer Singh found injury no.1 a fire arm injury and he was feeling pellet in the injury. There was no tattooing and scorching in the wound and it was not an exit wound. X-ray was advised and according to P.W.4, no abnormality was found in the X-ray on which learned counsel for the appellants submits that if fire arm injury was caused and there was no exit wound then in that situation pellets would have been found in the body. P.W.2 in his cross-examination at page 24 of the paper book has stated had Gopal had fired upon him from a hand, one and half hand and at page 29 of the paper book has stated that Gopal had fired from a distance of 02 hands, on which he submits that as per medical jurisprudence if fire arm injury is caused within a distance of 05 feet then blackening and tattooing will be present.

30. In spot map (Ext. Ka-6) proved by P.W.7 S.I.Syed Masook Husain, Investigating Officer, place XA has been

shown as the place of causing injury and place XB has been shown from where accused Gopal fired. The distance of place XA from place XB is shown as 10 steps . In cross examination at page 24 of the paper book he has stated that Gopal had fired upon him from a distance near about a hand, one and half hand and on page 29 he has stated that when the accused were taking out fodder from the 'Burgi' he was at a distance of two hands. He has further stated that the accused were committing 'Marpeet' and at that time Gopal fired. Such a statement has been made by the witness on 01.02.2000 and 01.03.2001. While the incident has taken place on 08.01.1997. The witness is also a rustic witness, therefore, in view of the nature of injury caused to him and the varied statement at the same time, i.e., a hand, one and half hand and two hands while as per spot map (Ex.Ka-6) distance has been shown as 10 feet which was prepared at the time of incident, therefore, there is no reason to disbelieve the distance disclosed in the spot map. Thus, on account of not finding blackening and scorching on the wound prosecution case cannot be doubted.

31. As per X-ray report (Ext. Ka-2) proved by Dr.R.P.Gupta no abnormality has been found in the fire arm injury. As per page 537 and 538 of **MODI Medical Jurisprudence And Toxicology 24th Edition Reprint 2012,** *"when the wound of entrance is present, but not the wound of exit, it means that a bullet is lodged in the body, except in those rare cases where a bullet has been coughed out after entering the respiratory passages or lost in the stool after entering the intestinal tract and also where a bullet by coming in contact with a bone is so deflected as to pass out by the same orifice as it entered."*

32. In view of **Modi Medical Jurisprudence**, in rare case bullet is deflected from the same orifice from which it entered. Prosecution evidence on the point of causing fire arm injury to injured Deshraj is consistent and corroborated with medical evidence. Therefore, keeping in view of Modi Medical jurisprudence, on the basis of not finding any bullet in the body of the injured and distance disclosed by witness between accused and himself, we do not find any substance in the contention of the learned counsel for the appellants that if fire arm injury is caused within a distance of two hands blackening and tattooing will be found and there is no exit injury, therefore, pellet should be present in the injury.

33. Considering the evidence produced by the prosecution as discussed above, we find that evidences of P.W.1, P.W.2 and P.W. 3 are consistent, trust worthy and reliable with regard to the incident, therefore, the contention of the learned counsel for the appellants also has no force that on account of enmity they have been falsely implicated.

34. According to Ext.Ka-1, accused Gopal caused fire arm injury on the left leg of injured Deshraj. Injured Deshraj has stated that when accused were beating him at that time Gopal fired upon him which indicates that firing by Gopal to the injured Deshraj was not in furtherance of common intention of other accused. It was his lone act. Therefore, all the accused persons cannot be held liable for causing fire arm injury by accused Gopal. Further, in

Ext.Ka-1 it is mentioned that fire arm injury hit the left leg of Deshraj. Seat of injury is on the thigh which is not a vital part. Injured and other witnesses have improved their statement that with intention to kill the accused fired upon the injured, it was not the case of the prosecution that with intention to kill the shot was fired by the accused Gopal targeting a vital part but injury was caused on a non-vital part. As per evidence of the injured also the accused started beating and at once Gopal fired and the shot hit the injured on his thigh. In such a situation it cannot be inferred that intention of the accused was to kill the injured. Therefore, charge under Section 307 I.P.C. is not proved. Causing fire arm thigh injury by accused Gopal is proved, therefore, offence under Section 324 I.P.C against him is made out and for the same he is liable.

35. On a conspectus of facts and circumstances of the case and close scrutiny of the evidence available on record, as discussed above, we find that prosecution evidence is consistent, trust worthy, and corroborated by medical evidence. Fire arm injury by Gopal was not caused in furtherance of common intention of all the accused persons. Therefore, for causing fire arm injury he is alone liable for his act. Injury was not caused with intention to kill, therefore, he is not liable for punishment under Section 307 I.P.C. but fire arm injury on thigh is proved, for which he is liable to be punished under Section 324 I.P.C. Punishment of appellants Rakesh, Gopal and Mohan under Section 307/34 I.P.C is not proper and is liable to set aside. Consequently, they are liable to be acquitted under Section 307/34 I.P.C. So far as offence under Sections 323, 504 I.P.C. is concerned, prosecution evidence in this regard is consistent, corroborative to each other. Therefore, conviction and sentence is liable to be affirmed.

36. The appeal is, therefore, partly allowed. The impugned judgment and order convicting and sentencing the appellants Rakesh, Gopal and Mohan under Section 307 I.P.C. is set aside and they are acquitted for the offence under Section 307/34 I.P.C.. Appellant Gopal is convicted under Section 324 I.P.C. and in the facts and circumstances of the case he is sentenced to rigorous imprisonment for a period of two years. The appellant no.1 Rakesh, appellant no.2 Gopal and appellant no.3 Mohan are on bail. Their bail bonds are cancelled.

The court concerned is directed to take the appellants into custody to serve out the sentences awarded to them by the trial court under Sections 323, 504 I.P.C. and appellant Gopal under Section 324 I.P.C. as aforesaid.

Office is directed to communicate this decision to the court concerned forthwith and also send back the record.

(2020)03-05ILR A630
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2020

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

Criminal Appeal No. 2189 of 1990

Arvind & Anr. ...Appellants(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri M. Islam, Sri Nazrul Islam Jafri

Counsel for the Opposite Party:
D.G.A.

Criminal law- Indian Penal Code- Section 449-Section 302/34 - Appeal against conviction.

Trivial contradiction in statements–

Held :- Trivial contradiction in statements are liable to be ignored as ocular testimony of prosecution witnesses supported by the medical evidence. (Para 34)

Appeal rejected. (E-2)

List of Cases Cited:-

1. Criminal Appeal No. 291 of 2010,

2. Subhash Vs. St. of U.P. decided on 2nd November, 2017.

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

(1) Heard Sri Nazrul Islam Jafri, learned senior counsel assisted by Sri M. Islam, learned counsel for the appellant, Sri Krishan Pahal, learned A.A.G. for the State assisted by Sri Bhanu Prakash Singh learned brief holder and perused the record of the appeal.

(2) By way of instant criminal appeal, challenge has been made to the validity and sustainability of the judgement and order dated 03.12.1990 passed by II Additional Sessions Judge, Rampur in Sessions Trial No.9 of 1989, **(State Vs. Arvind and another**), Case Crime No.88 of 1988, police station- Patwai, district- Rampur, whereby the appellant- Arvind- has been convicted and sentenced to undergo ten years R.I. and life imprisonment for offence under Sections 449 IPC and 302/34 IPC, respectively.

(3) Appropriate to mention that during the course of appeal, **appellant no.2 Sita Ram** expired, therefore, his appeal stood abated against him, vide order of this Court dated 03.12.2018.

(4) Facts engraved in the first information report- Exhibit Ka-1- reflect that there was pending civil litigation between father of the informant- Nem Chand- and accused- Arvind and Sitaram- both sons of Baburam- in respect of some landed property. It is stated that in the night intervening 17/18.6.1988 informant's father- Nem Chand, his uncle Mishri and Hemraj were sleeping in the courtyard of their house, it was around 1.30 a.m. that it started drizzling, therefore, the informant and his family members started moving inside the house holding their respective cots, at the same time miscreants standing at their portal outside flashed torch lights upon them, when Hemraj and Mishri too flashed their torches towards them and spotted co- accused- Arvind and Sitaram. Accused- Arvind and Sitaram- were possessing country-made gun and two others possessing swords were standing over there. All the miscreants rushed into the courtyard and asked informant's uncle- Hemraj- the whereabouts of Nem Chand. At that point of time, Nem Chand (father of the informant) emerged from inside the house. Thereupon, the accused- Arvind and Sitaram- fired on him (Nem Chand) with their country-made guns, which caused gunshot pellet injuries on the chest and stomach of the deceased. Alarm was raised, whereupon, Harprasad s/o Khyali and Kundan s/o Ishwari from the neighbourhood and the other co- villagers holding torches in their hands arrived on the spot, due to which, all the four assailants escaped away towards the west of the village towards the canal. Accused were identified in the torch light. Laden on a cot victim- Nem Chand- was (then) taken to the police station by the informant and his uncle, but Nem Chand breathed his last on the way near the police station. The informant wrote the FIR- Exhibit Ka-1- and lodged it at the Police Station.

(5) Contents of the written report were taken down in the concerned check FIR at Case Crime No.88 of 1988, under Section 302 IPC at Police Station- Patwai, District- Rampur at 2.30 a.m. on 18.6.1988. The copy of check FIR is Ex. Ka.13 and relevant entries were made in the concerned G.D. at serial no.3 at 2.30 A.M. on 18.6.1988 whereby case was registered against the accused. Copy of G.D. is Ext. Ka.-14.

(6) After registration of the case, Investigating Officer- Umesh Chandra Mishra P.W.9 swung into action and took-over investigation on 18.6.1988. He recorded the statements of Gajram Singh, Hemraj and Mishri at the police station. The dead body was lying in the police station but on account of it being night hours, proceedings for inquest were postponed until the following morning. On the next day (18.6.1988) at 6 A.M. the Investigating Officer appointed inquest witnesses and prepared the inquest report, which is Ext. Ka.-5. In the opinion of witnesses, it was thought proper to send the dead body of Nem Chand for post-mortem examination for ascertaining real cause of death.

(7) In the process relevant papers were also prepared by the Investigating Officer viz. Photonash (Exhibit Ka-6), challan dead body (Exhibit Ka-7), specimen seal (Exhibit Ka-8), letter to C.M.O. and R.I. (Exhibits Ka-9 and 11, respectively) etc. The dead body was sealed and was entrusted to S.I. Bhojraj Singh and Dharmveer Singh for post-mortem examination.

(8) Post-mortem examination on the cadaver of the deceased was conducted on 18.06.1988 at 01.45 P.M. by Dr. S.P. Singh P.W.11, wherein the following ante-mortem injuries were noted at the time of examination:

Ante mortem injuries

1. Gun shot wound of entry 3 cm x 3 cm x chest cavity deep over middle of sternum, margin lacerated and inverted. No blackening or scorching.

2. Multiple firearm wounds of entry, each measuring 1/2cm x ½ cm x left side of abdomen, margins lacerated and inverted, just below sub coastal margins.

3. Gun shot wounds of exit four in number, each measuring 2 cm x 2 cm x back of communicate injury no.2 on the back of abdomen (right side back of abdomen), margins lacerated and everted.

In the opinion of doctor, cause of death was stated to be haemorrhage and shock as a result of ante-mortem injuries. The post-mortem report is Exhibit Ka-15.

(9) The copy of the post-mortem report was obtained by the Investigating Officer on 20.6.1988. Blood stained clothes of the deceased- Nem Chand were sent for Chemical Examination at Agra. The Chemical Examiner's report is Exhibit Ka-16.

(10) Consequent whereupon the Investigating Officer also inspected the spot and prepared the site plan- Exhibit Ka-12. He also took sample of simple and blood stained clay-roll from the spot in two separate containers and prepared a memo of the same- Exhibit Ka-4. One empty cartridge .12 bore and three pellets were recovered from the spot, a memo of the same was also prepared as Exhibit Ka-3. Besides, he recorded statement of Omwarti (wife of the deceased- Nem Chand) and Niranjan, Bhawani Prasad. On 19.6.1988, he arrested the accused- Arvind and Sita

Ram- and interrogated them. He also recovered the torches and prepared the memo of the same as Exhibit Ka-2.

(11) After completing the necessary formalities the Investigating Officer filed the charge-sheet against the accused under Section 302 IPC.

(12) The case of the appellant was committed to the court of Sessions from where it was made over for trial and disposal to the aforesaid trial court. The trial court, after hearing the accused and the prosecution on point of charge, was satisfied with prima facie case for the offence under sections 449, 302/34 I.P.C., consequently it framed charges against accused under the aforesaid sections of I.P.C. The charges were read over and explained to the accused, who abjured the charges and claimed to be tried.

(13) In turn, prosecution was asked to adduce its testimony in order to prove the guilt. The prosecution produced in all 11 witnesses. Brief reference of the prosecution witnesses is ut-infra:-

(14) Gajram Singh P.W. 1 is the first informant and eye-witness of the occurrence. He has proved the written report Ext. Ka.-1. Hemraj P.W.2 and Mishri P.W.3 are the eyewitnesses and brothers of the deceased. Har Prasad is P.W.4, he has been declared hostile, similarly Kundan Lal P.W.5 has not supported the prosecution case. Smt. Omwati is P.W.6. She is also the eye witness and wife of the deceased. Nem Chand is P.W.7. He is witness of fact of recovery of empty cartridge and pellets. Sompal is P.W.8. Umesh Chandra Mishra is P.W.9 is the Investigating Officer of this case. Constable Bhojraj Singh is P.W.10. Dr. S.P. Singh P.W.11 has conducted post-mortem examination (Exhibit Ka-15) on the dead body of the deceased.

(15) Except as above, no other evidence was adduced by the prosecution, therefore, evidence for the prosecution was closed and the statement of the accused was recorded under section 313 Cr.P.C. wherein they have claimed to have been falsely implicated in the case on account of enmity.

(16) The defence did not lead any evidence, whatsoever.

(17) The learned trial court after hearing both the sides on merit and after appraising the facts and evaluating evidence on record returned finding of conviction and sentenced the appellant to ten years R.I. and life imprisonment for offence under Section 449 IPC and under Section 302/34 IPC, respectively.

(18) Resultantly, this appeal by the accused- appellant.

(19) Arguments advanced by the learned senior counsel Sri Nazrul Islam Jafri are manifold, the probability of commission of the offence by the present appellant- Arvind- is highly bleak on account of various facts and attendant circumstances of this case and the testimonial description of the prosecution witnesses of fact. The F.I.R. is ante- timed. How is it possible that the incident occurred at 1.30 a.m. in the night intervening 17/18.6.1988 and the matter was reported at the Police Station- Patwai, district- Rampur at 2.30 A.M. and the description about the lodging of the F.I.R. is quite dramatic and it is claimed that one shop was open around 2.30 a.m. from where help was sought by purchasing certain articles thereafter report was scribed

outside the police station then it was lodged. It has emerged in the testimony of the prosecution witnesses that at the time of the lodging of the FIR, daroga ji was inside the police station which aspect goes to show police interference and deliberation in scribing and lodging the written report- Exhibit Ka-1. The source of light on the spot is absolutely missing. Under what circumstances when the accused were known and resident of the same village still they will not hide/conceal their faces while committing the offence has not been properly explained. In support of his claim on point of non- concealment of faces, learned senior counsel (for the appellant) has placed reliance on the law laid down in **Criminal Appeal No.291 of 2010, Subhash vs. State of U.P. decided on 2nd November, 2017.**

(20) The memo of torch was deliberately and belatedly prepared by the Investigating Officer after one month of the occurrence itself. Moreover, the source of light- the torch in question has not been produced before the trial court and the concerned witness Sompal P.W.8 has not whispered even a single word regarding the use of the torch and taking possession of the same by the Investigating Officer. Fact is that the matter was deliberated upon with the help of the police and on account of pending civil litigation involving landed property/will a false case has been thrusted upon the appellant for no worthy reason. There are material contradictions occurring in the statement of the prosecution witnesses. They are wholly unreliable, partisan and interested witnesses. Their testimony on the whole, does not inspire confidence. The circumstances when taken as a whole point out that no one infact saw the occurrence and the incident was caused by some unknown assailant, who was not identified till the inquest was prepared and the relevant entries were kept empty at the police station and after the matter was deliberated and sorted out by the informant side and the police, things were tried to be filled up in a casual manner. The charges under Sections 449, 302/34 IPC have not been proved beyond reasonable doubt.

(21) While retorting to the aforesaid argument, learned A.A.G. has submitted that in this case the main incident of shooting down the father (Nem Chand) of the informant has been proved profusely by the consistent testimony of the prosecution witnesses- i.e. particularly P.W.1 Gajram Singh and P.W.2 Hemraj. Their presence on the spot cannot be doubted. They are the natural persons present on the spot.

(22) The learned A.A.G. also engaged our attention to the testimony of P.W.5 Kundan Lal and claimed that by virtue of his testimony, it trickles out that Arvind was one among the assailants and he was sighted on the spot. Albeit, he turned hostile and resiled from his statement and he is not willing to come out specifically against the appellant. However, in the cross- examination participation of the present appellant- Arvind- in the incident cannot be ruled out as he has been spotted on the spot by the witnesses.

(23) He further submitted that lodging of the FIR is prompt. There is no point in claiming it to be ante- timed and there was no reason as such. The motive imputed for committing the crime is also specific and direct. In so far as the task of hiding faces by the assailants are concerned, then the mind set of the assailants cannot be taken to work uniformly in all cases and it is not a case that the assailants attempted to commit dacoity and in the process

murdered the victim. The ill- will of the appellant was of such degree that they dared commit the offence in the presence of the other inmates of the house.

(24) We have considered the rival submissions and also considered the rival claim made by both the parties. In view of above, the point for adjudication of this appeal relates to fact whether the prosecution has been successful in proving charges against the appellant beyond all reasonable doubt?

(25) The genesis of the prosecution case is reflected from perusal of the first information report, Exhibit Ka-1, which, iner-alia, contains facts in form of allegation that some litigation regarding landed property was pending between the informant side and the present appellant. At the time of the occurrence, the deceased along with his family members was sleeping in the courtyard of his house at night, it was around 1/1.30 a.m. some drizzle took place and due to drizzle, his other family members sleeping over there in the courtyard took their cots and were in the process of moving inside the house when some persons, who were standing at the door (of the house) flashed their torches towards the informant side, whereupon, informant's uncles- Hemraj and Mishri- also flashed their torches towards them, then they saw the appellant (Arvind) possessing countrymade gun in company with others. The miscreants arrived in the courtyard asked about Nem Chand and in the meanwhile, informant's father Nem Chand arrived in the courtyard coming out of his house, when Arvind and other co-accused fired on him with their countrymade gun, which caused gunshot injury on the chest and stomach of the deceased. Alarm was raised, whereupon, the neighbours and the co- villagers possessing torches in their hands arrived on the spot, due to which, the assailants escaped away from the scene. The incident is stated to have been seen in the torch light and the assailants identified. It was also stated that two unknown persons were also among the assailants, who can be identified, as and when they are seen. In the concluding description, the written report entails description that the informant and his uncle were carrying the deceased on a cot to the police station, but the deceased succumbed to his injuries on way near the police station. The dead body was stated to be lying on the cot. The contents of the FIR have been entered in the concerned Check FIR and the relevant entries made in the General Diary on 18.6.1988 at 2.30 a.m. at Case Crime No.88 of 1988 and case was registered at Police Station- Patwai against the appellant in district- Rampur. The time of the occurrence was stated to be 1.30 a.m. on 18.6.1988.

(26) The basic contention raised on the point of occurrence relates to fact that the incident was not seen by anybody and the incident was caused by some unknown persons, but on account of pending civil litigation, the name of the appellant has been falsely involved in this case. It has also been claimed that there was no motive for the appellant to commit the offence. Further contention is that some unknown dacoits raided the village and they killed Nem Chand.

(27) We carefully scrutinized the testimony of the prosecution witnesses of fact and particularly the informant Gajram Singh P.W.1, Hemraj P.W.2, Mishri P.W.3, Har Prasad P.W.4, Kundan Lal P.W.5 and Omwati P.W.6 etc. They have given in their description of the occurrence every

particular of the occurrence. All have stated about the accused that he (Arvind) participated in the offence and he in company with other co- accused opened fire on Nem Chand. It has also been claimed n behalf of the appellant that certain witnesses were not present- say- the presence of Omwati P.W.6 is doubtful. But, we are not impressed with the argument for the reason that merely because the presence of Omwati P.W.6 on the spot if doubtful, what about the presence of the other witnesses of fact- say- P.W.1 Gajram Singh, P.W.2 Hemraj and P.W.3 Mishri etc.

(28) We have to scrutinize the fact from particular angle whether, the presence of the witnesses of fact on the spot is natural and their testimony regarding the occurrence is worthy of credence and their version can be taken as truthful version or not?

(29) With that view in mind, we have also scrutinized the entire facts and circumstances of the case. Now, the admitted prevailing/existing circumstance is that the occurrence took place in the night intervening 17/18.6.1988 and it so happened that the deceased along with his family members was sleeping on the cot in the courtyard of the house and this house is inhabited by a number of family members of the deceased- Nem Chand. It Drizzled in the night around 1.30 a.m. (on 18.6.1988), when the family members, sleeping in the courtyard, were awakened and they tried to move inside the house with their cots when the incident is stated to have been caused by the appellant by opening fire on the deceased after arriving in the courtyard of the house.

(30) Sri N.I. Jafri, learned senior counsel has earnestly urged that it so happened that all the family members, who were sleeping in the courtyard had by that time moved inside the house in their respective rooms when the incident was caused by some unknown persons and nobody could see the real assailants.

(31) We are not ready to accept this piece of argument in the wake of the specific testimony of the prosecution witnesses of fact- say- P.W.1 Gajram Singh and P.W.2 Hemraj. They have in their examination-in-chief as well as in cross-examination, consistently and satisfactorily detailed about the very manner in which the incident commenced and culminated into death of Nem Chand. As per their testimony, it started drizzling around 1.30 a.m. On 18.6.1988 while the deceased along with Gajram Singh P.W.1 and Hemraj P.W.2 and other members of the family were sleeping in the courtyard and they tried to move inside their house, simultaneously, it so happened that four persons flashed their torch lights on them (prosecution side) and they entered in the courtyard, when the informant- Gajram Singh P.W.1, Hemraj P.W.2 and Mishri P.W.3 also flashed their torch light on the miscreants, when they saw accused- Arvind and Sitaram- possessing countrymade gun in company with two others and one of the two unknown possessing sword. The miscreants asked P.W.2 Hemraj and P.W.3 Mishri about Nem Chand, in the meanwhile, the informant's father- Nem Chand also came out of the room in the courtyard, when fire was opened by the appellant and one co- accused on him, which fire hit Nem Chand on his chest and stomach.

(32) This piece of testimony virtually goes unimpeachable. Merely because certain trivial aberrations occur in the

testimony of the prosecution witnesses- say- P.W.3 Mishri and P.W.6 Omwati; that alone would not be suffice for over throwing the entire prosecution case. For the shake of argument, we can assume and hold that even P.W.6 Omwati was not present on the spot, even then the presence on the spot of the other prosecution witnesses- say- Gajram Singh P.W.1 and Hemraj P.W.2 is proved satisfactorily beyond doubt. Their conduct on the spot is natural, it has emerged in the cross-examination of Mishri P.W.3, as appearing on page No.33 of the paper book that the family members had gone inside their rooms, but that is a casual and isolated statement. No further cross- examination on this aspect done. His testimony virtually proves the presence of P.W.1 Gajram on the spot and may be that few members of the family were inside the house at the time of the occurrence, but the presence of P.W.3 Mishri in the courtyard is very much there and his testimony regarding the occurrence is innocuous and inaccessible.

(33) Now, the point of FIR being ante- timed is merely an argument not whispered by any cogent evidence or circumstance. The dead body was taken to the police station and the FIR was scribed outside the police station. No infirmity or inconsistency of any sort giving rise to any adverse circumstance is perceptible in the testimony of the prosecution witnesses.

(34) Major thrust has been given to the entire testimony of Omwati P.W.6 that a wholesome reading of her testimony negates the presence of the other prosecution witnesses of fact on the spot. We have also scrutinized carefully the entire testimony of P.W.6 Omwati as forthcoming about the occurrence. Obviously, she is vacillating on certain points, but she is not vacillating on the point of the commission of the offence and her deviation is minor, trivial and cannot be treated to be of dubious nature. She is partly reliable on point of occurrence, but because of certain deviations and contradictions in her statement in court and recorded under Section 161 Cr.P.C. Contradictions in the statement of the P.W.1 Gajram Singh, P.W.2 Hemraj and P.W.3 Mishri with the statement under Section 161 Cr.P.C. are also there but all these contradictions are of minor and trivial nature but the substantive evidence regarding the occurrence being caused by appellant is established beyond doubt.

(35) The ocular testimony of the prosecution witnesses also finds support from the medical testimony on record. The post-mortem examination on the body of the deceased was done on 18.6.1988 at 1.45 P.M., wherein, Dr. S.P. Singh P.W.11 noted the three ante- mortem injuries and all these three ante- mortem injuries have been found in the shape of gunshot wounds. Injury no.1 and injury no.3 are the gunshot wound of entry and gunshot wound of exit. Thus, resembling to one shot and the injury no.2 is multiple firearm wound of entry; each measuring 1/2 cm x 1/2 cm x left side of abdomen. Injury no.2 must have been caused by diffraction of pellets. There is no blackening and tattooing found in the ante-mortem injuries. The post-mortem examination report has been prepared by Dr. S.P. Singh, and it is Exhibit Ka-15. In the opinion of doctor, the injuries caused on the deceased could have been caused around 2 A.M. in the concerned night (of the occurrence).

(36) Now, the overall outcome is that the testimony of the prosecution witnesses regarding participation of the present

appellant- Arvind- in the occurrence at the relevant point of time has been innocuously proved and established by the consistent testimony of P.W.1 Gajram Singh, P.W.2 Hemraj and P.W.3 Mishri and the court is duty bound to concentrate on the point of actual occurrence and in case, actual occurrence is found to have been proved after evaluating the entire evidence, then to claim that by virtue of certain minor inconsistencies appearing in the testimony of the prosecution witnesses, the case of the prosecution becomes opaque and doubtful, is not an acceptable contention under prevailing facts and circumstances of this case.

(37) Here the incident has been proved beyond reasonable doubt. The presence of the prosecution witnesses at the time of occurrence, on the spot, is most natural though it has been claimed that there was no motive for committing the offence, but we come across evidence that some enmity on account of pending litigation was going on and apart from that certain light discrepancy also took place between the informant side and the accused prior to the incident. Moreover, it is case of eye- account testimony where gravity or triviality of the motive imputed shall not create much difference in the commission of the offence amply proved by the testimony of the prosecution witnesses. There is no specific suggestion to the prosecution witnesses that they were inside the house when the occurrence took place and they did not see the occurrence.

(38) We further notice that the lodging of the FIR is prompt and Sri Umesh Chandra Mishra P.W.9- who entered the relevant GD entry (Exhibit Ka-14) and lodged the case against the accused has proved the check FIR (Exhibit Ka-13).

(39) The two witnesses P.W.4 Har Prasad and P.W.5 Kundan Lal though named in the description of the FIR, have not supported the prosecution case, but they have been confronted with their statement regarding the occurrence as noted by the Investigating Officer under Section 161 Cr.P.C. A cumulative reading of their testimony also establishes fact that the incident took place in the night intervening 17/18.6.1988 and P.W.5 Kundan Lal has specifically stated in his cross- examination that he saw the assailants scampering away from the house of the deceased- Nem Chand. It appears that these two witnesses (P.W.4 and P.W.5) have been won- over by the defence and they are not telling the real story. However, their testimony would not minimise the significance of the testimony of the other prosecution witnesses and particularly P.W.1 Gajram Singh and P.W.2 Hemraj, who have given immaculate and innocuous version of the incident and have proved fact of participation of the appellant in the incident beyond all reasonable doubt.

(40) So far as the claim of the appellant regarding fact that the assailants had not concealed their faces while committing the offence is concerned, we may observe that it is not a case where the intention was to commit robbery or dacoity, but here the intention was to kill Nem Chand; and it being so the mind- set of the assailants cannot be interpreted and judged from their gesture while they did not hide their faces. Further, there is no point or circumstance in disbelieving the prosecution witnesses on the point of occurrence, on the contrary we find that the testimony of witnesses profusely establishes participation of the appellant in the offence. There is no plausible reason that the prosecution witnesses will leave the real culprit and falsely implicate the

present appellant. Therefore, the above contention loses significance and is not helpful to the appellant.

(41) We have also perused carefully the afore-cited judgement placed by the learned senior counsel for the appellant.

In all humbleness, we may submit that the facts of this case in hand, after evaluation of the entire testimony is found to be highly distinguishable from the one referred by the learned senior counsel. Therefore, the same is not applicable to the given facts and circumstances of the case in hand.

(42) It is cardinal principle of criminal jurisprudence that prosecution would have to prove its case beyond all reasonable doubt by producing convincing and clinching testimony in order to prove guilt of the accused. Here in this case testimony of witnesses of fact is consistent, clinching and creditworthiness of the witnesses of fact is found to be intact and inspiring confidence.

(43) The above critical scrutiny regarding the evidence, facts and circumstances of the case goes to unravel the truth in favour of the prosecution that it has successfully proved the incident to have been caused by the appellant in the night intervening 17/18.6.1988 at 1.30 A.M. at village- Patwai, district- Rampur, whereby, appellant- Arvind murdered Nem Chand by using countrymade gun; consequently, the conviction recorded and the sentence awarded by the learned trial Judge in Sessions Trial No.9 of 1989, **(State Vs. Arvind and another)**, Case Crime No.88 of 1988, police station- Patwai, district- Rampur is wholly justified.

(44) Arguments advanced in support of the appellant sans merit and in the final outcome this appeal is **dismissed.**

(45) Appellant- Arvind is on bail. His bail bonds and surety bonds are hereby cancelled. He shall be taken into custody forthwith for serving out the sentence.

(46) Let a copy of this order/judgement be certified to the court below for necessary information an follow up action.

(2020)03-05ILR A639
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE
THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crimianl Appeal No. 2546 of 2006

Naseem Ahmad ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Vijay Gautam, Sri B.K. Tripathi, Sri Mohammad Parvez, Sri Mohd. Ashraf, Sri N.I. Jafri, Smt. Chandra Kala Chaturvedi, Sri Manisha Chaturvedi.

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

Dowry Prohibition Act, 1961- Sections 498-A, 304-B I.P.C. - Section 4 - Appeal against conviction.

Held :- Death of wife caused by setting her ablaze by husband - 3rd degree burns -

deceased not even taken to the hospital. (Para 39)

Lenient View: In the facts of case no ground made out for taking a lenient view for the purpose of sentencing. (Para 39) Prosecution has proved charges against the appellant under Sections 498-A, 304-B, I.P.C and Section 4 of Dowry Prohibition Act beyond any reasonable doubt. (Para 40)

Appeal rejected. (E-2)

List of Cases Cited:-

1. Kashmira Devi Vs. St. of Uttarakhand. & ors, 2020 SCC Online SC 87.

2. Rammi Vs. St. of M.P., 1999 (8) SCC 649.

3. St. of Raj. Vs. Thakur Singh (2014) 12 SCC 211.

4. Baijnath & ors. Vs. St. of M.P., 2017 (1) SCC 101.

5. Hazara Singh Vs. Raj Kumar 2013 (9) SCC 516.

6. St. of M.P. Vs. Babulal & ors, 2013 (12) SCC 308.

7. St. of M.P. Vs. Surendra Singh, 2015 (1) SCC 222.

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

1. Heard Ms. Chandra Kala Chaturvedi learned counsel for the appellant and Shri. A.N. Mulla, learned A.G.A., for the State.

2. This criminal appeal has been filed under Section 374 (2) Cr.P.C, against the judgment and order dated 24.3.2006 passed by Additional District and Sessions Judge/Fast Track Court No.1, District-Siddharth Nagar, in Sessions Trial No.144/1999, whereby appellant was convicted under Sections 498-A, 304-B Indian Penal Code, 1860 and Section 4 of Dowry Prohibition Act, 1961 and sentenced for one year rigorous imprisonment and fine of Rs.1000/- under Section 498-A I.P.C., one year rigorous imprisonment with a fine of Rs.2500/- under Section 4 of Dowry Prohibition Act and Life Imprisonment under Section 304-B I.P.C. In case of non-payment of fine to undergo further sentence of 5 months. Other two accused were acquitted.

3. Prosecution case in brief was that on 22.3.1995, first informant Haji Hafizullah lodged a written report (Ex. Ka.1) alleging that his daughter Raina Parveen @ Munni was married to Mohd. Naseem r/o District-Bahraich (accused/appellant herein) in the year 1989. Soon after her marriage, accused repeatedly demanded dowry of Rs.10,000/-, which was ultimately given him. It was further alleged that his daughter was murdered for dowry by the appellant and his younger brother-in-law Mohd. Ashfaq. Even after some days of marriage his daughter told that she was subjected to cruelty and also beaten for dowry demand. As the daughter was subjected to cruelty, he brought her to parental house. However, after some days on intervention of elders, she was returned to her matrimonial house. It was further alleged that earlier also an attempt of murder was committed upon her daughter by pouring kerosene oil over her body. However, she was saved and he took her back to parental house and she remained there for two and a half years. Subsequently, after settlement at Panchayat, deceased was taken to her matrimonial house by her husband and in laws.

4. In written report it was further mentioned that on 21.3.1995, neighbour of the first informant, Abdul Amin received a phone call at about 1.30 in night that Raina Parveen was seriously injured, after half an hour, it was telephonically informed that she was no more. Incident of burning was

committed at about 8 A.M. on 21.3.1995. However, no medical aid was provided to his daughter and she succumbed to burn injuries.

5. On the basis of written report, an F.I.R. (Ex.Ka.6) was lodged on 22.3.1995 at 8.30 A.M. at Police Station-Tehri Bazar, District-Siddharth Nagar. Distance between place of occurrence and police station was reported to be 2 Km.

6. The Investigating Officer visited the place of occurrence, prepared site plan and recovery memo (Ex.Ka.5) of a Tin-container, having capacity of 5 litres, in which two litres of kerosene oil was found. Inquest report was prepared and dead body was sent for post mortem.

7. Autopsy of dead body of Raina Parveen @ Munni was conducted on 23.3.1995 by Dr. S.S. Srivastava, who found following antemortem injuries:-

(1) Burn 1st to 3rd degree involve whole body except both foot and interior part of left leg before knee joint. Line of redness present.

(2) Abrasion (two) in area of 2 cm x 1 cm of forehead in middle point 4 cm above the arch of nose.

On internal examination, brain and brain membrane were found congested. Pleura, both lungs and larynx trachea were found congested. Inside trachea, small particles of carbon were found. In stomach, liquid and gas were present. Cause of death was shock as a result of antemortem burn injury.

8. Trial was committed to the Court of Sessions and charges under Sections 498-A and 304-B I.P.C. and Section 4 of Dowry Prohibition Act were framed against the appellant and two others namely Imran @ Ganesh and Ashfaq Ahmad.

9. The prosecution in order to prove their case examined P.W.1-Faridddudin, P.W.2-Sawara Begum, PW.3-Dr.S.S. Srivastava, P.W.4-Ashiq Ali, P.W.5-Bansh Lochan Pandey and P.W.6- Jag Prasad Pandey.

10. P.W.1-Faridduddin (brother of deceased) in his chief examination supported the prosecution version on the issue that death was caused within 7 years of marriage, deceased was subjected to cruelty for demand of dowry by her husband soon before her death and death was caused by burns. In cross-examination this witness remained consistent, however mentioned about cordial relations between his sister and husband.

11. P.W.2-Sawara Begum, mother of the deceased also supported the prosecution version in her chief examination on the issue of demand of dowry and that deceased was subjected to cruelty. Deceased had written a letter to her that she was subjected to cruelty due to dowry demand. She also told P.W.-2 that her husband used to beat her. This witness also remained unshaken in cross-examination. However, she also mentioned about cordial relations between her daughter and husband (appellant).

12. P.W.-3, Dr. S.S.Srivastava conducted post mortem of dead body of deceased, proved injuries mentioned in the post mortem report. In his cross-examination, the Doctor stated that the injuries could be an outcome of an accident.

13. P.W.-4, Ashik Ali, neighbour of appellant, Panch to the Inquest report of dead body as well as to recovery of container with two litres of kerosene oil from the place of occurrence, supported the recovery memo. In cross-examination, P.W.-4 stated that there were cordial relations between the deceased and her husband. No incident of brawl between them was reported. P.W.-4 further mentioned that at the time of incident, appellant Naseem Ahmad was not present at his house.

14. P.W.-5, Bansh Lochan Pandey, proved written report and F.I.R. He mentioned about recordings of statements of the witnesses and recovery of a container containing two litres of kerosene oil from the place of occurrence.

15. P.W.-6, Jag Prasad Pandey was the Tehsildar at the relevant time, who prepared the inquest report of the dead body of deceased.

16. Statements of the appellant as well as other co-accused were recorded under Section 313 Cr.P.C. wherein they denied prosecution case and submitted that deceased died due to accident, while preparing food. Mohd. Harun was examined as defence witness (DW-1), who stated about cordial relations between the couple and that at the time of occurrence, appellant was present at his shop. Marriage was solemnised in 1987 or 1988. Deceased died due to accident while preparing food on stove.

17. Learned Trial Court after considering statement of the witnesses and other materials came to the conclusion that marriage of the deceased was solemnised within a period of 7 years from her death and she was subjected to cruelty soon before her death in regard to demand of dowry. Accused/appellant poured kerosene oil on the deceased and set her ablaze. Learned Trial Court rejected the defence story that deceased died due to accident while preparing food on the stove.

18. The learned trial court acquitted co-accused Imran and Ashfaq from all the charges in absence of sufficient evidence against them, however convicted the appellant for all the charges.

19. Ms. Chandrakala Chaturvedi, learned counsel appearing on behalf of the appellant submitted that:

(i). The impugned judgment and order dated 24.3.2006 was passed only on the basis of sole testimony of PW-2 (mother of the deceased) whereas testimony of PW-1 (brother of the deceased) was found to be unreliable.

(ii). Demand of Dowry was not proved.

(iii) Year of marriage remained uncertain as there was different version of P.W.-1, P.W.-2 and D.W.-1 on the issue, therefore, it was not conclusively proved that death was caused within 7 years of marriage.

(iv). PW-1 (brother of deceased), P.W.-4 (neighbour of appellant) and D.W.-1 have stated about cordial relations between deceased and appellant, therefore allegations of cruelty for demand of dowry are without any basis.

(v). PW-4 and DW-1 stated that appellant-Naseem was not present at his home at the time of occurrence and reached

house after the occurrence. Therefore, prosecution failed to prove presence of the appellant at his house at the time of occurrence.

(vi). Presence of 2 litres kerosene in container, half cooked rice on stove, of which some part had spilled over, at the place of occurrence indicates that deceased was burnt while cooking and her death was accidental.

(vii). Doctor (PW-3) has opined that death could be caused due to accident, which corroborates from the scene of occurrence and also supports the explanation given by appellant in the statement recorded under Section 313 Cr.P.C.

(viii). The appellant is suffering from small lymphocytic Lymphoma (blood cancer) and is undergoing treatment at BHU, Varanasi. The appellant had already served more than 13 years of imprisonment and is suffering from major health issue therefore on humanitarian ground the appellant deserves acquittal.

20. Per contra, Shri. A.N. Mulla, learned A.G.A. opposed the submissions of the appellant and submitted that testimony of P.W.1 and P.W.2 was consistent and they completely supported the prosecution version. He further submitted that P.W.1, brother of deceased specifically stated that the marriage of his sister and appellant was solemnised in the year 1989, occurrence took place on 21.3.1995 i.e. within seven years of marriage. P.W.1 supported the prosecution version regarding demand of dowry as he specifically stated that appellant demanded Rs.10,000/- for opening a shop. Due to harassment and cruelty, deceased remained at her matrimonial house for about 3 years. She was taken back on request of family of appellant; but still subjected to cruelty. He further submitted that contradictions are trivial and are not affecting the basic prosecution case. He finally submitted that postmortem report completely supported the prosecution version that the deceased was not accidently burnt, but was set ablaze after pouring kerosene oil, which is evident from the nature of injury No.1 which indicates that she was burnt 1st to 3rd degrees, whole body except both foot and interior part of left leg before knee joint.

21. In the present appeal, conviction of the appellant is under Sections 498-A, 304-B, I.P.C. and Section 4 of Dowry Prohibition Act.

22. In ***Kashmira Devi Vs. State of Uttarakhand & Ors, 2020 SCC Online SC 87,*** the Court held in paragraph 18 that "for sustaining the conviction under section 304-B I.P.C. the following essentials must be satisfied:-

(i) the death of a woman must have caused by burns or bodily injury or otherwise than normal circumstances;

(ii) such death must have occurred within seven years of her marriage;

(iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband;

(iv) such cruelty or harassment must be for or in connection with demand for dowry;

(v) such cruelty or harassment is shown to have been meted out to the woman soon before her death.

(Vide Kans Raj Vs. State of Punjab & Ors (2000) 5 SCC 207 and Smt. Shanti & Anr. Vs. State of Haryana (1991) 1 SCC 371."

23. In the light of above legal positions, we have to ascertain as to whether in the facts and circumstances of present case, the prosecution is able to establish the ingredients of Section 304-B I.P.C.

24. The first issue is as to whether death of the deceased occurred within seven years of her marriage.

25. Accurate date of marriage was neither mentioned in FIR nor in testimony of any of the witnesses. Only year of marriage i.e. 1989 was mentioned, in the written report lodged by P.W.1. P.W.1 (brother of the victim) alleged that he was 2 years elder to the victim, while another sister Sikandar Jahan was 2 years elder to him. P.W.1 was 37 years as on 10.4.2002 when he was examined. Thus, the year of birth of P.W.1 would be 1965, that of victim as 1967 and that of elder sister Sikandar Jahan as 1963. The defence alleged that the victim was married in the year 1983-84. P.W.1 stated that the victim was around 25-26 years old at the time of her marriage. If that was so, then, year of birth of the victim would be 1957-58 which would surpass far beyond the year of birth of elder sister of the victim (1963). The trial court on cumulative assessment of the evidence of P.W.'s 1 & 2, was of the view that the period of marriage of the victim would fall between 11.4.1988 to 11.4.1989. P.W.2, mother of the deceased in her testimony recorded on 11.6.2002 stated that marriage of her daughter took place around 13-14 years ago. On the basis of testimony of P.W.1 and P.W.2, it can be safely presumed that marriage took place either in 1988 or 1989, thus the death on 21.3.1995 was within 7 years of marriage.

26. We are in complete agreement with the reasoning of the trial court as regards the year of marriage of the victim to which no perversity could be demonstrated.

27. The next issue which requires consideration of the Court is about cruelty and harassment subjected to deceased in connection with demand of dowry by her husband soon before her death. On this issue, written report as well as occular evidence of P.W.1 and P.W.2 has supported prosecution version that there was dowry demand of Rs.10,000/- after the marrriage which was fulfilled by the father of the deceased. Both the witnesses also stated that due to cruelty, deceased was forced to live at her parental house for about 3 years. It has also come in the evidence that she was subjected to cruelty soon after she returned to her matrimonial house. Thus, she was subjected to cruelty over demand of dowry soon before her death. Merely because P.W.1 and 2 stated in cross-examination that there were cordial relations between the deceased and her husband, the entire evidence on cruelty and demand of dowry cannot be rejected. The Court has to see whether the testimony of P.W.1 and 2 inspires confidence and we are of the definite view that nothing has come in evidence, except minor inconsistency or

contradictions or exaggerations which could shake confidence in accepting testimony of P.W.-1 and 2 to be reliable.

28. In ***Rammi Vs. State of M.P., 1999 (8) SCC 649***, the Court in paragraphs 25 and 26 held that:

"25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the Section is extracted below:

155. Impeaching credit of witness.- The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him-

*(1)-(2) * * **

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;"

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be "contradicted" would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to "contradict" the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of Code also permits the cross-examiner to use the previous statement of the witness (recorded under Section 161 of the Code) for the only limited purpose, i.e. to contradict the witness."

29. Submission of counsel for the appellant that testimony of P.W.1 was completely rejected by learned trial court is liable to be rejected, as we have perused the impugned judgment and find that the learned trial court relied upon testimony of P.W.1 however, noted contradictions in his testimony, which were trivial.

30. P.W.1 and 2 remained consistent in respect of issues such as deceased was subjected to cruelty soon before her death over demand of dowry, death took place within seven years of marriage. Medical examination, nature of injuries and testimony of Doctor S.S.Srivastava (P.W.-3), are clinching and sufficient to prove beyond doubt that death of victim was caused otherwise than under normal circumstances, on account of burn injuries, attributable to the appellant. Therefore, prosecution was able to prove all the necessary ingredients of Sections 498-A, 304-B I.P.C. and Section 4 of Dowry Prohibition Act.

31. We have also considered the provisions of Section 106 of the Evidence Act 1872 and its applicability in the facts and circumstances of present case. Section 106 provides inter-alia that when any fact is exclusively within the knowledge of any person, the burden of proving that fact is upon him. In the present case, wife of the accused died in the house, where they

ordinarily reside. The accused offers an explanation that death of his wife was caused by accident while cooking. We are of the view that explanation given by the accused is false which is a strong circumstance that accused is responsible for commission of the crime.

32. It is important to refer to paragraph 22 of ***State of Rajasthan Vs. Thakur Singh (2014) 12 SCC 211,*** on applicability of Section 106 of the Evidence Act.

"22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts."

33. Further presumption as to dowry death under Section 113-B Indian Evidence Act is also against the accused as prosecution has successfully substantiated the ingredients of "dowry death" that soon before her death, deceased was subjected to cruelty for demand of dowry by accused-appellant. Accused/appellant has completely failed to rebut the presumption.

34. In B***aijnath and Others Vs. State of Madhya Pradesh, 2017 (1) SCC 101***, the Court in paragraph 30 held that:

"30. A conjoint reading of these three provisions, thus predicate the burden of the prosecution to unassailably substantiate the ingredients of the two offences by direct and convincing evidence so as to avail the presumption engrafted in Section 113B of the Act against the accused. Proof of cruelty or harassment by the husband or her relative or the person charged is thus the sine qua non to inspirit the statutory presumption, to draw the person charged within the coils thereof. If the prosecution fails to demonstrate by cogent coherent and persuasive evidence to prove such fact, the person accused of either of the above referred offences cannot be held guilty by taking refuge only of the presumption to cover up the shortfall in proof."

35. Lastly, we have to deal with the submission of appellant on lenient view on quantum of punishment.

36. In ***Hazara Singh Vs. Raj Kumar 2013 (9) SCC 516,*** the Court in paragraph 10 held that:

"10.....The legislature has bestowed upon the judiciary this enormous discretion in the sentencing policy, which must be exercised with utmost care and caution. The punishment awarded should be directly proportionate to the nature and the magnitude of the offence. The benchmark of proportionate sentencing can assist the judges in arriving at a fair and impartial verdict."

37. In ***State of Madhya Pradesh Vs. Babulal & Ors, 2013 (12) SCC 308*** , the Court in para 19 held that:

"19. In view of the above, the law on the issue can be summarised to the effect that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which is commensurate with the gravity and nature of the crime and manner in which the offence is committed. The most relevant

determinative factor of sentencing is proportionality between crime and punishment keeping in mind the social interest and consciousness of the society. It is a mockery of the criminal justice system to take a lenient view showing misplaced sympathy to the accused on any consideration whatsoever including the delay in conclusion of criminal proceedings. The Punishment should not be so lenient that it shocks the conscious of the society being abhorrent to the basic principles of sentencing. Thus, it is the solemn duty of the court to strike a proper balance while awarding sentence as awarding a lesser sentence encourages a criminal and as a result of the same society suffers."

38. In ***State of Madhya Pradesh Vs. Surendra Singh, 2015 (1) SCC 222,*** the Court in paras 13 and 14 held that:

"13. We again reiterate in this case that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter-productive in the long run and against the interest of the society.

14. In a recent decision in the case of State of M.P. Vs. Bablu, (2014) 9 SCC 281, after considering and following the earlier decisions, this Court reiterated the settled proposition of law that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. One should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers."

39. The case in hand is required to be decided on the issue of granting lesser punishment on the basis of aforesaid settled legal proposition regarding principle of sentencing. In the present case, accused husband has caused death of his wife by pouring kerosene and set her ablaze, which caused 3rd degree burns, over her whole body, except both foot and interior part of left leg before knee joint. Deceased was even not taken to the hospital. All essential ingredients of offences under section 304-B I.P.C. are proved beyond reasonable doubt. Sentence awarded is just and appropriate. In these circumstances, taking any lenient view will be against the aforesaid principles of sentencing.

40. We, in view of above, do not find any error in the impugned judgment and are thus of the considered opinion that prosecution has proved charges against the appellant under Sections 498-A, 304-B,

I.P.C and Section 4 of Dowry Prohibition Act beyond any reasonable doubt.

41. The appeal is dismissed.

(2020)03-05ILR A648
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.02.2020

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

CRIMINAL APPEAL No. 3042 of 1987

Faiyaz & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Keshav Sahai, Sri Ajay Kumar Pandey

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

Criminal law- Indian Penal Code - Section 302, - Section 302/34 - Appeal against conviction.

Criminal law- Indian Penal Code - Section 34 IPC - Common Intention

Held :- All appellants appeared on spot from sugarcane field possessing country made pistols and only one shot fired. Pre-concert amongst appellants established by description and manner of incident from the testimony of witness. All the assailants shared the common intention to kill the victim. Appellant's claim of remaining silent on spot- irrelevant.

Appeal rejected. (E-2)

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

1. By way of the instant criminal appeal, challenge has been made to the validity and sustainability of the judgment and order of conviction dated 21.12.1987 passed by the VII-Additional Sessions Judge, Meerut, in Sessions Trial No.8 of 1986 (State of U.P. Vs. Faiyaz and others), under Section 302, 302/34 I.P.C., Police Station- Kithore, District- Meerut, whereby all the appellants have been sentenced to life imprisonment.

2. Heard Sri Ajay Kumar Pandey, learned counsel for the appellants, Shri Krishna Pahal, learned Additional Advocate General assisted by Sri Bhanu Prakash Singh, learned A.G.A. for the State and perused the record.

3. Prosecution case is that one Shaharyab s/o Afsar of village- Jadauda, P.S.- Kithore, District- Meerut lodged an F.I.R. at Police Station- Kithore, District- Meerut on 13.10.1985 at 3:15 p.m. against accused Faiyaz, Mahfooz, Hasnain and Tariqat alleging that the informant and his father Afsar were going to collect fodder from jungle on 13.10.1985 around 12:00 noon, while they were so proceeding and reached near the sugarcane filed of Faiyaz. Suddenly Faiyaz, Mahfooz, Hasnain and Tariqat, the co-villagers appeared on the scene from the sugarcane field possessing country made gun in their hands challenging that they will not spare the informant side whereupon the informant and his father got frightened and they tried to flee away from the scene when Faiyaz fired with his gun on informant's father due to which he fell down and the informant saved himself by fleeing away from the scene. On hearing the sound of the fire villagers Yusuf, Mahmood, Muzaffar, Hisamuddin, Nazar Hussain and Akhtar arrived on the spot and on seeing these persons the assailants also secured their escape and disappeared in the sugarcane

field. Motive imputed in the F.I.R. was one as some previous altercation/ haggling that took place between the father of the informant and the accused side when Akhlaq wanted to construct the wall whereupon life threat was extended by the accused. After the occurrence the co-villagers and the informant rushed to the spot where the informant's father fell down then they came to know that the victim has died. One barrel and slipper belonging to the accused was also lying on the spot. This report is Ex. Ka-1. Relevant entries were made in the concerned check F.I.R. whereby case was registered at case crime no.333 of 1985 under section 302 I.P.C. at Police Station- Kithore, District- Meerut on aforesaid date and time. The check F.I.R. is Ex. Ka-3 and the concerned G.D. of the aforesaid date and time at aforesaid police station is Ex. Ka-4. Investigation of this case was taken by Inderdev P.W.-6. He took note of the contents of the F.I.R. and the concerned general diary entry and arrived on the spot at around 5:30 p.m. in the jungle of village Jadauda. He prepared the inquest report on the spot- Ex. Ka-5 and apart from that he also prepared relevant papers. The challan dead body, photo dead body and letter to C.M.O./R.I. and photo nash etc. These papers are Ex. Ka-6 to Ka-9. Besides he also prepared memo of simple and blood stained clay roll Ex. Ka-12. He also made the memo of slipper and the barrel found on the spot Ex. Ka-13. He prepared the site plan Ex. Ka-14. Besides he also sent the dead body of the deceased Afsar for post-mortem examination to mortuary where P.W.3 Dr. R. Singh conducted the post-mortem on the cadaver of the deceased on 14.10.1985 at 11:30 p.m. wherein the following ante-mortem injuries were noted :-

(i) Guns shot would of entry 1.5 cm x 1 cm x brain cavity deep on back of head 13 cm behind the right ear. The margins were inverted and eccohymosed and directing forward.

(ii) Lacerated wound (gun shot wound of exit) 15 cm x 10 cm x crenial cavity deep on right side of forehead and upper part of nose. Cranial cavity open and brain matter partially absent and communicating to injury no.1.

4. In the opinion of doctor the cause of death was shock and haemorrhage as a result of ante-mortem injury. Post-mortem report is Ex. Ka-2. The investigation was completed and charge-sheet Ex. Ka-15 was submitted. Subsequently the trial commenced and after hearing both prosecution and the accused on point of charge prima facie ground was found existing for framing charge under section 302/34 I.P.C. The charge was abjured and the accused opted for trial.

5. The prosecution produced six witnesses out of whom P.W.1 Shaharyab, P.W.2 Yusuf and P.W.4, Hisammuddin- are witnesses of fact and the rest of the prosecution witnesses say- Dr. R. Singh is P.W.3, Ram Saran Singh P.W.5 and the investigating officer Inderdev P.W.6 are formal witnesses. Statement of the accused was recorded under section 313 Cr.P.C. wherein the accused claimed to have been falsely implicated on account of enmity. No evidence whatsoever was led by the defence. The case was heard on merit and after evaluating the facts and circumstances and evidence on record the learned trial judge passed aforesaid impugned judgment and order of conviction and sentence dated 21.12.1987, under section 302/34 I.P.C. and thus sentencing them to imprisonment for life. Consequently, this appeal.

6. Contention is that the first information report itself is suggestive of fact that the informant was not present on the spot and the natural corollary will be

that after a blind murder took place and the informant received the information of the incident arrived on the spot and in consultation with the police a false report was lodged on account of subsisting enmity suggesting prejudicial bent of mind of the informant as has emerged in the testimony of the prosecution witnesses of fact. The deceased Afsar was having criminal antecedent and was involved in commission of heinous offences. There was no motive for the present surviving appellants to have ever indulged in the act of firing and remaining present on the spot at the time of the occurrence stated to have occurred at /around 12:00 noon on 13.10.1985 in the jungle of village Jadauda. Considering the entire case how can it be said that the incident took place around 12:00 in the noon and the report was lodged at 3:15 p.m. at the police station-Kithore in district- Meerut. The distance between the place of occurrence and the police station was stated to be more than 10 kms.

7. The prosecution case is not specific against the present appellants that they ever acted or reacted on the scene by participating in the commission of the offence and were acting in furtherance of the common intention of the main accused Faiyaz. On account of the enmity prejudice only P.W.1, the informant Shaharyab has lodged false information with the police. The point is that for application of common intention against an accused it would have to be proved within the four corners of section 34 I.P.C. that it was also the common intention of the another co-accused who was present on the spot and he too interacted to have the plan executed to a particular end but in this case this essential ingredient of subsisting common intention is altogether missing. There is no specification that all the four accused with intent to kill Afsar fired from their respective weapons. Had the prosecution witness P.W.1, the informant and the son of the deceased would have been present on the spot they would have narrated in particular as to when and in what manner the shots were fired. But the first information report is silent about any such specification of firing. However the case has been improved in the testimony before the trial court and the role of firing has been assigned in the F.I.R. itself to only one accused Faiyaz whereas the testimony of P.W.1 is to the magnitude that all fired. More so, what was the reason that the four assailants who are claimed to have been present on the spot all armed with country made gun will leave the one of the two persons to escape from the scene so as to give evidence against the miscreants. This is particular aspect and a particular circumstance not properly explained by the prosecution which naturally gives rise to fact that P.W.1 Shaharyab was not present on the spot at the time of the occurrence and a false case has been cooked up.

8. Regarding the appropriate time of the alleged occurrence that it in fact took place around 12:00 noon on 13.10.1985, the testimony of the doctor witness PW.3 Dr. R. Sing is indicative of the fact that the death of the victim might have taken place sometime in the night intervening 12/13/.10.1985 and the statement is specific in the cross-examination of the aforesaid witness. This being the reasonable probabilities of the case, how can it be said with certainty that the occurrence took place around 12:00 noon only on 13.10.1985. The "mens rea' as was required to be proved against the present appellants qua the main accused Faiyaz has not been established properly. There is nothing on

the point as to from what distance/ range the shot was fired. Assuming it to be that any such occurrence took place even then the statement of P.W.1 Shaharyab reveals that at the very particular time when the shot hit the deceased this witness did not see that particular occurrence then how can it be said that the shot fired by Faiyaz hit the deceased.

9. Controverting the aforesaid argument learned Additional Advocate General Shri Krishna Pahal assisted by learned A.G.A. Shri Bhanu Prakash Singh have submitted that the case of the prosecution is well proved under section 302 I.P.C. by virtue of application of section 34 I.P.C.. Learned counsel also spelt out section 34 I.P.C. in support of his claim that in this case the act imputed is admittedly of criminal nature and the scene of occurrence is self-explanatory of the common intention of all the accused. It is noticeable that the appearance of the present appellants on the scene is in a group and all of them are possessing country made gun and an exhortation was made on the spot which frightened the deceased and his son P.W.1 and they tried to scamper away from the scene however in the meanwhile fire was opened which hit the deceased- Afsar. Post-mortem examination report is indicative of fact that only one shot was fired. When this particular aspect was asked by the trial court itself with P.W.1 then P.W.1 specifically suggested that only one fire was shot on the spot. However only one shot completed the task therefore there was no point in further opening another shot as no one was impeding his way to execute the crime. Each and every particular aspect regarding the occurrence, say- its commencement, manner of happening and its completion has been asked in all niceties by the defence in the cross-examination of the informant after strenuous test he remained intact. Consequently, it cannot be said that he was not present on the spot and the prevailing circumstances of this case are indicative of nothing else than the criminal bent of mind and the criminal intent working among all the assailants present on the spot to execute the plan who have been stated to be four in numbers. Learned A.A.G. also urged that there was no reason for false implication and sparing the real culprit, may be that there was some cause for false involvement but that could not work to the impact that the real culprits are given a go-bye and only false persons are named in the F.I.R.. There is no other person named the F.I.R. nor has anything adverse creating any doubt in the prosecution story has emerged in the cross-examination of P.W.1 which may render his testimony unworthy of credit. The case of the prosecution is proved to the hilt. Under circumstances, conviction is justified.

10. We have also considered the rival submissions. Now in the light of the above, the core consideration that arises for adjudication of this appeal relates to fact whether the prosecution has been able to establish the charge against the present appellants and in particular the fact that P.W.1 the informant was present on the spot and can it be

11. We can proceed straightway on the description of the F.I.R.. It proceeds on to describe that it was 12:00 noon on 13.10.1985 when the informant and the victim Afsar were proceeding to collect fodder and as soon as they reached near the sugarcane field of Faiyaz then Faiyaz, Mahfooz, Hasnain and Tariqat (co-villagers) all of a sudden appeared on the

spot emerging out of the sugarcane field possessing country made gun in their hands exhorting that no one will be spared whereupon informant and his father tried to run away from the scene. In the meanwhile Faiyaz fired with his gun pointing on the father of the informant which fire hit him. He screamed and fell out. On hearing the noise of the sound of the fire a number of persons Yusuf, Akhtar Muzaffar and others arrived on the spot whereupon the assailants secured their escape. Certain other description has been also given regarding the point of discontent prevailing between the sides on account of some dispute regarding construction of some wall. Apart from that it has also been described in the F.I.R. that after that the informant went up to his father and found him dead and there was lying some barrel and slipper scattered on the spot. The report was lodged on the very same day at 3:15 p.m. at police station- Kithore of district-Meerut. The written report is Ex. Ka-1 and on the basis of the same relevant entries were noted down in the concerned check F.I.R. Ex. Ka-3 and the concerned G.D. Ex. Ka-4 and a case was registered against the accused at case crime no.333/ 1985, under section 302 I.P.C.. Consequently, the investigation ensued and it was taken over by Shri Inderdev Jha- P.W.6 who noted contents of the F.I.R. and arrived on the spot around 5:30 p.m. the very same day. He selected the witnesses for preparation of the inquest and prepared the inquest report Ex. Ka-5. Thereafter relevant papers were also prepared for sending the body for post-mortem examination. These papers are Ex. Ka-6 to Ka-9. Besides he also completed other formalities and collected the simple and the blood stained clay from the spot and prepared memo of the same Ex. Ka-12. Similarly, he also prepared memo of paper and barrel Ex. Ka-13. Site plan was also prepared which is Ex. Ka-14. Thereafter the investigation was taken over by Shri Ved Prakash, the second investigating officer who after recording statement of the accused filed the charge-sheet which has been proved by this witness as Ex. Ka-15.

12. That way we can notice that proper investigation after the lodging of the F.I.R. culminated into filing of the charge-sheet. Contention is that P.W.1 was not present on the spot and assuming it to be that he was present, even then the present surviving appellants have not been imputed any specific role nor any reactionary role previous or subsequent imputed so as to establish that they shared any common intention to kill Afsar though the fire might have been caused by main accused Faiyaz. The contention is that the first informant was allowed to escape unhurt and no attempt whatsoever was made to open fire on him. In that regard we have before us the testimony of P.W.1. We upon careful scrutiny of the entire testimony and in particular the examination-in-chief come across the fact that the incident as narrated in the first information report has been virtually dittoed and on cross-examination being done various aspects reflecting on point of involvement of the deceased and the informant in various criminal cases has been tried to be brought to the fore but that had got no relevancy with the description of the occurrence as has emerged in further cross-examination as appears on page No. 22 of the paper book, wherein in the first paragraph on point of the topography of the place of occurrence each and every particular relating the incident has been reasonably connected with the place of occurrence. All the relevant particulars of the incident as to what happened when the offence was being committed and the shot hit the deceased and where the deceased

fell down has been properly replied and proved by P.W.1.

13. Contention is that at that very particular time when the shot hit Afsar, the informant P.W.1 did not see it. But we upon scrutiny of testimony of P.W.1 record our finding that the description of the occurrence given by P.W.1 is innocuous, in view of fact that no further cross-examination has been done on the point as to how he came to know about the fact that the shot fired by Faiyaz hit Afsar and it was under these circumstances that the trial court tried itself to unfold the truth by asking question to the witness on that point of occurrence then it transpired that only one shot was fired on the spot. Now the natural explanation is that two men are proceeding together and an offence is committed against them then it is most natural that the person under fear of imminent death would try to flee away from the scene and will not concentrate on the victim of the occurrence as to at what part of the body he has been hit although there is no cross-examination either general or specific on this aspect. The entire episode as described by the prosecution has been established in the cross-examination of P.W.1 in its entirety.

14. Now, the claim is that the accused never participated in the occurrence. That claim looses significance and goes into oblivion on account of specific testimony of P.W.1 regarding presence of the accused on the spot thus establishing their presence on the spot. Now the next contention comes into picture that assuming it to be that they were present on the spot even then no action or reaction was made by the present appellants and no nexus with the intent of the main accused to execute the plan with Faiyaz has been reasonably established. On that count also we may take notice of contents of section 34 of the Indian Penal Code which primarily stipulates about any criminal act being committed by several persons in furtherance of the common intention of all, each of such persons shall be liable for that act in the same manner as if it were done by him alone. Here, the act of one becomes act of all though no covert act done by others but they being present with weapons in hand profusely establishes prevalence of sharing of common intention to commit the crime. That being the dictum laid down under section 34 I.P.C.. We may refer to the attendant facts and circumstances of this case on the spot itself.

15. The scenario claimed and proved in this case appears to be that four persons are stated to have arrived in a group on the spot possessing weapons in their respective hands. Only one shot was fired by one among the four culprits. Can it be said that the other assailants present on the spot never entertained any such animus like the one who fired on the deceased ? The answer would be absolutely in negative. Possession of lethal weapon by other accused in company with prime accused itself is indicative of the animus shared by one and all. Since the presence of the co-accused is established on the spot beyond doubt then their remaining silent on the spot and not opening fire either in retaliation or as in reactionary measure on the fleeing of informant would not ipso-facto create a situation to be construed that the other three accused/the present appellants were not sharing the animus to commit the crime with the main accused. Here the liability is vicariously imposed by virtue of application of Section 34 I.P.C. The object and the intention was one to kill the deceased. Consequently, the argument falls flat that in the absence of any overt act

common intention cannot be applied to the other accused though present on the spot.

16. Now we may observe with wisdom that in the matters of ascertaining prevalence of common intention among all the accused not only the evidence but the surrounding circumstances have also got their positive roles and in case it all if taken as a whole a reflection immediately emerges that each one present on the spot must have known the nature of the offence intended by the group, it being so each one forming the group shall be imputed with the same intention that was the animus working in the mind of one who executed the plan and it is established law that common intention may also develop on the spot itself. Here prior concert among the accused is proved by the way the offence was committed and manner of offence is self-explanatory. In this case the pre-concert among all the assailants is well established by the very description of the incident as well as the manner and style of the incident itself as emerging in testimony that all the assailants appeared on the spot from the sugarcane field of Faiyaz possessing country made gun in their respective hands, no matter if one shot was fired by one among the four assailants. If it so occurred and the same has been proved by the prosecution witnesses by cogent testimony then the only outcome is that all the assailants shared the common intention to kill and to kill the victim and nothing else. That being the position, claim of the appellant that they remained silent on the spot and never shared the common intention with the main assailant is not acceptable. The trial court has rightly held that the case is one attracting application of section 34 I.P.C. and by virtue of application of section 34 I.P.C. rightly recorded finding of conviction under section 302 I.P.C. against the accused-appellants which finding of conviction cannot be interfered by us, consequently, this appeal lacks merit and the same is **dismissed.**

17. In this case, appellants are on bail. Their bail bonds and sureties are cancelled. They shall be taken into custody forthwith for serving out the sentence imposed upon them.

18. Let a copy of this order/judgment be certified to the court below for necessary information and follow up action.

(2020)03-05ILR A654
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Criminal Appeal No. 4561 of 2014

Nadeem & Anr. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Mahendra Prakash, Sri Dhruv Narayan Mishra, Sri Gautam Kumar Banerji, Sri Kamal Dev Rai, Sri Mumtaz Ali, Sri Pradeep Kumar, Sri Shad Khan

Counsel for the Opposite Party:
A.G.A., Shishir Kumar Tiwari

Criminal Law - Indian Penal Code - Section 364A, 411, 379 - Appeal against conviction.

Held :- Lack of evidence- No evidence demand of ransom conviction under section 364A IPC set aside. (Para 65)

Section 365 IPC – evidence on record proves commission of offence under section 365 IPC. Hence trail court's judgment modified (para 66)

Appeal partly allowed. (E-2)

List of Cases Cited:-

1. Ashwani Dubey Vs. St. of U.P., (2016) 97 ACC 229

2. Mahesh Vs. St. of U.P., (2016) 96 ACC 775,

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

1. The present Criminal Appeal has been preferred against the judgment and order dated 17.10.2014, passed by the Additional Sessions Judge, Court No.4, Bulandshahr in S.T. No. 893 of 2012, arising out of Case Crime No.307/80 of 2011 (State Vs. Nadeem & another) convicting and sentencing the appellant Nadeem for the life imprisonment along with fine of Rs.10,000/- for the offence under Section 364A I.P.C. and in default of payment of fine six months additional imprisonment to each of the appellants and for the offence under Section 411 I.P.C. three years rigorous imprisonment and fine of Rs.3,000/- and in default of fine two months further imprisonment. The accused Mazhar for the offence under Section 379 I.P.C. has been sentenced for three years rigorous imprisonment with Rs.3000/- fine and in default of fine two months additional imprisonment. All the sentences in respect of both the appellants shall run concurrently.

2. The prosecution case as has been set out in the FIR lodged by the informant (here-in-after referred to as 'complainant) Shahabuddin with an allegation that in the night of 15.4.2011 at 9 P.M. an unknown person came to his house who disclosed his name as Alam and had conversation with him relating to work of embroidery and for getting an order of export and the business transaction got settled with 5% commission.The said person had brought cold-drink with him which he offered to the complainant and both of them consumed the same while they were having conversation. After they had talk with each other they went to sleep at 2 A.M. in the night. Alam also slept with the complainant. Along with the complainant, his son namely, Rehan aged about 4 years also slept. In the morning when the complainant got awakened at 8 A.M. then he saw that the person by the name of Alam had disappeared along with the son of the complainant, namely, Rehan. He made hectic search of them but all went in vain and hence, he lodged the FIR of the incident with a prayer for appropriate action to be taken.

3. In pursuance of the written report (Ext.Ka.1) submitted by the complainant Shahabuddin at Police Out Post Nai Mandi, Police Station Kotwali Dehat, District Bulandshahr against the unknown person, namely, Alam, a First Information Report was registered as Case No. 307/80 of 2011, under Section 363 I.P.C. on 16.4.2011. Chik FIR was prepared as Ext. Ka.10.The information about the registration of the FIR was also endorsed in G.D.No.15 at 12.20 P.M. as Ext. Ka.11 on 16.4.2011.

4. During investigation on 17.4.2011, the case was converted under Section 364A I.P.C. from Section 363 I.P.C. The said fact was further endorsed in the G.D. No.6 of the concerned police station at 6.20 P.M. (Ext. Ka.13) (on 17.4.2011).

5. On 17.4.2011, the police team of Police Station Jagatpuri Delhi had arrested the accused-appellants Nadeem and Mazhar and at the pointing out of the accused Nadeem, the abductee son of the complainant, namely, Rehan was recovered from house No.F161/Gali No.5, Shastri Park, Delhi.The police of Police Station Jagatpuri Delhi also recovered a Motorola mobile phone from the possession of the appellant Nadeem.

6. The Investigating Officer on receiving an information about the arrest of the appellants Nadeem and Mazhar, recovery of the abductee Rehan and mobile phone by the police of Police Station Jagatpuri Delhi went there along with the complainant Shahabuddin.The police of Police Station Jagatpuri Delhi had given the supurdgi of the abductee Rehan to his father Shahabuddin on 17.4.2011. The said facts were also endorsed in G.D. No.22 at 2135 hours (Ext. Ka. 4) dated 17.4.2011 and the offence under Sections 328, 379, 411 I.P.C. were also added in the present case.

7. After investigation the Investigating Officer submitted charge sheet (Ex.Ka.15) under Sections 364A, 379, 411 328 I.P.C. in the Court against the two appellants and one Chand Khan.

8. The charges were framed against the accused appellants-Nadeem and Mazhar for the offence under Sections 364A, 379, 411 328 I.P.C. by the trial Court and the appellants denied the prosecution case and claimed their trial.

9. The prosecution in support of its case examined PW1- Shahabuddin (complainant of the case), PW2-Smt. Zahira wife of Shahabuddin, PW3- S.I. Hasrat Ali, PW4-Constable Sipahi Lal, PW5-S.I. C.P. Singh, PW6-S.I. Rajveer Singh Chauhan and PW7-Inspector Siddharth Tomar.

10. The prosecution further relied upon the documentary evidence such as written report submitted by the Shahabuddin (Ext. Ka.1), Chik FIR (Ext. Ka.10), copy of G.D. by which FIR was registered (Ext. Ka.11), site plan (Ext. Ka.12), G.D. regarding converting of case being G.D.No.6 at .20 hrs. dated 17.4.2011 (Ext. Ka.13), G.D. dated 18.4.2011 being No.20 at 21.35 hours. (Ext. Ka.14), Supurdginama (Ext. Ka.5), copy of G.D. by which police force of police station Jagatpuri Delhi proceeded for the recovery and arrest of the accused being Ext. Ka.2, recovery memo of appeal (Ext. ka.7), recovery memo of abductee Rehan (Ext. Ka.4). The documents relating to the arrest and search of the accused (Ext. Ka.6 to 9) and charge sheet (Ext. Ka.15).

11. The statements of the accused under Section 313 Cr.P.C. was recorded by the trial Court and the appellants in their statements denied the prosecution case and submitted that they were not named in the FIR. They stated that PW3-S.I. Hasrat Ali has wrongly endorsed in the G.D. regarding proceeding for the arrest and recovery of the victim and have wrongly proved the same. The appellant Nadim has further stated that no mobile phone was recovered from his possession nor, the abductee child was recovered from his possession. The appellants have further stated that the police in order to save the accused Chand has colluded with the complainant and has falsely implicated them in the present case.

12. The appellant Mazhar has also stated before the trial Court that no

recovery of the abductee child was made from his possession nor, the abductee was with him.

13. PW1- Shahabuddin in his deposition before the trial Court has reiterated the prosecution as stated in the FIR. He stated that his wife after consuming the cold drink was in a state of unconsciousness. He made a search of his son, namely, Rehan in the nearby areas but he could be traced out and after taking 2-3 persons along with him went to Police Out Post Nai Mandi for lodging the F.I.R. and while the report was being written by him, at that moment on his other mobile a phone call was received from his mobile which was stolen and it was told to him that his son has been abducted and if he wants him back then he would pay Rs.5 lacs. He further informed the person concern calling on the mobile that he was a very poor person and at that time the phone was cut. He further stated before the trial Court that he had submitted a written report at the police Out Post and proved the same as Ext. Ka.1 which was in his hand writing and signature.Thereafter, a police team was constituted for the search of his son. On 17.4.2011 he received an information from the Police Station Jagatpuri, Delhi that they had recovered one child and he was called by them at once. On receiving the said information he reached there and saw the appellants Nadeem and Mazhar and his son Rehan there. The police told him that his son was recovered from possession of the said two accused and thereafter the police handed over his son to him. He further deposed before the trial Court that the accused had abducted his son for a ransom of Rs.5 lacs.

14. PW1 in his cross-examination has stated that in the present case the complicity of his brother Chand was disclosed by the two appellants. This witness has admitted that in S.T. No.1094 of 2011 (State Vs. Chand Khan) he had come for recording of his evidence and his statement was recorded.Chand Khan was the resident of Village Parwana. Chand Khan was arrested by the police for kidnapping/abduction of his child and he has given the statement before the trial Court that Chand Khan was not involved in the abduction/kidnapping of his son. He further admitted the fact that the accused Chand Khan is his real brother and he has stated that he was not involved in the incident and because of which he made deposition before the trial Court that Chand Khan was not involved in the kidnapping/abduction and he had also not seen Chand Khan at the police station. He further admitted that in the present case, the police have also made Chand Khan as accused along with the two appellants. No identification parade of the two appellants was conducted in jail and they were shown to him at the police station. He denied the suggestion that Chand Khan was his real brother and on account of which he deliberately did not depose against him. He further denied the suggestion that at the instance of the police personnel who showed the appellants he has falsely implicated the appellant Mazhar.

15. He admitted the fact that the first call which he had received was made from his mobile No.9358699811 which was taken by the accused Mazhar and the other mobile on which he received call its number is 9358018276. On the said phone he had conversation. The phone call which was received by him was after he had written the report. From the other side on the phone he heard a voice that if he wants his child back then Rs.5 lacs be paid. He

further submitted that he had not seen the persons who abducted his child and had seen them after his child was recovered. He admitted that he did not see any one kidnapping or abducting his child and at the police station the Police Inspector had shown him the appellants and told him that the said two appellants had kidnapped/abducted his son. He denied the suggestion that the accused Mazhar had not visited his house. He further stated before the trial Court that the appellant Nadeem had not come with the appellant Mazhar at his house.

16. In his cross-examination, this witness has further admitted that the accused appellant Nadeem belongs to his village and there was no enmity with him but stated that 10-12 years ago accused Nadeem had committed theft in his house and the said matter was compromised in Panchayat. He denied the suggestion that on account of the enmity with the accused Nadeem he was implicated in the present case.

17. PW2-Smt. Zahira, wife of Sahabuddin and mother of the abductee in her examination-in-chief has stated that on 15.4.2011 accused appellant Mazhar in the night at about 9 p.m. had come to her house and disclosed his name as Alam. Accused Mazhar had talked her husband regarding the work of embroidery. The accused Mazhar had also brought cold-drink with him and had offered the cold drink to her and her husband and thereafter both of them consumed the same and the other bottle of cold drink was consumed by the appellant Mazhar himself. Accused Mazhar along with her husband Shahabuddin and son Rehan had slept in the room situated on the ground floor and she had slept in a room which was on the upper floor. After consuming the cold-drink she became unconscious and in the morning when she along with her husband got awakened, accused Mazhar and her son Rehan were not seen. Thereafter they made a search about the two but they could not be traced out. Her son Rehan was kidnapped/abducted by the accused Nadeem and Mazhar and from their possession her son was recovered by the Delhi Police.

18. She further deposed before the trial Court that she saw the accused Mazhar for the first time in her house when he had come along with the cold-drink and disclosed his name as Alam and thereafter she has seen him before the trial Court on the date fixed in the trial. Her husband after returning from Delhi had told her that Rehan was recovered from the possession of the appellants Nadeem and Mazhar by the Delhi Polie and her son was abducted for a ransom of Rs.5 lacs.

19. In her cross-examination, this witness has stated that a person by the name of Alam had come to her house alone at 9 p.m. and the investigating officer recorded her statement about the incident under Section 161 Cr.P.C. Alam had brought three bottles of cold-drink. She had not gone to Delhi and her husband alone had gone to Delhi. She did not remember whether she had shown empty bottles of cold-drink to the Investigating Officer because she was unconscious. She further stated that she was not aware of the fact whether her husband had taken the bottle of cold-drink when he went for lodging the report along with him. She further submitted that she did not see any of the accused taking away her son. The Investigating Officer had recorded her statement under Section 161 Cr.P.C. after a

month. She has given a statement under Section 161 Cr.P.C. to the Investigating Officer that her son was handed over to her by the police. She admitted that Chand is her real Devar and she in her statement under Section 161 Cr.P.C. has stated to the Investigating Officer that the Chand was not involved in the kidnapping/abduction of her son and if the Investigating Officer has written the same she could not tell the reason. Nadeem did not visit her house, 10-12 years ago Nadeem had committed a theft in her house and before the incident of theft the appellant Nadeem often used to come to her house and after the incident of theft he never came back again. Nadeem was the resident of Village Parwana and she does not know what the Nadeem do. After the incident of theft her husband did not feel annoyed. Nadeem had committed theft of Rs.25000/- and he had returned Rs.10,000-12,000/- and rest of the amount was settled in the Panchayat. She further deposed that her husband used to earn Rs.10,000/- per month at the time of incident and they also own a house in the city which is of 56 Sq. Yard and besides the same they do not have any house or plot. At the time of the incident, they did not have Rs.2-4 lacs either in their house or in the Bank.

20. She denied the suggestion that Nadeem was implicated in the present case because of the incident of theft in which Nadeem was involved, on account of which her husband has lodged a false report against him. At the time of the incident she had seven children and as on date she also has seven children.Rehan used to sleep with his father. Usually they used to wake up in the early morning, but the night on which Alam had come to her house, they woke up at 6 a.m. She denied the suggestion that the entire prosecution story was conspired by her along with her husband falsely implicating the innocent persons. She further denied the suggestion that as the Chand was her real Devar hence she has not deposed against him.

21. In her cross-examination, she has stated that she became conscious on the next day at about 2-2.30 p.m. and after regaining consciousness she started searching her son and she had also searched her son at Bulandshahr. The police had not called her for identification parade nor, had conducted any identification parade of the accused before the Magistrate. She denied the suggestion that she had not seen the appellant Mazhar nor, Mazhar had abducted or kidnapped her son. Her husband carries on a business and she does not help her husband in his business.

22. PW3-S.I. Hasrat Ali has deposed before the trial Court that he was posted as Sub Inspector at Police Station Jagatpuri, Delhi on 17.4.2011 and he proceeded vide D.D.No.18A at 12.20 hrs from the police station and along with him Sub Inspector C.P. Singh, Head Constable Balveer and Jeetaman also accompanied him. He has proved his leaving of the police station in G.D. (Ext. Ka.2) and proved the same. He further stated that on that date at about 12 noon he received an information from the Constable Jilyad that some persons have kidnapped/ abducted a child from U.P. and have brought to Delhi and are trying to get a room on rent within the jurisdiction of police station Jagatpuri and if raid is made then the child could be recovered. On the basis of the said information, instructions were taken from the Station House Officer of the concerned police station. Thereafter, he along with the police force reached at 40 Feet Jagatpuri Road near a mosque where a person had arrived and on the pointing out

of informer the police force arrested the accused. On his arrest, the accused disclosed his name as Nadeem, son of Fateh Mohammad, resident of Parwana, Police Station Khanpur, District Bulandshahr and from his right side pocket/trouser which he was wearing, a mobile phone was recovered on the spot and he prepared its recovery memo and thereafter read the same to the witness. The recovery memo of the mobile phone has been proved by him as Ext. Ka.3.

23. This witness further stated that on the information given by the accused Nadeem, police force reached at the House No.F161, Gali No.5 Shastri Park, Delhi and on entering the house the police team saw that one person was sitting along with a child and on seeing him, the accused Nadeem told that the person who was sitting with the child was his companion Mazhar. The police team arrested the accused Mazhar along with the child at 1.50 p.m.The accused Mazhar told the name of the child as Rehan, son of Shahabuddinn, resident of Sayana Bas Stand, Bulandshahr. The child was aged about 3-4 years. The recovery memo of the child was also prepared by him in his hand writing and thereafter he read over the same to the witness who also signed along with the accused persons. He proved the recovery memo of the abductee Rehan as Ext.Ka.4.

24. This witness further deposed that the police team brought the accused along with the child at police station Jagatpuri and informed the Police Out Post Nai Mandi, Police Station Kotwali Dehat about the arrest of the accused and recovery of the child and the same was also endorsed in the G.D. No.20A dated 17.4.2011 of the police station Jagatpuri. On the same day, he handed over the kidnapped/abducted child Rehan to his father Shahabuddin, for which he also prepared a Supurdginama and proved the same as Ext. Ka.5, which was in hand writing and signature. He further produced the the accused on 18.4.2011 before the Metropolitan Magistrate, Karkarduma, Delhi in the Court and papers regarding the arrest of the accused and their search was prepared by him in his hand writing and signature and proved the same as Ext. Ka.6 to 9. Disclosure statements of the accused Mazhar and Nadeem were written by him separately.

25. In his cross-examination, this witness has stated that when the police team arrested the accused Nadeem, there was no person from the public had stopped near the police team. He admitted that at the time of arrest of the accused Nadeem it was a day time and people were moving on the road. He further admitted that they tried to stop some of the persons from the public for taking him as witness but because of the paucity of time he did not enquire about the name of the persons of the public who were stopped by him.

26. He further admitted that till the information was given by the police informer, no FIR was registered at the police station about the incident. The police informer had told that at Police Station Bulandshahr the case has been registered. He admitted the fact that it is true that in his statement he has not stated that the case was registered. The accused Nadeem was not made Baparda whereas the accused Mazhar was kept in Baparda. He stated that as the Nadeem was seen by many persons hence, he was not kept Baparda.

27. He denied the suggestion that the mobile phone which was recovered from Nadeem, had been in fact given by the family members of the abductee child and the same was not recovered from Nadeem.

He did not remember that besides mobile phone any other article was recovered from accused Nadeem or not. He further denied the suggestion that the abductee child was not recovered from the accused persons and further that the child was recovered from some other place or the child was given by his family members and recovery of the child has been shown falsely.

28. He further submitted that how many persons were there in the house, he did not remember. The door of the house was not bolted from inside. He further did not remember that how many stories were constructed in the said house and how many rooms were there in the said house. When they pushed the door of the house they reached in the same room where the child was found. He along with the police team stayed in the house for about ½ hours but neither the witness from public came there nor he called them. At 3 p.m. after returning to the police station, an information was sent to the father of the child and parents of the child came in the evening to him. He did not record the confessional statement of the accused before the Magistrate at the police station nor informed the Magistrate about it that the accused confessional statement is to be recorded. He further denied the suggestion that he did not arrest the accused from the spot nor the abductee child was recovered from the possession of the accused.

29. PW4- Constable Sipahi Lal in his deposition before the trial Court has stated that on 16.4.2011 he was posted as Constable Clerk in the Police Out Post Nai Mandi, Police Station Kotwali Dehat,District Bulandshahr and on the said date he registered Case Crime No.307/80/2011, under Section 363 I.P.C. of which Chik FIR is in his hand writing and signature. He further endorsed about the registeration of the FIR in G.D.No.15 at 12.20 hrs. on 16.4.2011. He proved the Chik FIR (Ext. Ka.10) and G.D.No.15 (Ext. ka.11).

30. In his cross-examination, this witness has stated that on the basis of the written report submitted by the informant, he registered the FIR and for investigation he has written the name of S.I.Rajvir Singh Chauhan (Ext.Ka.10) which makes endorsement about the same in red ink, has not been written by him.

31. PW5-S.I.C.P.Singh has stated before the trial Court that he was the member of the police team which had arrested the accused persons along with the abductee child. He has proved the G.D. Ext.Ka.2, recovery memo of mobile Ext. Ka.3, recovery memo of the abductee child Rehan Ext. Ka.4, Supurdginama Ext. Ka.5, arrest memo of the accused persons along with their search memo Ext. Ka.6 to 9 and he was present when the accused persons were produced before the Court.

32. This witness has further stated that the accused Nadeem was arrested first and thereafter on the pointing out of the accused Nadeem, accused Mazhar was arrested from whose custody abductee child was also recovered.

33. In his cross-examination, this witness has stated that the police team had tried to request the witnesses from the public but they could not find any witness. He stated that it was a day time and many persons of the public were moving around, hence, they did not ask any of the persons of the public regarding their names nor enquired from the persons of the neighbouring house from where the

recovery was made because of the paucity of time.

34. On a query being made by the Court what does he mean by 'paucity of time', then he answered, as the child was to be recovered quickly. He stated that at the time when the accused Nadeem was arrested, abductee child Rehan was not found along with him and in the present case along with the two accused, Chand was also an accused. He further stated that he did not know that in the incident of kidnapping whether the uncle of the abductee, namely, Chand was involved or not and again he stated that the police team was also told that one accused by the name of Chand was also involved in the present case.This witness denied the suggestion that none of the accused persons were arrested from the spot nor, any child was recovered from the spot.

35. This witness in his cross-examination has further stated that when the police team raided the house for the recovery of the child then 20-30 persons had arrived there and again stated that 15-20 persons arrived. The recovery memo was prepared at the place of occurrence. No person of the public was made as witness and 15-20 persons of the public who had arrived at the place of occurrence they did not enquire about their names nor other members of the team asked about their names from them. The recovery memo was signed by him but it did not mention that the accused were kept Baparda.

36. The house from where the child was recovered, he did not know about its area and also that how many stories were constructed in the said house. He further cannot state how many rooms were constructed in the said house from which the accused was arrested he did not remember and it took about 15 minutes to prepare the recovery memo. He denied the suggestion that the accused was not given the copy of recovery memo and further denied that the accused was not arrested on the spot nor the child was recovered and for some unknown reasons, false arrest has been shown.

37. PW6- S.I. Rajvir Singh Chauhan has stated before the trial Court that he was posted as In-charge of the Police Out Post Nai Mandi, Police Station Kotwali Dehat, District Bulandshahr on 16.4.2011 and he had taken over the investigation of the present case and after taking over the investigation he recorded the statement of the informant Shahabuddin and other witnesses and recorded the same in the case diary and further visited the place of occurrence, prepared the site plan at the pointing out of the informant, which is in his hand writing and signature and proved the site plan as Ext. Ka.12. On 17.4.2011, he received a message from mobile phone No.9711449810 that a child by the name of Rehan has been kidnapped/ abducted and police of police station Jagatpuri, Delhi has recovered him along with two accused who have confessed about the incident of kidnapping/abduction of the child.

38. He further stated that this witness along with Constable Vijendra Singh and Shahjad Singh proceeded from Police Out Post to Delhi and they also taken the informant Shahabuddin who was asked to reach at Anoop Shahr and from where he accompanied them to Police Station Jagatpuri, Delhi and reached there.

39. The informant on reaching at the Police Station Jagatpuri after seeing the accused, informed the police that he was

the same person who had come to his house in the night and stayed. He recorded the statements of the accused persons in the case diary and further recorded the statements of S.I. Hasrat Ali, S.I. C.P.Singh, Head Constable Balvir Singh, Constable Jeetpal Singh under Section 161 Cr.P.C.

40. On 18.4.2011, he took transit remand of the accued Mazhar and Nadeem. On 17.4.2011, offence under Section 328, 379 & 411 I.P.C. was added and on the same day the case was converted from Section 363 I.P.C.to 364A I.P.C. and the same was also endoresed in the G.D. Ext. Ka.13. On 18.4.2011, the recovery of Motorola mobile phone which was taken from the Police Station Jagatpuri, the same was submitted by him to the police malkhana and also mentioned about the adding of the offence under Sections 328, 379 & 411 I.P.C.in the G.D. Rapat No.22 at 11.35 hrs. and proved the same as Ext. Ka.14. He also proved the recovery of the mobile phone Motorola as material Ext. Ka.1, which was recovered from the accused Nadeem before the trial Court. This witness has further stated that on 21.4.2011, he recorded the statement of the accused Chand in the case diary and thereafter the investigation of the case was transferred from him.

41. This witness in his cross-examination has stated that neither the recovery of the child nor the recovery of mobile phone was made in his presence. The accused were not brought Baparda from Delhi nor the accused were handed over to him Baparda. Except the informant he did not record the statement of any of the witnesses of fact. The informant had not seen any accused taking away his child. He did not submitted charge sheet against the accused and only prepared the site plan at the pointing out of the informant. He also admitted the fact that the accused Chand has been acquitted in the present incident and he was aware of the fact after going through the records.

42. PW7-Inspector Siddharth Tomar has deposed before the trial Court that on 25.4.2011 he was posted as Inspector In-charge of Police Station Kotwali, District Bulandshahr and under the orders of the C.O.City he had taken over the investigation of the case. On 5.5.2011, he recorded the statement of the witness Zahira wife of the informant, under Section 161 Cr.P.C. and after investigation he submitted charge sheet against the accused Nadeem, Mazhar & Chand in Case Crime No.307/80/11, under Sections 364A, 379, 328, 411 I.P.C. and proved the charge sheet as Ext. Ka.15 which is in his hand writing and signature.

43. In his cross-examination, this witness has stated that as the accused Chand was also involved in the present case hence, he submitted charge sheet against him also. He did not record the statement of the accused nor visited the place from where the abductee child was recovered. He was not aware of the fact that the accused Chand was the real brother of the father of the abductee. He was also not aware of the fact that the trial of the accused Chand was separated being S.T.No.1094/11 in the Court of Additional Sessions Judge, Court No.19 (F.T.C.) from where he was acquitted. He denied the suggestion that he carried on a wrong investigation and submitted wrong charge sheet.

44. On cross-examination made on behalf of the accused Mazhar from him, he

has stated that the name of the accused Chand came during the course of investigation. There is no endorsement in the C.D. that the accused Mazhar and Nadeem were kept Baparda or any identification was held regarding them. He admitted that the FIR was registered against unknown persons. He denied the suggestion that he had not carried out the investigation in a fair manner and wrongly submitted charge sheet against the accused Nadeem and Mazhar.

45. After considering the prosecution evidence and defence version, the trial Court convicted and sentenced the accused Nadeem and Mazhar for the offence under Sections 364A, 379 & 411 I.P.C. and acquitted them of the charges under Section 328 I.P.C. as the prosecution has failed to prove its case for the said offence.

46. Being aggrieved by the impugned judgment and order passed by the trial Court, by which the accused/ appellants have been convicted and sentenced, they have preferred the instant appeal.

47. Heard Sri Shad Khan, learned counsel for the appellant Nadeem-appellant No.1, Sri Gautam Kumar Banerjee, learned Amicus Curiae for the appellant no.2- Mazhar and Sri Gaurav Pratap Singh, learned A.G.A. appearing for the State and perused the lower court record.

48. Learned counsel appearing for appellant no.1 has submitted that from perusal of the F.I.R. It is evident that the same was lodged under Section 363 I.P.C. by the complainant against unknown person and there was no allegation of ransom for the kidnapping/abduction of the child of the complainant (PW1) Shahabuddin. He pointed out that in the statement under Section 161 Cr.P.C. of the complainant also, there appears to be no mention for the demand of ransom for the return of the child and the statement of PW2-Smt. Zahira, wife of Shahabuddin, whose statement under Section 161 Cr.P.C. was recorded after one month of the incident. It was mentioned that some ransom was demanded from them on a mobile phone, which is an afterthought.

49. He thus argued that in the FIR as well as in the statement of the informant recorded under Section 161 Cr.P.C., there was no allegation regarding demand of ransom from the complainant and for the first time before the trial Court PW1 Shahabuddin has stated that when he had written over the FIR then he received a call on his mobile phone from the mobile phone, which was taken away by the accused while abducting his son that if he want return of the child then Rs.5 lacs be paid today. He submitted that the fact regarding demand of ransom money was made subsequently just to improve the prosecution case to give a serious colour of the incident by the complainant in collusion with the police personnel.

50. He next submitted that during the course of investigation it has been found that one person by the name of Chand was also made an accused in the present case who happens to be the uncle of the abductee child and real brother of PW1 Shahabuddin and against whom the police has also submitted charge sheet in the present case along with two appellants and the trial of the accused Chand was separated being S.T. No.1094 of 2011 which ended in his acquittal as the informant and his wife did not depose against the said accused Chand as they have stated that he was not involved in the incident.

51. He further submitted that PW2-Smt. Zahira, wife of Shahabuddin and the

mother of the abductee child, in her cross-examination has further admited that her husband was doing the work of embroidery and could hardly only earn Rs.10,000/- per month and they had only a small house and further they did not have any bank balance to the tune of Rs.2-3 lacs. In such circumstances, the financial position of the informant was not sound which could require the accused to demand such a huge amount of Rs.5 lacs from him.

52. He further argued that the abductee child was recovered by the police of Police Station Jagatpuri, Delhi from a house and at the time of arrest of the accused Mazhar along with the child at Delhi no independent witness of the said recovery has been shown though from the evidence of PW3 Hasrat Ali and PW5 S.I. C.P.Singh shows that many persons of the public had arrived and were available but the police made a lame excuse that the child was to be recovered hence due to paucity of time they did not take any public witness for making the recovery of the abductee child and arrest of the accused Mazhar from the house.

53. He argued that so far as the arrest of the accused Nadeem by the police is concerned, that too appears to be a false one as no independent witness of his arrest or of the recovery of the mobile phone was made part of his arrest or recovery of Motorola mobile phone though he was also arrested from a busy place where the witnesses were easily made available. All the witnesses of arrest of the two accused appellant and recovery of the abductee child are the police witnesses, hence, the said recovery and their arrest appears to be a false one.

54. It was further argued that the prosecution has tried to conceal the origin of the incident as the trial Court found that the first part of the incident could not be proved by the prosecution where it has been stated by PW1 Shahabuddin that one person by the name of of Alam had come to his house for business purposes on the evening on 15.4.2011 and had also assured him for getting export deal. He had come with cold-drink bottles with him and offered the same to PW1 and his wife PW2 who consumed the same and the cold drink was also consumed by the said person in the evening and thereafter when the said person had stayed back in their house and slept in the night, had walked out with the son of the informant, who on the next morning found that the said person and his minor son Rehan were not traceable, on which the informant after great search lodged the FIR of the incident.

55. Therefore, the prosecution case with respect to the offence under Section 328 I.P.C. could not be proved by the prosecution by the cogent evidence, hence, the trial Court has acquitted the appellant for the offence under Section 328 I.P.C.

56. Learned counsel for the appellants besides the above arguments has lastly argued that even if the prosecution case is taken at its face value, the conviction of the appellants under Section 364A I.P.C. is not sustainable in the eyes of law and the case would not travel beyond Section 365 I.P.C. He further argued that the appellants have been convicted for life imprisonment under Section 364A I.P.C. and have served out about 9 years in jail and the maximum punishment provided under Section 365 I.P.C. is 7 years and, therefore, the appellants be released by modifying/altering their conviction and sentence under Section 365 I.P.C. from Section 364A I.P.C. as the prosecution has failed to establish that the child was abducted by the two appellants for payment of ransom.

57. In support of his argument, learned counsel appearing for the appellant has placed reliance upon a judgment of this

Court in case of ***Ashwani Dubey Vs. State of U.P., reported in (2016) 97 ACC 229 & Mahesh Vs. State of U.P., reported in (2016) 96 ACC 775,*** wherein this Court in a similar facts and circumstances has modified/altered the conviction and sentence from under Section 364A I.P.C. to Section 365 I.P.C.

58. Sri Gautam Kumar Banerjee, learned Amicus Curiae appearing for the appellant no.2 has adopted the arguments advanced by the learned counsel for appellant no.1.

59. *Per contra,* learned A.G.A. on the other hand, has vehemently opposed the arguments advanced by the learned counsel for the appellants and submitted that the appellant no.1 Nadeem was arrested by the police on 17.4.2011 and from his possession a motorola mobile phone belonging to the informant Shahabuddin was recovered and further he also confessed that the said mobile phone belonged to the informant Shahabuddin whose son was abducted by him along with his companion Mazhar, he further disclosed to the police that he can get the child recovered along with the accused Majahar. On the information given by the appellant Nadeem, the police reached to the house at Delhi and recovered the abductee child along with the accused Mazhar who was arrested by the police of police station Jagatpuri, Delhi and both the accused along with the abductee child were brought to the police station Jagatpuri, Delhi, thereafter an information was given by the police of the said police station to the concerned police station at Bulandshahr and the police of the concerned police station at Bulandshahr further took PW1 along with them and reached the police station Jagatpuri where they saw that the accused Mazhar who claimed himself to be the Alam, had visited his house on the day of the incident and identified him. PW1 further stated that it was he who had taken over his son in the night of 15/16.4.2011.The child was thereafter handed over to PW1 by the police of police station Jagatpuri, Delhi and the accused were brought from Delhi on transit remand to Bulandshahr and the case was converted from the offence under Section 363 I.P.C. to 364A I.P.C. and further offence under Sections 328, 379, 411 I.P.C. was also added in the present. After investigation the police submitted charge sheet for the offence under Sections under Sections 364A, 379, 411 328 I.P.C. and the accused were put to trial. He further argued that as the abductee child has been recovered from the possession of the appellant Mazhar on the information given by the appellant Nadeem from whom motorola mobile phone was recovered and from the said mobile phone a demand of ransom of Rs.5 lacs was made by the accused on the other mobile phone of PW1, as has been stated by PW1 and PW2 before the trial Court, hence, the trial Court has rightly convicted and sentenced the appellants for the offences in question.

60. We have given thoughtful consideration to the submissions advanced by the learned counsel for the parties and thoroughly perused the evidence on record.

61. It is an admitted fact that the FIR of the incident was lodged by PW1 Shahabuddin on 16.4.2011 at 12.20 hrs. for the offence under Section 363 I.P.C. against one unknown person namely, Alam for enticing and taking away his minor son by the said unknown person.The accused appellant Nadeem was arrested by the police on 17.4.2011 at 12.45 p.m. on the information given by the police informer

and from his possession a motorola mobile phone which was of silver and gray colour being mobile No. RMRH 51500017908 was recovered and who disclosed that the said mobile phone belonged to the complainant Shahabuddin, resident of Bulandshahr and he confessed before the police that he along with his companion Chand son of Faqruddin of District Bulandshahr and Mazhar had abducted Rehan, aged about 3-4 years, son of Shahabuddin on 15/16.4.2011 at 3 a.m. (night hours) and the mobile phone of the informant/complainant which was recovered from him was taken away for demanding ransom. On the information and pointing out of the accused appellant Nadeem, the police raided the House No. F-161 Gali No.5, Shastri Park, Delhi. The police arrested the accused Majhor along with the son of the informant, namely Rehan and further recorded the statement of the accused Mazhar who has stated that he along with his companion Nadeem and Chand had abducted the son of the informant Rehan in the night of 15/16.4.2011 at 3 A.M. The police of Police Station Jagatpuri, Delhi thus arrested the accused along with the child and brought to the Police Station Jagatpuri, Delhi from where they informed the concerned police station of Bulandshahr regarding the arrest of the accused and recovery of the child. On which, the police of police station Kotwali Dehat,District Bulandshahr reached the Police Station Jagatpuri, Delhi along with the PW1 Shahabuddin who identified the person Alam who stated that the accused Mazhar was the person who had come to his house at 15.4.2011 disclosing his name as Alam for the purpose of getting an export order and had stayed in his house in the night and took away his son Rehan for which he lodged the FIR. The police thereafter handed over the abductee child to PW1 and prepared a supurdginama on 17.4.2011. The accused were produced before the before the Metropolitan Magistrate, Karkarduma, Delhi for transit remand on 18.4.2011 and thereafter they were brought to the District Bulandshar.

62. During the course of investigation, the case was converted under Section 364A I.P.C. from Section 363 I.P.C. and offences under Sections 328, 379, 411 I.P.C. were added and after the investigation PW7 submitted charge sheet for the offene under Sections 364A, 379, 328, 411 I.P.C and the accused were put to trial who denied the charges and stated that in order to save the accused Chand, they have been falsely implicated in the present case by the informant PW1 Shahabuddin in collusion with the police.

63. The argument of learned counsel for the appellants has great significance and has substance that in the FIR as well as in 161 Cr.P.C. statement of the informant, there was no mention for demand of ransom by the accused persons for the return of the abductee child. In the statement of PW2 Smt. Zahira recorded under Section 161 Cr.P.C., it has been stated by her that a call for ransom of Rs.5 lacs was made for the return of the child but the said statement was recorded after one month of the incident just to improve the prosecution case and for the first time before the trial Court it has been stated by PW1 that a ransom call was made from his mobile phone which was taken away by the accused while kidnapping his son in the night of 15/16.4.2011 on his other mobile. Moreover, it has been stated by him that when he had written the report of the incident,he received a call on his mobile by which he was threatened by the accused

and a demand of ransom of Rs.5 lacs was made for the return of his child, which has not been established by the prosecution by a cogent evidence.'

64. Moreover, the accused Chand whose complicity has also come into light in the statement of the two appellants regarding kidnapping/abduction of the child of the informant, who was uncle of the abductee and real brother of PW1 the informant, and though charge sheet was submitted against him for the offences in question, he was put to trial in S.T .No.1094 of 2011 before the competent Court, but the PW1 and PW 2 who are his real brother and sister-in-law (Bhabhi) of accused Chand have failed to depose against him and stated that Chand was not involved in the present case along with the two appellants and on the basis of which the trial Court has acquitted him, which also raises suspicion regarding testimony of the said two witnesses against the appellants that they had abducted the child of the complainant for a ransom. But, considering the fact and evidence led by the prosecution that the abductee Rehan has been recovered by the police from the custody of the appellant Mazhar on the pointing out of the accused appellant Nadeem on 17.4.2011 from a house at Delhi which stands to be proved from the testimony of PW3, PW4 & PW5 who raided the house from where the abductee child was recovered and they have deposed about the arrest of the accused appellant Nadeem and recovery of Motorola mobile phone from him and further he took the police team to the house at Shastri Park, Delhi from where the abductee along with the accused appellant Mazhar were found and further the documentary evidence available on record such as recovery memo, arrest memo etc. goes to show that they had kidnapped/abducted the son of the complainant with an intent to cause abductee secretly and wrongfully confined as it transpires from the prosecution evidence, hence, the contention of learned counsel for the appellants that no case under Section 364A I.P.C. is made out against the appellants as the prosecution has failed to prove its case beyond reasonable doubt that the abductee was kidnapped/abducted for a ransom, hence, their conviction and sentence under Section 364A I.P.C. is not all justified and their conviction and sentence may be altered to Section 365 I.P.C., holds merit and is acceptable.

65. In view of the foregoing discussions and after scanning the entire evidence on record including the testimony of the witnesses and other documentary evidence, we have no hesitation to hold that the conviction of the appellants under Section 364A I.P.C. by the trial Court is unsustainable as the trial Court has failed to appreciate from the evidence on record that there was no cogent and legal evidence regarding demand of ransom for kidnapping or abducting the child of the informant/complainant by the accused persons. Hence, the conviction and sentence of the appellants under Section 364A I.P.C. is against the evidence on record and is liable to be set aside by this Court, which is accordingly set aside. But this Court hold the conviction of the appellants under Section 365 I.P.C. They are sentenced to 7 years R.I. under Section 365 I.P.C. with a fine of Rs.10,000/- on each of them and in default of payment of fine they shall further undergo imprisonment of six months

66. The appellants are stated to be jail for more than 9 years. As the maximum

sentence awarded under Section 365 I.P.C. is 7 years and appellants have already served out the imprisonment of surplus period as they are stated to be in jail for the last more than 9 years, hence, the payment of fine as has been ordered by this Court under Section 365 I.P.C. and by the the trial Court, the same shall be treated to be the imprisonment against the fine imposed on them, hence, they shall be released forthwith, if they are not wanted in any other case. The period of six months of additional imprisonment which they could have been required to undergo in case of default of payment of fine of Rs.10,000/- each has also been undergone by them, hence, they are not required to make any payment of fine. The judgement and order of the trial Court is modified to that extent.

67. Sri Gautam Kumar Banerjee, learned Amicus Curiae on behalf of appellant no.2-Mazhar be paid honorarium as per the Rules as he placed his papers regarding his appointment as Amicus Curiae by the Legal Service Authority for arguing the appeal on behalf of appellant no.2-Mazhar.

68. It is further directed that the accused appellants shall furnish bail bond with surety to the satisfaction of the Court concerned in terms of the provision of Section 437-A of Cr.P.C.

69. In view of the above, the appeal stands partly allowed.

70. Let the lower court record be transmitted to the trial Court concerned along with the certified copy of this order by the office for its information and compliance forthwith.

(2020)03-05ILR A669
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE

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

Criminal Appeal No. 4576 of 2009
Connected with
Criminal Appeal No. 4664 of 2009

Atar Singh & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri A.R.B. Kher, Sri Anvir Singh, Sri R.P. Singh, Sri Rajeev Kumar, Sri S.F.A. Naqvi, Sri S.P.S. Rathi, Sri S.V. Singh, Sri Prem Shankar, Sri H.D. Singh

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

Criminal law- Indian Penal Code - Sections 302 and 148 - Appeal against conviction.

Held – Plea of alibi-must be proved with absolute certainty. (Para 66)

Minor Discrepancies - Can be ignored unless, completely incompatible with prosecution version. (Para 74)

Medical Evidence- Cannot over right medical evidence ocular testimony. (Para 106)

Lapses During Investigation- Not to discredit prosecution version in case supporting evidence is consistent and dependable. (Para 127)

Relative Witnesses- The testimony cannot be doubted in case of minor variation. (Para 130)

Appeal rejected. (E-2)

List of Cases Cited:-

1. Moti Vs. St. of U.P. 2003 Law Suit (SC) 301,

2. Ram Narain Singh Jaggar Singh Vs. St. of Punj. (1975 AIR SC 1727),

3. Mohinder Singh Vs. St.; 1950 SCR 821 (AIR 1953 SC 415-1953 Cri LJ 1761),

4. Rana Pratap Vs. St. of Har. (1983) 3 SCC 327,

5. St. of H.P. Vs. Jeet Singh 1999 (38) ACC 50 SC,

6. Ram Ghulam Chaudhary Vs. St. of Bihar; 2001 (43) ACC 929,

7. Nankaunoo Vs. St. of U.P.; 2016(1) SC Cr.R 237,

8. V.K. Mishra & anr. Vs. St. of Uttrakhand & anr., 2015(2) SC Cr.R,

9. Appa Bhai & anr. Vs. St. of Gujarat; 1988 (25) ACC168 SC,

10. Nathuni Yadav & ors. Vs. St. of Bihar; 1997 (34) ACC 576 SC,

11. Karan Singh & ors. Vs. St. of M.P., Judgment Today 2003, Suppl. Vol. 2 SC 261,

12. Tahsildar Singh & anr. Vs. The St. of U.P., 1959 SCR Supl. (2) 875.

13. Binay Kumar Singh Vs. The St. of Bihar, 1997 Vol. 1 SCC 283,

14. Bhagwan Singh Vs The St. of Punj., 1952 AIR 214,

15. Dalip Singh Vs. St. of Punj. AIR 1953 SC 364,

16. Veer Singh & ors. Vs. St. of U.P., (2014) 2 SCC 455,

(Delivered by Hon'ble Naheed Ara Monis, J.)

1. The abovementioned two appeals have been filed on behalf of the appellants, namely, Atar Singh, Mansha Ram, Phulwari and Nawab Singh against the judgment and order dated 22.7.2009 passed by the learned Additional Sessions Judge, Court No.2, Farrukhabad in Sessions Trial No.327 of 1989 (State of U.P. Vs. Atar Singh & others) arising out of case crime no.158 of 1985 whereby they have been convicted and sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs.15,000/- under Section 302 IPC and three years rigorous imprisonment for the offence punishable under Section 148 IPC. Both the sentences were directed to run concurrently and in case of default of payment of fine they were directed to further undergo simple imprisonment of six months.

2. The prosecution was launched against seven accused persons, namely, Atar Singh, Sughar Singh, Nawab Singh (sons of Pyare Lal), Phulwari S/o Vijay, Mansha Ram S/o Shankar, Kaptan Singh and Deshraj (sons of Babu Ram) in pursuance of the FIR lodged against them registered by Bahaar Singh as Case Crime No.158 of 1985, under Sections 147,148,149,302 IPC at police station Kayamganj, District Farrukhabad on 18.5.1985 at 6.50 P.M.

3. The Sessions Trial No.327 of 1989 pertains to the trial of accused appellants, namely, Atar Singh, Sughar Singh, Nawab Singh, Mansha Ram and Phulwari.The trial of accused Sughar Singh was separated at the fag end, on his plea of juvenility, who was acquitted by the court below. Kaptan Singh and Deshraj are the accused persons of Sessions Trial No.129 of 1995.

4. Appellants, namely, Atar Singh, Mansha Ram and Phulwari have preferred appeal bearing Criminal Appeal No.4576 of 2009, Nawab Singh has preferred appeal bearing Criminal Appeal No.4664 of 2009 against their conviction in Sessions Trial No.327 of 1989. The appellant Kaptan Singh and Deshraj have preferred separate appeal bearing Criminal Appeal Nos.4639 of 2009 & 4404 of 2009 respectively against their conviction in Sessions Trial No.129 of 1995. As stated in opening paragraphs all the accused persons were convicted by the judgment and order dated 22.7.2009 passed by the learned Additional Sessions Judge, Court No.2, Farrukhabad and each were directed to undergo rigorous imprisonment for life and also to pay fine of Rs.15,000/- under Section 302 IPC and three years rigorous imprisonment for the offence punishable under Section 148 IPC. Both the sentences were directed to run concurrently and in case of default of payment of fine they were further directed to undergo simple imprisonment of six months.

5. It is pertinent to mention here that due to passing away of appellant Atar Singh on 19.9.2018, the appeal on his behalf has stood abated by order dated 3.12.2018.

6. The prosecution case in short conspectus is that the First Information Report was lodged on 18.5.1985 at 6.50 P.M. by Bahaar Singh S/o Ram Sahay in respect of an incident occurred on the same day at 4.30 P.M. which was registered as Case Crime No.158 of 1985, under Sections 147,148,149,302,201 IPC at police Kayamganj, District Farrukhabad. He divulged in the FIR that his father Ram Sahay was Pradhan of his village Lakhanpur for about 35 years. In the last election, Chandrakali, the wife of Kaptan Singh @ Kamta Prasad S/o Babu Ram Yadav had contested election against his father. His father had lost the election for which a petition was filed which is pending. About two & half years ago a dacoity had been committed in the house of Saudan Singh, who had named Atar Singh S/o Pyarey Lal and Mansha Ram and two others of which the case is pending. Besides this, two years ago a case under Section 396 IPC was filed by Sohan Lal Nunre of village Lakhanpur in which two persons were killed by dacoits. In the said case, Mansha Ram, Atar Singh and Deshraj, the brother of Kaptan Singh were named in the FIR by Sohan Lal. Atar Singh and Kaptan Singh were under the impression that the complainant's father has implicated them in the case of dacoity. About two years ago, Kaptan Singh, Mansha Ram and Atar Singh had fired upon his father and his brother Tahar Singh with intent to kill them but luckily they had escaped from there. In this case all the three accused persons were challaned by the police. On account of the above reasons, Kaptan Singh and Atar Singh were bearing enmity with his father. Two and half months ago family member of Kaptan Singh was murdered in the village in which Kali Charan S/o Ram Naresh Yadav had filed a false report against Vijayee and Mansha Ram along with Tahar Singh who is the brother of the complainant at the instance of Kaptan Singh and on account of which, his brother is in jail. After 2-4 days, the dead body of Nahar Singh, the elder brother of Atar Singh was found in a well in which Atar Singh had implicated the complainant, his father, Nanhey, Rajendra, Tejram etc. of his village in the case, on the basis of mere suspicion that they had committed murder of Nahar Singh. A case under Section 107 IPC was also filed by Kaptan Singh and others, which is still

continuing and on account of these reasons Atar Singh and Kaptan Singh were inimical with his father Ram Sahay.

7. Today (on 18.5.1985) in the evening at about 4.30 P.M. his father Ram Sahay was sitting on a cot on the platform situated in front of his baithak. Atar Singh, his younger brother Sughar Singh, elder brother Nawab Singh, Phulwari and Mansha Ram of his village as well as Kaptan Singh and Deshraj emerged out from the house of Atar Singh and passed through the baithak of Rajju and reached at the platform. Atar Singh, Phulwari and Mansha Ram were armed with rifle, Sughar Singh, Kaptan Singh and Deshraj having double barrel gun and Nawab Singh was armed with countrymade pistol came over chabootra. As soon as his father saw them he got up and tried to run towards baithak, at this Atar Singh, Mansha Ram and Kaptan Singh had fired upon his father. After receiving gun shot injury his father ran towards baithak and fell down there. Sughar Singh, Nawab Singh and Phulwari went behind him and entered in the baithak. There too, they had again fired upon him. Atar Singh, Mansha Ram and Kaptan Singh were firing indiscriminately outside which had created reign of terror. His father had succumbed to the injuries in the baithak. All the accused persons thereafter dragged the dead body of his father from baithak and put him on the heap of wood of Arhar kept in an open vacant land of Sahab Singh. Atar Singh and Deshraj exerted that *"Sale Ko Jalakar Rakh Kar Do" (burn him to ashes)* and set the heap of wood of Arhar on fire. Other persons put dry leaves (patai) of sugarcane on fire. Thereafter they went towards the house of Kaptan Singh unleashing reign of terror by firing. This incident was witnessed by his mother who was standing at the door he himself, Sahab Singh S/o Bhawani Singh of his village and Brijender Singh who is the son of his brother's 'Sarhu' Soney Lal who resides there but they all were helpless seeing the murder of his father due to fear of accused persons armed with rifles and guns. The dead body of his father burnt to some extent has been lying on the spot, hence action be taken by lodging the FIR.

8. On the basis of the aforesaid FIR lodged by Bahaar Singh S/o Ram Sahai, police swung into action. A case was registered against Atar Singh, Sughar Singh, Nawab Singh, Phulwari, Mansha Ram, Kaptan Singh and Deshraj under Sections 147,148,149,302,201 IPC as Case Crime No.158 of 1985 on 18.5.1985 at police station Kayamganj, which was written by Constable Clerk Babu Ram marked as Ext. Ka-8 & Ext. Ka-9. S.S. Yadav, Inspector (C.B.C.I.D.) posted as Sub-Inspector at police station Kayamganj on 19.5.1985 had been entrusted to investigate the case. He along with in charge Inspector Jagdamba Prasad Mishra and SSI K.L. Verma with police force reached at the place of occurrence where the deceased Ram Sahay was done to death by firing upon him and his body was burned by the accused persons which was kept on the wood of Arhar. The inquest of the deceased was conducted in the presence of the witnesses and the inquest report was marked as Paper No.16-A/1,16-A/2, 16-A/3. It was duly signed by the Sub-Inspector S.S. Yadav who proved his signature and the same was marked as Ext. Ka-3. Thereafter the dead body was sealed, of which sample seal was prepared. He had further prepared papers of challan nash, police form no.13, letter to Chief Medical Officer, I/C Fatehgarh, letter to R.I., photo nash, chik FIR, copy of GD, site plan, memo of empty cartridges, memo of ashes

of heap of Arhar, memo regarding search and arrest of accused persons, recovery of illegal firearm, memo of plain & blood stained earth, which were marked as Ext. Ka-4 to Ext. Ka-17. The recovery memos as mentioned above were made in the presence of Sahab Singh and Soney Lal which were signed by them.

9. The statement of the complainant and other witnesses were recorded under Section 161 Cr.P.C. The papers relating to the inquest of the deceased were handed over to Constable Lal Mani and Constable Balram along with the dead body and sent to the District Hospital for autopsy of the deceased. After conducting the investigation by SSI K.L. Verma, the charge sheet was submitted on 30.6.1985 against the accused persons, namely, Atar Singh, Sughar Singh, Nawab Singh, Mansha Ram and Phulwari, under Sections 147,148,149,302,201 IPC. The charge sheet was marked as Ext. Ka-18. The charge sheet had been submitted separately on 13.2.1986 against Kaptan Singh and Deshraj by SSI Bhanwar Pal Singh, under Sections 147,148,149,302,201 IPC, which was marked as Ext. Ka-20.

10. On submission of charge sheet, as usual the cognizance was taken by the concerned Magistrate and after compliance of provisions of Section 207 Cr.P.C. the case was committed to the court of sessions. The case was transferred to the Special Judge/Additional Sessions Judge, Farrukhabad. The charges were framed against Atar Singh, Sughar Singh, Nawab Singh, Mansha Ram and Phulwari on 30.6.1990, under Sections 148,302/34 IPC in Sessions Trial No.327 of 1989.

11. Against accused Kaptan Singh and Deshraj the charges were separately framed on 29.9.1995 by the Second Additional Sessions Judge, Farrukhabad in Sessions Trial No.129 of 1995. Both the trials were consolidated on 17.9.1998.

12. The charges were read over to the abovementioned accused persons who abjured the charges and claimed to be tried. Even though the accused persons Kaptan Singh and Deshraj of Sessions Trial no.129 of 1995 were appearing intermittently in Sessions Trial No.327 of 1989. but the prosecution witness P.W-1 was again examined and cross-examined in Sessions Trial no.129 of 1995. The accused persons were on trial for murder hence there was no justification to have a criminal trial pending for so long when the charges were already framed against them.

13. To bring home guilt of the accused persons, the prosecution has examined Bahaar Singh (complainant) S/o Ram Sahay as P.W-1, Brijendra Singh as P.W-2, who is the son of maternal uncle of informant, Dr. C.N. Bhalla who conducted the autopsy of the deceased Ram Sahay as P.W-3, S.S. Yadav (Retired Inspector) as P.W-4 and Phool Chandra, Pairokar as P.W-5.

14. Bahaar Singh who is the son of the deceased and the informant of the case was examined as P.W-1 on 17.1.2001. He deposed that the name of his father was Ram Sahay. The incident took place 15 years & 6 months ago. On the day of incident i.e. 18.5.1985 when his father was killed he was sitting in front of his baithak at the platform. At about 4.30 P.M. Atar Singh, Sughar Singh, Nawab Singh, who are real brothers, Phulwari, Mansha Ram, Kaptan Singh and Deshraj emerged out from the house of Atar Singh and passed through the baithak of Ragghu and

suddenly came at the platform of his house. Atar Singh (since deceased), Mansha Ram and Phulwari were armed with rifle, Sughar Singh (declared juvenile), Kaptan Singh and Deshraj armed with gun and Nawab Singh was having countrymade pistol. When the accused persons climbed over his chabootra, then after seeing them, his father stood up to run towards inside baithak, at this juncture Atar Singh, Mansha Ram and Kaptan Singh fired upon his father which hit him. On receiving firearm injury his father fell down in baithak. Thereafter Sughar Singh, Phulwari and Nawab Singh entered into baithak and there too fire was shot at his father. Atar Singh, Mansha Ram and Kaptan Singh were firing indiscriminately who had created fear and terror. His father had succumbed to the injuries in the baithak. Thereafter all the accused persons dragged the dead body of his father and brought in the open field of Sahab Singh and had put the dead body on the heap of wood of Arhar. Atar Singh and Deshraj after using vituperative words, exerted to burn him to ashes (Sale ko Jala Kar Raakh kar do) and set him on fire on the heap of wood of Arhar. Other accused persons picked up dry leaves of Sugarcane and put over the fire and after unleashing reign of terror by firing they went away towards the house of Kaptan Singh. This incident was witnessed by his mother Nisar Devi who was standing at the door. Besides her the complainant P.W-1 himself, Sahab Singh and Brijendra Singh of his village and other witnesses were present who had witnessed the incident. No one could dare to come forward to stop the accused persons as they were having rifle and gun. He reached near the half burnt dead body of his father. He left him at the spot and went to lodge the FIR. After the incident, he had written the report which was taken by him and handed over to the police of police station Kayamganj. The report paper no.5-A was proved by him and was marked as Ext. Ka-1.

15. He further deposed that his father Ram Sahay was murdered as there was deep rooted enmity between the accused persons and his family, detail about the enmity was written in the report.

16. The witness was put to lengthy cross-examination on behalf of the accused persons, namely, Atar Singh (since deceased), Mansha Ram and Nawab Singh by the defence counsel. In his cross-examination P.W-1 deposed that his father Ram Sahay was Pradhan of Lakhanpur which consist of Akhunpur Lakhanpur, Nagla Akhunpur, Karim Nagar, Pattiya, Eidgah Nagla, Nagla Thakur. Since 1972 Babu Ram, the father of accused Kaptan Singh who contested the election of Pradhan was defeated constantly. He does not know as to whether Babu Ram had filed any petition or not. He denied that any parti-bandi is going on since long. In 1982 accused Kaptan Singh's wife Chandrakali had contested the election of Pradhan against his father, but election was won by Chandrakali and his father had lost the election. He was not aware that Atar Singh, Nawab Singh, Sughar Singh, Mansha Ram and Phulwari had supported in the election. He denied that those persons had opposed his father. In his knowledge Atar Singh and others were neutral in the said election of Pradhan. He did not

know as to who were other persons, except Babu Ram and Chandrakali, contested election against his father. He denied that other candidates were opposing his father Ram Sahay. He also denied that he is deliberately not disclosing the name of the other persons.

17. In his cross-examination P.W-1 further deposed that prior to the death of his father 2 & 1/2 years ago there was dacoity and murder in the house of Saudan Singh. In that case a report was lodged against accused Atar Singh, Mansha Ram, Albele, who is the brother-in-law of Atar Singh and one another person. He showed his ignorance that in that case Tahar Singh was a witness from the side of Saudan Singh. The accused persons were acquitted.

18. The dacoity in the house of Sohan Lal Nunre of village Lakhanpur happened two years ago prior to his father's murder in which two persons, namely, Data Ram and Shripal were killed. In that case Atar Singh, Mansha Ram and Deshraj were the accused who were acquitted. He denied that his father was involved in the dacoity in conjunction with his associates. His father had lodged an FIR under Section 307 IPC against the accused Atar Singh, Mansha Ram and others who had fired upon him. In that incident his father had not sustained any injury. In the said case his brother Tahar Singh and Nanhey Singh S/o of Saudan Singh were the witnesses. In this case also they were acquitted.

19. He further deposed that in the murder of Ram Naresh S/o Chiraunji of Nagala Akhunpur, Kali Charan had lodged the report in which his brother Tahar Singh, Asharam, Vijayee and Janaki were made accused. In this case his brother Tahar Singh was convicted for life imprisonment under Section 307 IPC and it is correct to say that they had been falsely implicated in the said case. He showed his ignorance that a case under Section 107 Cr.P.C. was filed against his father at police station Kayamganj and Akhunpur. His father was living on rent in Kayamganj for a certain period. He had taken contract of countrymade liquor in Kayamganj. He was not aware about Rameshwar Sahay and Vittan Lal had been in transport business along with his father and it is wrong to say that there was dispute regarding liquor and transport with his father. He denied that his father had any connection with any gang of dacoits. He denied that any gang used to take shelter at his place. He denied that his father had illicit relation with the female of the dacoit's family. Smt. Nisar is his mother and was not concubine. She was not muslim. Her father was Thakur named as Bachan Singh who had expired. There is no family alive in the family of Nisar. He denied that his mother had came along with gang and was kept by his father. He denied that when his father was murdered gang of Sultan Dhanuk was active and the gang used to get shelter by him. He denied that gang of Sultan used to take shelter at his place. He also denied that on the arrival of the police on the information of his opponent, gang of Sultan escaped from there. It is also wrong that they had offered shelter to members of the gang and looted booty and when gang of Sultan came to get back Rajjo and looted booty, his father had refused to return them. He denied that the gang of Sultan had exerted pressure to get back Rajjo and the booty and his father had committed murder of Rajjo and burnt her dead body. It is also wrong to say that his father had not returned the looted cash, jewelry and weapon with ill intention. He deposed that he is not aware that the case of

murder of his father was committed to sessions court in one time and rest case of Kaptan Singh and Deshraj was committed subsequently. He deposed that the date is fixed today in respect of all the seven accused persons in this Court. He cannot say as to whether the statement is being recorded for all the accused persons. He is not being told whether his statement has to be recorded on behalf of Kaptan Singh and Deshraj.

20. P.W-1 in his cross-examination further stated that the name of his grandfather was Umrao and he had two sons, namely, Ram Sahay and Bhawani Sahay. Sahab Singh who is the son of Bhawani is witness in this case. Tahar Singh is his real brother who got married in Silah not in Jasrathpur. Brijendra Singh (P.W-2) is the son of Tahar Singh's Sarhu. Brijendra Singh is the resident of Jasrathpur (now Dashrathpur) which is 25-30 Km. away from his village. He further deposed that beside Soney Lal several other persons were residing in his village. The nearest house is of Soney Lal, Raghu and others are at a distance of 100-150 meters towards north. At the time of incident his mother, Sahab Singh and Brijendra Singh came over there, thereafter 2 to 4 persons also arrived there among them Ram Prakash, Soney Lal and several women and children were present. He remained at the spot 10-15 minutes. Fire extinguished with water by him, Ram Prakash, Soney Lal, Brijendra and children. The inquest of the dead body was conducted in the morning. At the time of conducting inquest, he was at his house and was not at the site. He had not signed the inquest report at the time of inquest. He had not seen that smoking was coming out or not. Till 9-10 AM in the morning the police remained there. The dead body was taken by the police on the bullock cart to Kayamganj. He did not go to the police station along with the dead body. Ram Prakash, Soney Lal and others were present there. The police station Fatehgarh was at the distance of about 4 Km from his village. He is not aware that Fatehgarh was 30-40 Km. The dead body came on a taxi from Fatehgarh at about 1.30 P.M. After postmortem of the dead body cremation was done on the same day. After cremation, he did not go to the police station. He could not remember that the police went to his village on the next day or not.

21. The site plan was prepared by the police on the next day after cremation. The police had recovered empty cartridges, tikli and shots in his presence. When the dead body was sent for postmortem on the same day, empty cartridges and blood stained earth etc. were taken into custody by the police. The police had not taken his signature on any paper.

22. Main door of his house is situated towards east. Platform is in front of the door, which is about 10/12 feet in length and width. Platform of Dabbu is adjacent to the northern side of platform which is towards north and south. There is one more platform in the southern side of his house which is about 15/12 feet wide. On this platform, his baithak is towards west. One window is also in the said baithak on the northern side to this platform. On southern side of his baithak one platform of two brothers, namely, Ram Prakash and Soney Lal is lying. The police had collected the empty cartridges from the south-west corner of platform of Ram Prakash as well as on his platform and from inside the baithak. The empty cartridges which were lying at the platform of Ram Prakash was at a distance of 5-6 feet. He showed his

ignorance about how many cartridges were lying at the chabootra and inside the baithak. Empty cartridges were of 12 bore and 315 bore. The distance where the dead body was recovered was 50-60 meters away from this platform on the eastern side of the baithak. He had also mentioned in the FIR place from where the incident was seen. During the entire incident he was at a distance of 20-25 meters away in the southern side from the place where his father was sitting. He remained there for 15-20 minutes after the incident. Earlier he was in his house. Brijendra Singh was with him prior to the incident. Brijendra Singh was along with him and Sahab Singh was present on southern side adjacent to the house of Ram Prakash. He had himself seen the shots of 10-5 fire hitting to his father. When his father got up and ran towards baithak he had received gun shot which was hit at his chest. He could not say as to which firearm hit his father first as several shots were made simultaneously. When his father was sitting on the cot he did not receive any fire. When he was about to rise to run from there then he received the fire. His father ran towards baithak which is towards west from the place where his father was sitting on a cot. Baithak was at a distance of 3-4 feet where he was sitting. His father received 2-4 fire which was fired from the northern side as he was about to run. His father could not close the door while entering into baithak. Three accused persons entered into the baithak. He could not say as to how many shots were fired inside baithak. The place from where he was seeing the firing, he was not able to see the fire made inside the baithak. He showed his ignorance as to how many fire were made at his father inside the baithak.

23. P.W-1 was further cross-examined on 9.2.2001 who stated on oath that he did not ask from anyone till he scribed the FIR as to how many shots were fired upon his father. When the first shot hit to his father the assailants were towards north side of his father. At that time, father was running towards western side. First fire hit to his father on his chest. He could not see that the fire was hit at the chest of his father from right or left side. When firing took place his father was sitting at his platform. 7-8 fire was made from all around in which some fire hit to his father, some at door step and some on wall of the outer side of the baithak. Fire shot also hit on the entrance of the upper side of the door. Besides 7-8 fire at the platform, several other shots were also made. 4-5 shots were made so that nobody could dare to come forward. The fire was made from north of the door of the baithak. No fire was made upon him or upon any witness. On receiving first shot his father did not fell on the ground, later on he fell in the baithak. Accused persons remained inside 4-5 minutes. When they came out from the baithak then they did not fire. His father was dragged from baithak 50-60 meters away. When they dragged him at that moment they had not fired. They put his father on the heap of woods of Arhar and set him ablaze. Thereafter again they fired. When his father was put on fire, he was already dead. He died inside baithak.

24. He had disclosed in his statement the place from where he had witnessed the incident. It is wrong to say that the place has not been mentioned in his statement from where he had seen the incident. In the report also he had mentioned the place. He had disclosed to the police that he used to go Jasrathpur. Witness Brijendra Singh (P.W-2) is the resident of Jasrathpur, District Etah who is studying and residing with him since last 8-10 years.

25. He denied that he and Brijendra Singh were at Jasrathpur on the day of incident and were not present at the time of incident. He also deposed it is wrong to say that mother Nisar was at Shamshabad and

was not at the place of incident. He also denied that on account of fear of miscreants his father mostly used to hide and did not live in the house. It is also wrong to say that miscreants on the day of incident had traced out his father and when he entered in the house miscreants chased him and his father closed the door after entering into the baithak. The miscreants pushed and broken the door and thereafter they had committed his murder and also wrong to say that in order to take revenge they (miscreants) dragged him from the baithak and set him on fire. It is wrong to say that he received information next morning in Jasrathpur that miscreants had committed murder of his father. It is wrong to say that people of his village had given oral information in the morning to the police station. It is wrong to say that firstly inquest was conducted and thereafter the report was lodged after consultation. It is wrong to say that on account of enmity he had named all the accused persons falsely and they had not committed murder. It is wrong to say that he had not witnessed the incident and on account of enmity he has falsely deposed against them.

26. The P.W-1 Bahaar Singh was again examined in Sessions Trial No.129 of 1995. His deposition is discussed in the connected appeal filed on behalf of the accused Kaptan Singh and Deshraj.

27. Brijendra Singh S/o Soney Lal was examined as P.W-2 on 15.6.2001.Brijendra Singh, P.W-2 affirmed on oath that Ram Sahay, the father of his maternal uncle (Mausa) Tahar Singh, was murdered 16 years ago who was the resident of Akhunpur. At that time Tahar Singh was in jail. He was residing in the house of his maternal uncle Tahar Singh in Akhunpur. His maternal uncle Tahar Singh and father of Tahar Singh, Ram Sahay were inimical with Atar Singh and his family members. On the day of incident, he (P.W-2) and Bahaar Singh (P.W-1) were coming from the field of muskmelon (Kharbooja). At about 4.30 P.M. in the evening when they reached near the field of Soney Lal, they saw that Ram Sahay Pradhan was sitting on a cot on his chabootra (platform) at once Atar Singh, his brother Sughar Singh, his elder brother Nawab Singh, Phulwari, Mansha Ram, Kaptan Singh and Deshraj emerged from the house of Atar Singh and came through the baithak of Ragghu and reached at the platform of Ram Sahay. Atar Singh, Mansha Ram and Kaptan Singh had fired upon Ram Sahay who ran towards baithak chased by Sughar Singh, Nawab Singh and Phulwari and they fired on him while entering inside bhaitak. Atar Singh, Mansha Ram, Kaptan Singh and Deshraj had fired indiscriminately outside which had created panic and terror. Pradhan Ram Sahay had breathed his last in the baithak. The dead body of Pradhan was dragged by Atar Singh and Deshraj towards the open place of Sahab Singh where the wood of Arhar was lying and kept his dead body on the heap of wood of Arhar. Atar Singh and Deshraj exerted, abusing to set him on fire and burn him to ashes *"Sale Ko Aag Laga Kar Rakh Kar Do"*. Then Atar Singh had ignited the fire. Rest of the accused had put dry leaf on the fire. Thereafter all the accused persons escaped towards the village of Kaptan Singh. This incident was witnessed by him and Bahaar Singh from the gher of Soney Lal. Sahab Singh had witnessed from the outside of the house of Ram Prakash and Nisar had seen from her own door of the house. They could not intervene to save on account of fear and terror of the accused persons. He had completed his education in Akhunpur and he knew all the accused persons since before.

28. P.W-2 was cross-examined on 16.6.2001 by the defence. He stated on oath that Akhunpur village is 20-35 km. away

from Jasrathpur. His village is in district Etah. He has four brothers and two sisters. Elder brother are Raghvendra Singh and Shail Singh. His brothers and two elder sisters had their education in Jasrathpur. His statement under Section 161 Cr.P.C. was recorded by the police in respect of the incident at about 9 A.M. 5-7 minutes before the dead body was sent his statement was recorded. He had deposed in his statement that accused Deshraj had dragged the dead body of Pradhan at the place where the woods of Arhar was lying. He could not disclose the reason as to why the police had not recorded about dragging of dead body by accused Deshraj. He had also disclosed to the police that he had studied in village Akhunpur. It is wrong to say that he did not study at village Akhunpur and it is wrong to say that to show his presence at the time of incident he has disclosed that he was staying for his study in village Akhunpur .

29. In his cross-examination he deposed that the dead body was taken from the place of incident at about 9 A.M. in the morning. Bahaar Singh who is brother of his maternal uncle (Mausa) and other villagers had accompanied the dead body. He did not go anywhere as there was no one in the house hence he remained in his village. After the incident police remained there till 9.30 A.M. in the village. In his presence in the morning, besides him the statement of Bahaar Singh, Sahab Singh and Nisar were recorded. Thereafter the inquest was conducted. The police left for police station along with the dead body. Again he deposed that he is not aware that the police went along with the dead body or before, but two police personnel had accompanied with the dead body. Later on Bahaar Singh did not go along with the police. Five police personnel remained there after the dead body was taken away. Bahaar Singh returned on the next morning. On the next day police had reached there at about 12 A.M. Site plan was prepared in his presence on the day of incident.

30. In his cross-examination he further deposed that at the eastern side of platform of Ram Sahay there is an open place which is 50 steps from east and 50 steps from door towards west. There is no wall. *Gher* of Sahab Singh towards north east about 50-55 meters. Open place of Sahab Singh is about 40-50 yards east and west. On the eastern side of field of Sahab Singh after half Km. agricultural fields of the village and the fields of Soney Lal, Sahab Singh and others are located. 15 minutes prior to the incident he along with Bahaar Singh had gone to see the field of muskmelon. The field of muskmelon is towards the east and south of the village. There is no field of Soney Lal. The field of Soney Lal is lying towards north and in between there is a field of Ram Sahay (Pradhan). P.W-2 was cross-examined at length with respect to the different field of the village situated near the place of incident. Again he was exhaustively cross-examined with respect to the field of villagers lying in the vicinity of the place of incident. He had deposed about the field of various villagers in a natural manner and he further deposed that the platform where Ram Sahay was sitting was 8-10 paces in length and width. The door of his baithak was towards east. His cot was closed to the door. Ram Sahai was sitting on the cot facing east. The cot was lying east to west. When the first fire was shot from the western side, at that moment Ram Sahay was sitting on the cot. 3 shot hit to Ram Sahay. Blood oozed out from the injury of Ram Sahay which fell on the cot and also on the ground. After 3 shots no fire was made at the platform as Ram Sahay ran

inside baithak. After he entered in baithak firing had taken place but he could not count. At the platform 10-15 shots were made in the air. After Ram Sahay entered into baithak he heard 4-6 round of fire, but he could not see. The fire made by the accused persons in the air on the chabootra and while running from the place. After 10-15 minutes of firing by the accused persons there was atmosphere of panic and terror. He had deposed before the police that all the accused persons ran towards house of Kaptan Singh while firing in the air. After burning the dead body no fire was shot. The fire was doused by him, Bahaar Singh after arrival of women and children. He had stated about the said incident to the police, but he could not say as to why the same has not been mentioned by the police in his statement. When the police saw the dead body it was wet. No smoke was coming out from the dead body. Wet ashes and half wet wood lying there had been collected by the police. He had seen 10-15 cartridges were found at the place of incident. Cartridges were found only at the place of chabootra and baithak. The blood was only found inside baithak and at the platform. It is wrong to say that he had not seen the incident. It is wrong to say that he received the information about the murder of Ram Sahay in the morning when he was in Jasrathpur. It is wrong to say that on receiving information he and Bahaar Singh came from Jasrathpur to the place of incident. He also denied that he is deposing falsely about the incident on receiving information.

31. After examining the two witnesses of fact, the prosecution examined Dr. C.N. Bhalla on 18.11.2002 as P.W-3. Dr. C.N. Bhalla, Medical Officer Leprosy Control Unit Fatehgarh, District Farrukhabad deposed on that he was posted on 19.5.1985 as Pediatrician in District Hospital, Fatehgarh. On that date, at about 5 P.M. he had conducted the autopsy of Ram Sahay Yadav S/o Umarao. He was aged about 60 years. The dead body was brought in sealed cover by Constable Lal Mani and Constable Balram of police station Kayamganj, who had identified the dead body. The age of the deceased was aged about 60 years and one day had passed away since his death. His body was average built. Postmortem burn injury 4-6 degree was present. Head was partially burned and mussels were visible on the body. On some parts burned bones were visible and on some parts body was highly scorched.

32. The following ante-mortem injuries were found on the body of the deceased (Ram Sahay):

1. Lacerated wound 3cm x 2.5cm x chest cavity in the left side 14cm below left ribs. Direction front to back;

2. Lacerated wound 3cm x 2.5cm x abdomen cavity subcortal margin in M.C.L. just below the right ribs. Direction front to back obliquely;

3. Lacerated wound 3cm x 2.5cm x chest cavity left side of back below 8cm of scapula. Direction back to front;

4. Lacerated wound 8cm x 5cm x depth of skull. Skull was cracked. Brain matter and blood was coming out. Right ear was lacerated. Direction right to left.

33. He found two wedding pieces from brain, one from chest and one from abdomen. Five ticklies were found from brain, four from abdomen and two from

chest and 78 small pellets were found from brain,, abdomen and chest.

34. On internal examination he found except frontal bone of the head all the bones were broken. Brain and its memberances were lacerated and the brain was coming out from injury. Left part of fourth and fifth ribs of the chest were broken. Both liver and its membranes were lacerated. Heart and its membranes were lacerated. Blood was filled in both part of chest. Stomach, small intestine, large intestine and gall bladder, both kidneys and spleen were lacerated.

35. He had opined that the cause of death was due to haemorrhage as a result of ante-mortem injuries.

36. The postmortem report was proved by him which was marked as Ext. Ka-2.

37. He deposed that death of Ram Sahay could have occurred on account of injuries sustained by him at 4.30 P.M. on 18.5.1985. Firstly he was injured by firing shots and thereafter his body was burned down.

38. In his cross-examination, he opined that there could be either side 4-6 hours regarding time of death. There could be possibility of receiving injuries at 11 P.M. in the night on 18.5.1985. In the stomach pasty food of 100gm. mixed with blood was found. He might have lastly taken meal prior to two hours before his death. He further deposed that as the dead body was 3-6 degree burnt, as such it was not possible to find out as to whether the injuries were of firearm.

39. On the internal examination wadding shots were recovered from different parts of the body which proves that the injuries were of firearm. It is not possible that wadding tikli and shots were present in the wounds from any previous injuries. He deposed that wadding tikli and shots were found in huge quantity, on account of which, heart, lung, liver, kidney and other internal organs were lacerated hence his death would have occurred instantaneously. He had not mentioned in his report about gun shot injury as the body was 3-6 degree burnt. He did not mention in his report as to from which part wadding tikli and pellets were recovered. He had found wadding tikli and pellets in all the four injuries. He could not say as to which bore of weapon was used. In pistol, rifle and revolver usually pellets are not used. The fire could have been shot from a distance between 4-12 feet.

40. The Dr. C.N. Bhalla was again examined in Sessions Trial No.129 of 1995 on 16.7.2009 as P.W-2. His deposition has been discussed in the connected Apeal filed by the accused Kaptan Singh and Deshraj.

41. S.S. Yadav, Retired Inspector, CBCID was examined on 26.5.2003 as P.W-4. He deposed on oath that he was posted as Sub-Inspector on 19.5.1985 at police station Kayamganj. On 18.5.1985 a case under Sections 302,201,147,148,149 IPC was registered as Case Crime No.158 of 1985. He visited the spot with in-charge Inspector Jagdamba Prasad Mishra and SSI K.L. Verma with police force where the deceased Ram Sahay r/o village Akhunpur, Police Station Kayamganj was murdered by firing and dead body was burnt. He had prepared the inquest report of the deceased

in the presence of inquest witnesses which was signed by them who had put the thumb impression and signed the same. Thereafter the dead body was kept in sealed cover and prepared challan nash, letter to CMO, letter to RI and photo nash paper nos.17A,18A/1, 18A/2 & 19A which were marked as Ext. Ka-3, Ka-4, Ka-5, Ka-6 & Ka-7 respectively. He proved the papers relating to inquest No.16A/1 to 16A/3 prepared and signed by him. The chik FIR and the copy of GD prepared by him were proved as Ext. Ka-8 & Ka-9. He prepared the site plan. After preparing the police papers, he had sent the dead body of the deceased for autopsy through Constable Lal Mani and Constable Balram to District Hospital.

42. The defence had sought adjournment on 26.5.2003 to cross-examine him on the next date. Thereafter the case was adjourned incessantly by the defence and on 10.2.2009 after about six years he was again summoned and was re-examined with the permission of the court on behalf of all the accused persons of both the sessions trial separately.

43. S.S. Yadav, Retired Inspector of CBCID deposed on oath on 10.2.2009 that he was posted at the police station Kayamganj along with Constable Clerk Babu Lal and SSI K.L. Verma. He proved the chik FIR and rapat no.21-A prepared by Constable Clerk Babu Lal and proved his writing which was marked as Ext. Ka-8 & Ka-9. He proved the paper no.8-A, site plan (paper no.9-A), recovery memo of empty cartridges (paper no.9-A/2 & 9-A/4) in respect of tracing out and raiding to arrest the accused persons and papers relating to efforts made to recover fire arm which were prepared by SSI K.L. Verma. Paper nos.9-A/5, 9-A/6 & 9-A/7 were marked as Ext. Ka-10 to Ext. Ka-17. The charge sheet paper no.3-A in respect of accused Atar Singh, Sughar Singh, Nawab Singh, Mansha Ram and Phulwari under Sections 147,148,149,302,201 IPC prepared and signed by SSI K.L. Verma on 23.6.1985 which was proved and marked Ext. Ka-18. He further deposed that SSI K.L. Verma had already retired in 1998, since then his whereabouts is not known nor he had ever met with him.

44. In his cross-examination he deposed that SSI K.L. Verma had already retired in 1998. He did not know about his residence. He reached at the place of incident in this case. He could not remember at what time he reached there on 18.5.1985 as the incident is very old. When he reached on 18.5.1985 it was dark. He could not arrange light to conduct the inquest. He denied that he has made any overwriting on the last page of the inquest report. He denied any overwriting in crime number or section. He denied that he had made overwriting in respect of nakal rapat by putting **"two"** in place of one. He also denied that there is overwriting in case crime number. He had also denied that in the inquest report **"Sections 147,148 & 149 IPC"** was mentioned later on. He also denied that on the first page of case crime number was mentioned in the inquest report and that the chik report was not inconsistent with the inquest report. He also denied that any oral information was received at the police station about the murder of Ram Sahay on 19.5.1985 and reached at the same time along with the police force at the place of incident. He proved that the inquest was signed by him. He did not mention in the inquest report that it was prepared under the order of SSI K.L. Verma. Border of Police Station Campell is adjoining to District Etah and Budaun. There were known gangs in which

gang of Sultan Dhanuk was active at the time of incident. He was not aware that in the gang females were also involved and Rajjo Devi was in the gang of Sultan. He had no information that members of Sultan gang used to take shelter with the deceased. It was also not known that deceased Ram Sahay was man of criminal nature and any criminal history is registered against him. Criminal history of Ram Sahay, deceased was not mentioned in the charge sheet.

45. This witness was cross-examined on behalf of the accused persons, namely, Kaptan Singh and Deshraj on the same day i.e 10.2.2009 separately in the Sessions Trial No.129 of 1995 (State Vs. Kaptan Singh and another) as the trial had been consolidated with the S.T. No.327 of 1989 (State Vs. Atar Singh & others) on 17.9.1998 which was the leading case.

46. In his cross-examination P.W-4 S.S. Yadav deposed that he is not aware as to what time they had departed from the police station to the place of incident. SHO and SSI were along with him. He is not aware about other police personnel. He had gone in the police jeep. He did not remember at what time they reached at the place of incident. He went along with SSI K.L. Verma at the place of incident. He did not remember about the nature of work done by SSI K.L. Verma and the Inspector. He is not aware whose statement was recorded by the Inspector and SSI K.L. Verma. He has also not remembered that as to what were the places raided by them. He could not say about the distance from the house where the dead body of the deceased was lying. He did not mention about the injuries of the firearm in the inquest report. Only it is mentioned that the body was burned. He is not aware that village Akhunpur and village Akhunpur ka Nagla are two distinct villages.

47. Constable Phool Chandra Pairokar of Police Station Kotwali, Farrukhabad was examined on 5.5.2009 as P.W-5. This witness deposed that he knew Babu Lal, Constable Clerk and SSI Bhanwarpal Singh. He was posted along with them and used to see their reading and writing. He knows about their writing and signature. He proved the paper no.4-A/1, 24-A/3, chik FIR and paper no.21-A/1, copy of GD prepared by Constable Clerk Babu Lal which were marked as Ext. Ka-9. Paper no.3-A (charge sheet) in respect of Kaptan Singh and another of Sessions Trial No.129 of 1995 was written by SSI Bhanwarpal Singh was proved by him and the same was marked as Ext. Ka-20. He further deposed that Constable Clerk Babu Lal and SSI Bhanwarpal Singh have been transferred. Since then he had not met with them.

48. This witness was cross-examined by the defence on the same day. He deposed that it is wrong to say that he was never posted along with Constable Clerk Babu Lal and SSI Bhanwarpal Singh and that no proceeding of this case had taken place before him. He also denied that as a mere formality he is deposing falsely under pressure.

49. After examining the witnesses of fact and formal witnesses, the accused appellants were examined under Section 313 Cr.P.C.

50. The statement of accused Atar Singh (since deceased), Sughar Singh, Nawab Singh (sons of Pyarey Lal), Mansha Ram and Phulwari under Section 313 Cr.P.C. were recorded on 8.5.2009. Their

case was of denial and false implication due to enmity.

51. After the arguments were concluded, an application was moved on behalf of accused Sughar Singh on 6.7.2009 and it was pleaded that Sughar Singh was minor at the time of incident. The learned trial court separated the case of Sughar Singh and sent to the Juvenile Justice Board. The judgment in Sessions Trial No.129 of 1995 (State Vs. Kaptan Singh and another) and in Sessions Trial No.327 of 1989, State Vs. Atar Singh and others were pronounced on 22.7.2009.

52. The learned trial court proceeded to hold them guilty under Sections 148,302/34 IPC and accordingly convicted all the accused appellants for life imprisonment for the offence punishable under Section 302/34 IPC and for three years R.I. for the offence punishable under Section 148 IPC with a fine of Rs.15,000/-. Both the sentences were directed to run concurrently as already stated in the opening paragraph.

53. We have heard Sri Sukhveer Singh, learned counsel for the appellants and the learned A.G.A. Shri Ashwini Prakash Tripathi appearing on behalf of the State who have taken through the entire record.

54. Shri Sukh Veer Singh, learned counsel has submitted that due to passing away of Atar Singh, the appeal on his behalf of has stood abated. The accused Sughar Singh, the brother of Atar Singh was also facing trial in Sessions Trial No.327 of 1989 along with other accused appellants. His trial was separated as he was declared juvenile and acquitted by the trial court.

55. It is argued by the learned counsel Shri Sukh Veer Singh appearing for the appellants that the deceased Ram Sahay who was a man of criminal nature was done to death by unknown person belonging to his rival group of gang of dacoits and the appellants have falsely been implicated due to previous enmity by the complainant Bahaar Singh, who is son of the deceased. There is great inconsistency in the statement of P.W-1 Bahaar Singh with the statement of P.W-2 Brijendra Singh who have alleged to be the eyewitness of the incident. They were not at all present at the time of incident as there is discrepancy in their statement with the postmortem report of the deceased with respect to manner of assault by the accused persons hence it creates serious doubt about their presence. The prosecution has come up with the definite case that Atar Singh (since deceased), Mansha Ram and Phulwari were armed with rifle, Nawab Singh was having countrymade pistol, Sughar Singh who is the brother of Atar Singh and Nawab Singh, was having DBBL Gun, Deshraj and Kaptan Singh were also armed with DBBL Gun emerged out at the place of incident where the deceased Ram Sahay was sitting on a cot in front of his baithak. Atar Singh, Mansha Ram and Kaptan Singh started firing which hit to the deceased. The deceased got up and tried to ran inside his baithak. Three other accused persons, namely, Sughar Singh, Phulwari and Nawab Singh entered and fired shots inside baithak with their respective firearms, whereas the Doctor who had conducted the postmortem of the deceased had found four lacerated wounds on the body of Ram Sahay and from all the injuries wadding tikli and the cartridges were recovered. Dimension of injury nos.1,2 & 3 were 3cm x 2.5cm which could have been caused by single firearm weapon

and those injuries could not be said to be the rifle injury. It cannot be said that the death had occurred on account of shot of rifle. As such the shots which were allegedly fired by Atar Singh, Mansha Ram and Phulwari, armed with rifle, could not be the cause of death of Ram Sahay.

56. It is further argued that the investigating officer has recovered 8 empty cartridges of 12 bore and 3 empty cartridges of 315 bore from the place of incident and on internal examination, the wadding tiklis and pellets were found from different part of the dead body which go to show that the injuries could have been caused by bullet. Learned counsel has also pointed out that the incident had occurred at 4.30 P.M. on 18.5.1985, of which the FIR was lodged at 6.50 P.M. but the inquest was conducted by the investigating officer S.S. Yadav, P.W-4 on the next day between 6 A.M. to 9 A.M. At the time of conducting inquest some sections were added in the inquest report which is mentioned as Section 302/34 IPC and Section 147,148 IPC. Thus the FIR is ante-timed which was registered subsequent to the inquest of the deceased. The investigating officer has not been examined which has caused great prejudice to the defence to cross-examine him on various material points regarding recovery memo and site plan to discredit the testimony of the prosecution witnesses who are said to be the eyewitnesses of the incident. The investigating officer in whose presence the recovery memo of blood stained, plain earth, recovery memo of empty cartridges, memo relating to the raid of the houses of the accused persons was not examined. Those recovery witnesses who are mentioned in the FIR have also not been examined during trial. Non production of the investigating officer who prepared the recovery memos has made the entire recovery as false which corrodes the credibility of the prosecution witnesses.

57. Relying upon the case of **Moti Vs. State of Uttar Pradesh;** *2003 Law Suit (SC) 301* it is submitted by the learned counsel that on account of discrepancy between medical evidence with the prosecution case with respect to nature of injuries fired with firearm weapon assigned to the accused persons they were acquitted in the said case. Similarly, the case in hand it is not ascertainable with which firearm weapon injury was sustained by the deceased and who is responsible to cause death. As there is conflict between ocular testimony of P.W-1 Bahaar Singh and P.W-2 Brijendra and the medical evidence, they cannot be considered to be the eye witnesses. The Hon'ble Apex Curt in Ram Narain Singh Jaggar Singh Vs. State of Punjab (1975 AIR SC 1727) has set aside the conviction and held in para 7 *"where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit entire case."*

58. In **Mohinder Singh Vs. State;** *1950 SCR 821 (AIR 1953 SC 415-1953 Cri LJ 1761)* this Court observed in similar circumstances as follows:

"In a case where death is due to injuries or wound caused by a lethal weapon, it has also been considered before the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that

where the prosecution has a definite or positive case, it is doubtful where the injuries which are attributed to the appellant were caused by a gun or by a rifle."

It is obvious that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. While appreciating the evidence of the witnesses, the High Court does not appear to have considered this important aspect, but readily accept the prosecution case without noticing that the evidence of the eye witnesses in the Court was a belated attempt to improve their testimony and bring the same in line with the Doctor's evidence with a view to support an incorrect case."

59. In the present case Atar Singh (since deceased), Mansha Ram and Phulwari were allegedly armed with rifle while Nawab Singh was having countrymade pistol. According to the postmortem report of the deceased no rifle injury was found though it was stated by the P.W-1 Bahaar Singh that Atar Singh (since deceased), Mansha Ram and Kaptan Singh had fired upon him. According to the prosecution case, Kaptan Singh was having DBBL Gun and Atar Singh (since deceased) and Mansha Ram were having rifle. After receiving shot of fire Ram Sahay, the deceased tried to run towards baithak and fell down. Thereafter Sughar Singh having DBBL Gun and Nawab Singh having countrymade pistol and Phulwari having armed with rifle entered inside baithak. Except three injuries over right and left chest, one on abdomen and one injury on the head of the deceased from wounds wadding tiklis of the cartridges were found. Injury nos.1,2 & 3 were of the same dimension which could have been caused by single weapon from close contact. As such the surviving accused appellants Mansha Ram, Phulwari and Nawab Singh cannot be made responsible for the cause of death of Ram Sahay. The appellants, namely, Atar Singh (since deceased), Nawab Singh and Sughar Singh are the real brothers and Sughar Singh has already been acquitted whose trial was also separated on account of his juvenility. Phulwari and Mansha Ram belonged to separate family, hence they have also no concern with the accused Kaptan Singh and Deshraj to involve themselves in the commission of offence.

60. The prosecution has also utterly failed to prove the common object and intention of all to commit the murder of Ram Sahay who hails from different caste and different family to come together sharing common intention and object to eliminate Ram Sahay. Only in order to add colour in the prosecution case, it was mentioned that after Ram Sahay was done to death, his dead body was dragged by the accused persons and brought towards an open land of Sahab Singh and the body was set on fire at the instigation of Atar Singh (since deceased) and Deshraj. When Ram Sahay already killed there was no occasion to bring the dead body in an open place in the broad day light and to set him on fire to destroy the evidence in the presence of the witnesses. It is also unnatural that the deceased's son and his wife who were present there had not uttered a single word or came forward to rescue Ram Sahay, their conduct creates serious doubt that they had seen the incident, even Smt. Nisar, who is the wife of the deceased and mother of the complainant has neither been produced nor

examined as a witness of the incident. It appears that none has seen the incident which had taken place during the course of night which supports the testimony of the Dr. C.N. Bhalla, who had conducted the postmortem of the deceased who has deposed that the incident could have taken place during night hours at about 10-11 P.M. In fact the dead body was recovered on the next day. Thereafter the inquest was conducted and an ante-timed FIR was lodged. The site plan was prepared on the next day of the incident whereas the P.W-2 had deposed that the site plan was prepared on the same day of the incident. It has also been argued that according to the site plan, the blood was found at two places; one on the chabootra (platform) and another inside baithak of the deceased but while preparing the recovery memo of blood stained earth, it has not been specified from which place the blood stained earth was collected and has been mentioned that it was found from the place as jaiwaqua. No weapon was recovered from anyone of the accused persons, except the blood and the empty cartridges from the spot which do not connect the appellants in the commission of offence.

61. Learned counsel for the appellants has laid stress that the trial court only relying upon the ocular testimony of highly partisan witnesses erred in arriving at the conclusion that the accused appellants had shared common intention to kill Ram Sahay and convicted them for the offence under Sections 148,302/34 IPC for maximum sentence of life imprisonment hence the appellants are entitled to be acquitted of the charge mentioned hereinabove.

62. Per contra, leaned A.G.A. Shri Ashwini Prakash Tripathi appearing for the State has refuted the submissions advanced by the learned counsel for the appellants while supporting the findings recorded by the learned trial court. He has submitted that the appellants along with two other accused persons, namely, Kaptan Singh and Deshraj have been named in the FIR in respect of the incident by the son of the deceased Bahaar Singh who has also been examined as P.W-1. On account of previous enmity, which has already been divulged in the FIR in great detail, the appellants and two other accused persons were bearing grudge and enmity with the father of the deceased, Ram Sahay. On the fateful day on 18.5.1985 at about 4.30 P.M. all the accused persons came armed with lethal weapon and fired with their respective firearms without giving any opportunity to Ram Sahay to save himself who was sitting at the chabootra on a cot he received firearm injuries he ran towards baithak few paces away from the cot, when again received firearm injury over the head thereafter Ram Sahay fell down inside baithak. It is the specific case of the prosecution that three accused persons, namely, Atar Singh (since deceased), Mansha Ram and Kaptan Singh fired firstly when Ram Sahay was sitting at the chabootra and thereafter three other accused persons, namely, Phulwari, Nawab Singh and Sughar Singh fired when he fell down inside baithak. The incident was witnessed by the complainant and his distant relative Brijendra Singh who was examined as P.W-2. Their statement does not find any material contradiction with respect to firing upon Ram Sahay, who was not only murdered by firing he was further mercilessly dragged 40-50 meter away by them. Atar Singh and co-accused Deshraj had exhorted and instigated that Ram Sahay be set on fire and they had lit the fire. In committing such a ghastly incident

by all the accused persons, the complainant and other persons who were witnessing the incident could not muster courage to move forward to save his father as they were unarmed.

63. To prop up his submission, learned A.G.A. has relied upon the decision of Hon'ble the Apex Court passed in Criminal Appeal No.1479 of 2015 (Moti Ram Padu Joshi & others Vs. State of Maharashtra) wherein the Apex Court relied upon **Rana Pratap; Vs. State of Haryana** (1983) 3 SCC 327 observed in reference to reaction of a witness of an occurrence, as under:

"Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

64. In the present case the P.W-2 Brijendra Singh who is the relative of P.W-1 was put to lengthy cross-examination by the defence to create doubt about his presence at the place of incident. The credibility of witness would not be effected merely on the score of relationship. In the case of Mohabbat & Ors vs State Of M.P (2009) 13 SCC 630 the Hon'ble Apex Court has held as under:

"12. Merely because the eyewitnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering the prosecution version."

13. "5. ... Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

.....

To the same effect are the decisions in State of Punjab v. Jagir Singh [(1974) 3 SCC 277 : 1973 SCC (Cri) 886] , Lehna v. State of Haryana [(2002) 3 SCC 76 : 2002 SCC (Cri) 526] (SCC pp. 81-82, paras 5-9) and Gangadhar Behera v.State of Orissa [(2002) 8 SCC 381 : 2003 SCC (Cri) 32] ."

The above position was also highlighted in Babulal Bhagwan Khandare v. State of Maharashtra [(2005) 10 SCC 404 : 2005 SCC (Cri) 1553]

, Salim Sahab v. State of M.P. [(2007) 1 SCC 699 : (2007) 1 SCC (Cri) 425] and Sonelal v. State of M.P.[(2008) 14 SCC 692 : (2009) 3 SCC (Cri) 417] (SCC pp. 695-97, paras 12-13).

65. In view of the catena of decisions that it would be unreasonable that the evidence given by related witness should be discarded. It is further submitted that all the accused persons have been specifically named in the FIR and the name of other eyewitnesses have also been mentioned therein. Merely because all the witnesses have not been examined would not be fatal to the prosecution as in this particular case the trial proceeding remained pending for a long period and several witnesses who were mentioned in the FIR had died and others refused to depose on account of the pressure of the accused persons hence they were discharged. The evidence of the P.W-1 and P.W-2 cannot be termed as highly partisan and interested or chance witnesses. On the contrary their evidence is consistent and credit worthy.

66. Learned A.G.A. has further relied upon the decision of this Court passed in Criminal Appeal No.668 of 2002 (Abhilakh Singh Vs. State of U.P.) and contended that in the aforesaid case, the investigating officer was not examined and it was the case of the defence that since the investigating officer has not been examined, it has caused great prejudice to the defence. While relying upon the various decisions of the Hon'ble Apex Court in the said case it was observed that it is always desirable for the prosecution to examine the IO. Non-examination of the Investigating Officer does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye witnesses. If the presence of the eye-witnesses on the spot is established and the guilt of the accused is also proved by their trustworthy testimony, non-examination of I.O. would not be fatal to the case of prosecution. In that case despite the two investigating officers were retired the trial court has taken all efforts to procure their attendance but they could not be examined.

67. In the present case also in the absence of the examination of investigating officer as he had been retired and his whereabouts could not be known due to long gap, the trial court has proceeded to decide the case on the basis of reliable evidence available on record.

68. The FIR was promptly lodged within two hours of the incident. There was strong motive for the accused persons to kill Ram Sahay which has already been given in detail in the FIR. There is no reason for the P.W.-1 being the son of the deceased to falsely implicate the innocent persons leaving behind the actual culprit. The incident had taken place in broad-day-light in a dare devil manner. The charge sheet was submitted in two parts as the accused persons, namely, Kaptan Singh and Deshraj were absconding against whom the process u/S 82/83 Cr.P.C. was initiated. Ultimately the charge sheet was submitted against Atar Singh (since deceased), Nawab Singh and Sughar Singh on 1.6.1985 who had surrendered on 30.6.1985 and Kaptan Singh and Deshraj surrendered on 18.6.1985 who were absconding against whom proceeding u/S 82/83 Cr.P.C. were initiated. Thereafter the case was successively adjourned for a long period of ten years when the charges were framed against present five accused persons on 30.6.1990 and against Kaptan Singh and Deshraj on 29.9.1995. Two separate trials

were proceeded as Sessions Trial No.327 of 1989 & Sessions Trial No.129 of 1995. P.W-1 was firstly examined on 17.1.2001 and thereafter on 20.5.2004 again in the aforesaid trials separately.

69. Thus minor discrepancies are bound to occur in the statement of the witnesses due to long lapse of intervening period. The testimony of P.W-1 and P.W-2 in the present case is consistent which is fully corroborated by the postmortem report, according to which firing had taken place from close range and internal parts of the body were extensively damage muscles and burnt bones were visible and on some places body was highly scorched. No blackening and tattooing found by the Doctor as the body was burnt. The site plan also shows that the blood was recovered from the platform where Ram Sahay was initially sitting on the cot and when he tried to save himself he was fired at from a very close range which hit him over his head and thereafter he fell down inside baithak. This vivid description given by the two witnesses has proved beyond doubt that Ram Sahay was killed by the accused appellants, who died on the spot on account of indiscriminate firing by all accused persons. It could be difficult to say with certainty as to whose firearm hit the deceased first, but the nature of injuries received by the deceased clearly shows that the fire was made by DBBL Gun as 78 tikli were recovered though the shots which were recovered from the different parts of body of the deceased.

70. The Doctor had recovered all the wadding tikli from the dead body which was sealed by him. The investigating officer had also recovered 8 empty cartridges of 315 bore from the place of incident and inside baithak which shows that all the firearm weapon were used in firing indiscriminately. As such the learned trial court has rightly held that all the accused persons who were armed with deadly weapon arrived at the spot and had fired with a common object to kill Ram Sahay.

71. Accused Sughar Singh whose trial was separated as he had raised his plea of being juvenile at the fag end of the trial and was later on acquitted. The prosecution has proved the guilt of the accused appellants including Atar Singh (since deceased) to the hilt. Hence Atar Singh (since deceased), surviving accused appellants, namely, Nawab Singh, Mansha Ram and Phulwari along with Kaptan Singh and Deshraj of the connected appeals have rightly been convicted by the learned trial court. Their conviction deserves to be maintained.

72. We have given anxious consideration to the submissions advanced by the learned counsel for the appellants and the learned A.G.A. on behalf of the State and have gone through the record.

73. It has been contended that the appellants had no immediate motive to commit the murder of Ram Sahay even the suggestions made by the prosecution that wife of appellant Kaptan Singh had won the election of Pradhan against Ram Sahay prior to two years of the alleged incident, remained unsubstantiated. Where the positive evidence against the accused is clear and cogent omission of motive is of no importance. It is always an impossible task for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended as held in this connection by the Hon'ble Apex Court in the case of **State of Himanchal Pradesh Vs. Jeet Singh** *1999*

(38) ACC 50 Supreme Court observing that "No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution."

74. The admitted position of law is that enmity is a double edged weapon which can be a motive for the crime as also the ground for false implication of accused persons. In case of inimical witnesses, court is required to scrutinize their evidence with utmost care to find out whether their testimony inspires confidence notwithstanding the existence of enmity. Where enmity is proved to be the motive for the commission of crime, accused cannot urge that despite proof of motive of the crime, the witnesses proved to be inimical, should not be relied upon. Testimony of eye-witnesses, which is otherwise convincing and consistent, cannot be discarded simply on the ground that deceased was related to eye-witnesses or previously there had been some disputes between accused and deceased or the witnesses. Mere existence of enmity in this case particularly when it is alleged as a motive for the commission of crime cannot be made a basis to discard or reject the testimony of the eye-witnesses deposition of whom is otherwise consistent and convincing. If direct evidence is satisfactory and reliable, the same cannot be rejected on hypothetical medical evidence. If medical evidence when properly read shows two alternative possibilities but not any inconsistency, the one consistent with the reliable and satisfactory statement of the eye-witnesses has to be accepted.

75. Learned counsel Shri S.V. Singh submitted that the investigating officer was not examined in this case which has caused serious prejudice to the accused persons as it has deprived them to examine him on material points.

76. We see no substance as the investigating officer was not an eyewitness.

77. In **Ram Ghulam Chaudhary Vs. State of Bihar**; 2001 (43) ACC 929 the Hon'ble Apex Court in paras 25, 26 & 27 has held as under:

"25. In the case of Ram Dev v. State of U.P, reported in [1995] Supp. 1 SCC 547, this Court has held that it is always desirable for the prosecution to examine the Investigating Officer. However, non examination of the Investigation Officer does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye witnesses.

26. In the case of Behari Prasad v. State of Bihar, reported in [1996] 2 SCC 317, this Court has held that for non examination of the Investigating Officer the prosecution case need not fail. This Court has held that it would not be correct to contend that if the Investigating Officer is not examined the entire case would fail to the ground as the accused were deprived of the opportunity to effectively cross-examine the witnesses and bring out contradictions.

It was held that the case of prejudice likely to be suffered must depend upon facts of each case and no universal strait- jacket formula should be laid down that non-examination of Investigating Officer per se vitiate the criminal trial.

27. In the case of Ambika Prasad v. State (Delhi Admn.), reported in [2000] 2 SCC 646, it was held that the criminal trial is meant for doing justice not just to the accused but also to the victim and the society so that law and order is maintained. It was held that a Judge does not preside over criminal trial merely to see that no innocent man is punished. It was held that a Judge presides over criminal trial also to see that guilty man does not escape. It was held that both are public duties which the Judge has to perform. It was held that it was unfortunate that the Investigating Officer had not stepped into the witness box without any justifiable ground. It was held that this conduct of the Investigating Officer and other hostile witnesses could not be a ground for discarding evidence of P.Ws. 5 and 7 whose presence on the spot was established beyond any reasonable doubt. It was held that non-examination of the Investigating Officer could not be a ground for disbelieving eye witnesses."

78. In the case of **Ram Ghulam Chaudhary (Supra)** the prosecution did not examine the investigating officer, however, all the accused persons were convicted by the trial court which was affirmed by Hon'ble the Apex Court.

79. Learned counsel for the appellant has pointed out various infirmities regarding investigation of the case.

80. There are umpteen pronouncements of the Hon'ble Supreme Court that investigation lapses, cannot provide ground of rejection of the prosecution and acquittal by a court in given case cannot be allowed to stand, solely, on the probity of investigation.

81. We will quote a few:

State of U.P. Vs. Harbhan Singh; 1998(37) ACC14 Supreme Court;

State of Karnataka Vs. K.Y. Reddy; 2000 SAR crime (37) Supreme Court;

State of Rajasthan Vs. Kishore; 1996(33) ACC 284 Supreme Court;

Karnail Singh Vs. State of Madhya Pradesh; 1995(32) ACC 742 Supreme Court.

82. In the aforesaid cases it was observed that any lapse during investigation of the case cannot be considered sufficient to discredit the prosecution version and if the eyewitnesses testimony is consistent and dependable, it is sufficient to sustain conviction. If there is any lacuna in the site plan, it will also not provide a ground for throwing out the prosecution case as weak and in co-inherent. It is indisputable in the present case that the occurrence took place in front of the house of the informant and at the time of incident, P.W-1 was present near his house. The learned trial curt has rightly held that the testimony of the eyewitnesses inspire confidence of the Court and ruled out possibility of being tortured or not being the eyewitnesses to the occurrence.

83. Failure to mention the exact place from where the blood was collected by the

investigating officer cannot be doubted about the place of incident as it has been mentioned in the site plan that the same has been found from place B which has been shown as platform where the deceased was firstly fired at by the accused persons. The investigating officer had collected blood from the place of incident which is mentioned in the site plan that spillage of blood was found inside baithak as well as trail of blood was found up to the place where the dead body was burnt. Thus the argument of the learned counsel for the appellants is unrealistic and far-fetched and the Court cannot draw any inference for such imaginative doubt.

84. It is further argued that misfired cartridges and fired cartridges were not sent to the Ballistic Expert, Forensic Science Laboratory and the firearm weapon used by the appellants were never seized to corroborate the prosecution case.

85. The said lapses on the part of the investigating officer would not necessarily proved fatal to the case of the prosecution where the direct testimony of the two prosecution witnesses is on record.

86. Such omissions or lapses in the investigation cannot be a ground to discard the prosecution case which is otherwise credible and cogent.

87. In **Nankaunoo Vs. State of U.P.;** *2016(1) SC Cr.R 237* it was held as under:

"Any omission on the part of the investigating officer cannot go against the prosecution case. Story of the prosecution is to be examined dehors such omission by the investigating agency. Otherwise it would shake the confidence of the people not merely in the law enforcing agency, but also in the administration of justice."

88. In **V.K. Mishra and another Vs. State of Uttrakhand and another;** *2015(2) SC Cr.R* it was held as under:

"The investigating officer is not obliged to anticipate all possible defences and investigate in that angle. In any event any omission on the part of the investigating officer cannot go against the prosecution. The interest of justice demands that such acts or omissions of the investigating officer should not be taken in favour of the accused or otherwise. It would amount to placing a premium upon such omissions."

89. In **Appa Bhai and another Vs. State of Gujarat;** *1988 (25) ACC168* Supreme Court had emphasised while appreciating the evidence the court should not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. Similarly, the discrepancies which are due to normal error of perception or observation should not be given importance. The so called omission of not mentioning exact portion of the body of deceased where the shot had been fired cannot be said to be the significant omission. The evidence of the two witnesses stands corroborated by the medical evidence which clearly goes to show that several shots were received by the deceased and after firing they set on fire to the deceased to erase the evidence. The accused appellants and two others fled away after firing in air creating an

atmosphere of terror and fear. The post event conduct of a witness varies from person to person. It cannot be a cast-iron reaction to be followed as a model by every one witnessing such an incident. Different persons would react differently on seeing any serious crime of such a nature and their behaviour and conduct would be different. Therefore, having witnessed a dastardly murder, it was not unnatural for the son or mother of the deceased to go near to the dead body. Learned trial court was justified in not rejecting the testimony of P.W-1 merely on that score.

90. In the present case where all the accused persons who were armed with firearm weapons emerged from the house of Atar Singh and after reaching on the platform when the deceased was sitting on the cot started firing resulting into his death in such a scenario it could not have been possible to meticulously observe all the action of each and every accused. The trial court cannot expect from the witnesses to depose in a parrot like fashion. The overall evidence of the witnesses appears to be untainted. The improvements, if any, made for the first time before the court ,no doubt need, to be eschewed but that does not mean that the entire evidence of the witnesses should be disbelieved only on the said ground.

91. It is well settled proposition of law that the testimony of a witness cannot be discarded in toto merely due to the presence of embellishments or exaggerations. This Court as well as Hon'ble the Apex Court has endorsed the in applicability of the doctrine falsus in uno, falsus in omnibus, which means "false in one things, false in everything". The Doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". The evidence has to be sifted with care. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration or embellishments. But the Court has to separate the grain from the chaff, truth from false. If after considering the whole mass of evidence, a residue of acceptable truth is established by the prosecution beyond any reasonable doubt, the Courts are bound to give effect to the result flowing from it and not throw it over board on hypothetical and conjectural ground. Minor variations of the evidence will not effect to the root of the matter. Such minor variations need not be given major importance.

92. The prosecution is not obliged to prove its case by leading separate evidence with respect to the common object of all the accused persons. Those factors found by the learned trial court on the available evidence on record, hence we have no reason to ignore the same with regard to the ocular testimony vis-a-vis conflict between the ocular testimony and the medical evidence. It is by now well settled that the medical evidence cannot override the evidence of ocular testimony of the witnesses. If there is a conflict between the ocular testimony and medical evidence naturally the ocular testimony prevails.

93. On the bare perusal of the First Information Report lodged against the accused persons, namely, Atar Singh, Mansha Ram, Phuwari, Nawab Singh, Deshraj and Kaptan Singh on 18.5.1985 at 6 P.M. relating to the incident occurred at 4.30 P.M. on the same day. The complainant Bahaar Singh who is the son of the deceased Ram Sahay has mentioned about the previous cases pending between the parties to show their animosity with the

deceased which prompted them to reach at the spot together in a pre-planned manner to execute their evil design.

94. In our opinion, there was nothing unusual on the part of the complainant to narrate the previous animosity and ill-will of the accused persons who were involved individually and collectively in the cases mentioned therein in the First Information Report.

95. It was argued that no detail of any case has been mentioned in the FIR as to when such crime had taken place or what was the case crime number and what was the sessions trial number. It was highly impossible for a person to give such details soon after an incident which had occurred suddenly and executed in a barbarous manner, not only shooting the deceased with their respective firearm weapons by the accused appellants, the deceased was dragged by them in a most diabolic manner in broad-day-light up to 50-60 meters away from the actual place of incident which had occurred in front of house of the deceased and was kept on the heap of wood and was set on fire in order to efface the dead body. The entire episode which had occurred in a few minutes it could not have been possible for the son of the deceased who had lodged the FIR to depose the case crime number or the sessions trial number or the dates of incident in which the accused appellants were involved jointly or individually. However, he has broadly narrated the reasons for committing the murder of his father by the accused appellants. In these circumstances, it cannot be said that the FIR has been registered after due deliberation developing false story on the basis of misconceived facts.

96. It has also been argued that the FIR was lodged after conducting the inquest of the deceased as the crime number as well as Sections of IPC have not been mentioned in sequence.

97. We are again not impressed by such arguments of the learned counsel for the appellants as the FIR has promptly been lodged, of which detail account has been given in the FIR and on this point P.W-1 Bahaar Singh had also articulated in examination-in-chief in the witness box has narrated and has also with stood lengthy cross-examination. It has also been specifically mentioned by the Inspector S.S. Yadav, who was examined as P.W-4 that the police personnel arrived on the spot on 18.5.1985 but due to darkness, the inquest was started on 19.5.1985. It started at 6 A.M. on the next day and prepared in three hours and concluded at about 9 A.M. The inquest report shows that there is no addition or alternation in the section mentioned in it which has been prepared on 19.5.1985 as it could not be prepared on 18.5.1985 due to darkness. It was prepared in the same hand writing by the same person. The other police personnel who had accompanied after lodging the FIR has also been mentioned in the inquest memo. Hence it cannot be said that the FIR was ante-timed. Mere description of the Sections 302,201 along with Sections 147,148,149 IPC in particular manner , it cannot be said that the said FIR was lodged after great delay or ante-timed.

98. Learned counsel has pointed out infirmity in the statement of the complainant P.W-1 Bahaar Singh to doubt about his presence that if he claims himself to be the eyewitness of the incident and the place from where the first informant seen the incident but it has not been mentioned in the FIR nor it has been mentioned that the mother of the complainant had also seen the incident which has been developed during trial. FIR is not an encyclopedia of the case. A witness testimony need not be disbelieved only because certain facts did not find mention in the FIR.

99. There is no material omission in the statement of the prosecution witnesses as regards the firing by the appellants on the deceased. It has to be borne in mind that some discrepancies in the ocular account of a witness, unless they are vital, cannot per se affect the credibility of the evidence of the witness. Unless the contradictions are material, the same cannot be used to jettison the evidence in its entirety. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. Merely because there is inconsistency in the evidence, it is not sufficient to impair the credibility of the witness. It is only when the discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court would be justified in discarding his evidence.

100. Minor discrepancy in the statement of witnesses is not necessarily a false evidence. Such evidence is subject to close scrutiny. No evidence should be at once discarded simply because it came from the interested parties like P.W-1 Bahaar Singh being the son of the deceased Ram Sahay whose evidence cannot be discarded which is natural and trustworthy.

101. Even in the absence of actual assault of members by the unlawful assembly they can be held vicariously liable as there was common object to commit a crime. Where parties go with a common purpose to execute a common intention, each and everyone becomes responsible for the act of each and every other in execution and furtherance of their common object, as the purpose is common so must be the responsibility

102. The prosecution cannot perform miracles and it is not always possible to adduce clinching evidence as to the common bond between or amongst culprits of a particular crime. The prosecution case could not suffer a setback simply because all accused are not related to each other.

103. In **Nathuni Yadav and others Vs. State of Bihar; 1997 (34) ACC 576 Supreme Court** it was held that motive for doing criminal act is very difficult area for prosecution as one cannot see into the mind of another.

104. The P.W-1 and another witness Brijendra Singh was not examined in connected sessions trial have stated that they had witnessed the incident together from the *gher.* Merely because P.W-1 has not explained that he was coming along with him (P.W-2) from the field of muskmelon it can not be presumed that his presence is doubtful as the same was also not put during the course of cross-examination from him that at that time from where he was coming. Their presence has been amply shown in the site plan prepared by the investigating officer which has been indicated as southern of gher of Soney Lal. They were standing at a distance of 20-22 ft when the accused persons reached at the chabootra (platform) where the deceased Ram Sahay was sitting on a cot facing towards east. The cot was at a distance of 3-4 ft from the baithak. The accused Atar Singh and Mansha Ram having armed with rifle and Kaptan Singh having DBBL gun fired at Ram Sahay, the father of the P.W-1 when they reached on the platform. As soon as his father had seen them he at once got up to run inside baithak at that time Atar Singh, Mansha Ram and Kaptan Singh had fired from their respective firearm. Then another shot was fired upon him which hit to his father and he fell down inside his baithak. Exact

mathematical calculation with respect to distance between the assailants and the deceased would not be possible to arrive at the conclusion that the presence of witnesses is doubtful. When the accused persons arrived near the cot then the distance from which they had fired would be in close contact with the body of the deceased because of the length of the barrel and hence there was no occasion that when the shot was made aiming towards from close distance the wads would fall down and would not pierce in the body rather wads and powder blast had caused laceration penetrating in the organs of the body. The shape of the abrasion of the entrance wounds also varies either circular or oval according to the angle the bullet strike at the body. The question regarding the direction of fire where from right to left or to back, it is necessary to ascertain the position of the victim at the time of the discharge of the bullet when the wound of entrance is present wad would lodge in the body. Wadding pieces, tikli and shots were found lodged in the body. No blackening or tattooing detected by the Doctor as the body was burn 4-6 degree.

105. The injury was hit to the deceased on his forehead when he turned around he made an attempt to save himself by entering into baithak. The Doctor had found two wadding pieces from brain; one from chest and another from abdomen. Five tiklis were found from brain; four from abdomen and two from chest. Besides this, 78 small pellets were found from brain, abdomen and chest. The Doctor has only given an opinion with regard to entering of the wadding into the body and had given approximate distance of firing from less than 4 ft. The wadding pieces which had entered into the body of the deceased clearly goes to show that the fire was made from very close range. It's barrel may or not may be touching the body of the victim while firing indiscriminately at the deceased. It is not necessary that the fire made by all the three accused persons firstly hit to the deceased. The nature of injury goes to show that firing made by rifle might have deflected owing to the fact that it was not fired at an immobile object. Some fire missed hence empty cartridges were found at platform as well as inside the baithak.

106. From the postmortem report it is quite evident that the first shot made from behind at the deceased as he tried to stood up who was sitting on the cot which is injury no.3 as it's direction is from back to front. Injury nos.1 & 2 which were on front of chest and abdomen when the deceased had turned around and his face was towards baithak and the assailants were standing facing towards east the direction is front to back. Injury no.4 was on his head hence direction was from right to left when the deceased tried to ran inside baithak the assailants were on his right side near the cot. The description of accused persons when they fired has been narrated by P.W-1 which fully supports the injuries described in the postmortem report.

107. It has been pointed out by the learned counsel for the appellants that it is alleged that Sughar Singh, Phulwari and Nawab Singh entered into the baithak after the deceased fell down and they had also fired and at the same time, Atar Singh, Mansha Ram and Kaptan Singh were firing indiscriminately outside to unleash the reign of terror. Though Kaptan Singh did not enter into the baithak but his presence along with other accused persons making fire indiscriminately cannot be doubted.

108. The Doctor has also opined that the dimension of injury nos.1, 2 & 3 were the same meaning thereby it was fired by the same weapon by one person. Inside the

body, one wadding piece was recovered from chest and one from abdomen, four tiklis from abdomen and two from chest and 78 small pellets were found from brain, abdomen and chest. The Doctor has also opined that injury may be caused by several weapons depending upon the distance. The learned counsel for the appellants has tried to make a mountain out of the mole.

109. The fact remains that as the body was burnt by the accused persons it was not possible to the Doctor to find blackening, tattooing and scorching. The site plan indicates that after killing the deceased at platform his dead body was dragged from the baithak by the accused persons and was taken to an open land 50 yards away. The trail of blood was found by the investigating officer which has been specifically mentioned in the site plan in red ink, which further corroborates the testimony of the P.W-1 Bahaar Singh and P.W-2 Brijendra Singh showing that the victim Ram Sahay was killed by firing and his dead body was mercilessly dragged by them and was set ablaze. Hence the ocular testimony has greater evidentiary value which cannot be disbelieved.

110. The cases which have been cited are not applicable under the present facts and circumstances of the case as in the present case the incident had taken place in the broad-day-light when all the accused persons in a pre-planned manner emerged out at the place of incident and started firing aiming at the deceased, out of them, two accused persons, namely, Atar Singh and Mansha Ram were armed with rifle and Kaptan Singh was armed with DBBL Gun which was specifically narrated by the complainant in the FIR and in his statement recorded before the trial court. Hence we find that there is no material infirmity in the ocular testimony with the medical evidence and the site plan. The plea of Kaptan Singh in statement under Section 313 Cr.P.C. that P.W-1 was not present at the time of incident cannot be accepted as it has to be proved with absolute certainty so as to exclude his presence anywhere else from the place of incident.

111. There is yet another material aspect of the case with respect to the post trial conduct of the accused appellants when they were held guilty of the crime and convicted for life imprisonment. All the accused persons preferred appeals before this Court with prayer for consideration of bail during pendency of the appeal u/S 389(i) Cr.P.C. and the learned counsel for the appellants has also tried to take the benefit with respect to the description of guns and rifles in the hands of various accused persons to obtain bail.

112. Thus only for the purpose of somehow getting bail one set of accused have shifted burden upon others for causing injury with gun and vice versa. But the fact remains that they had shared common intention and the firing had taken place and Ram Sahay, the deceased was done to death on the fateful day. It would be very difficult to fix liability upon one person only i.e. Sughar Singh in the entire episode who was pleaded juvenility and acquitted by the court below. All of them had come jointly with prior meeting of mind to eliminate Ram Sahay but whose shot of fire was fatal cannot be deciphered. Dragging of dead body from baithak to the field of Sahab Singh where he was put on fire further shows that all the accused persons were having common intention and involved in dragging the dead body as such the contention on behalf of other accused appellants has no substance that they had

not fired at the deceased who had suffered homicidal death and the injuries sustained by him were all ante-mortem in nature as a result of firing with gun. It is common experience that in the confusion of the moment the witnesses are prone to make some error when they were seized by sudden fear.

113. We do not find any difference between the case of all the accused appellants. The prosecution has established that common object of the unlawful assembly was to commit the offence of rioting armed with deadly weapon punishable under Section 148 IPC.

114. It has also been argued that very detail account has been given in the FIR with regard to the previous cases but no detail description of the cases have been mentioned in the FIR hence does not prove the immediate motive on the part of the different sets of accused.

115. The description about the enmity has been made in the FIR by the informant without mentioning the details of the criminal cases. The prosecution case cannot be disbelieved only because it did not find mention in detail. We cannot expect from a grief stricken person to give better particulars of the case. The contents of the FIR has given an exhaustive account by the P.W-1, the son of the deceased as such possibility of inventing a story at that juncture trying to implicate all the accused persons is absolutely ruled out. The investigating officer had gathered material of two cases in which the accused persons were involved; one is Case Crime no.301 of 1983 relating to the FIR under Section 307 IPC pending in the court of IInd Additional District Judge as Sessions Trial No.90 of 1984 pertaining to a case filed by Ram Sahay, the deceased against Kaptan Singh, Mansha Ram and Atar Singh (State Vs. Kaptan Singh & others) and another is Case Crime No.300 of 1983, under Section 396 IPC which was against Nakse, Mansha Ram and Atar Singh pending in the court First Additional Chief Judicial Magistrate as Sessions Trial No.229 of 1983 (State Vs. Nakse & others). In spite of cross-examination of prosecution witnesses nothing fragile surfaced in their statement in this regard. Pre and post conduct of all the accused persons while committing crime has left no room of doubt that they had not formed an unlawful assembly sharing common object to eliminate the victim. The court can visualize the common object of the unlawful assembly from the entire evidence on record. Due to prolong continuation of the trial some embellishments in the testimony of the prosecution witnesses has bound to occur. We notice in this case, that there is sufficient evidence to show that barbaric incident had happened on 18.5.1985. It was the appellants and none others who had committed the crime to satiate their evil design.

116. There is nothing in the cross-examination of P.W.1, the first informant Bahar Singh that his attention was called to that part of his statement recorded u/s 161 Cr.P.C. in which he had omitted either to describe himself as an eyewitness of the incident or to name the place from where he had witnessed the same. We do not find any reason to disbelieve the evidence of P.W.1. Mere inconsistency in evidence is

not sufficient to impair the credit of the witness.

117. **Section 145 of The Indian Evidence Act, 1872**

118. Cross-examination as to previous statements in writing.--A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

119. A conjoint reading of the aforesaid provision indicates that any police officer making an investigation under chapter 12 of the Code of Criminal Procedure, 1973 or any police officer making any investigation under this chapter examines any person believed to be acquainted with the facts and circumstances of the case, the police officer may reduce into writing any statement made to him in the course of examination u/s 161 Cr.P.C. and if it is true, he shall make separate entry to record all the statements of such person whose statement he records.

120. Section 162 (1) of Cr.P.C. stipulates that no statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. Proviso to Section 162 (1) of Cr.P.C. mandates that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. Section 162 (2) of Cr.P.C. excludes any statement falling within the provisions of clause 2 of the Indian Evidence Act, 1872 and 27 of that Act from the application of the aforesaid proviso.

121. The object of Section 145 of the Evidence Act is to give a witness a chance of explaining the discrepancy and inconsistency and to clear up the point of ambiguity and dispute.

122. The Hon'ble Apex Court in the case of **Karan Singh & Ors. Vs State of Madhya Pradesh**, Judgement Today 2003, Suppl. Vol. 2 SC 261, has held that when a previous statement is to be proved as an admission, the statement as such should be put to the witness and if the witness denies having given such a statement, it does not amount to any admission and if it is to be proved that he had given such a statement, the attention of the witness must be drawn to that statement. The object behind this provision is to give a witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute.

123. The question of contradicting the evidence and the requirements of compliance in Section 145 of the Evidence

Act has been considered by the Apex Court in the case of **Tahsildar Singh and Another Vs The State of Uttar Pradesh**, *1959 SCR Supl. (2) 875*. The Apex Court in the aforesaid case was examining the question as to when an omission in the former statement can be held to be a contradiction and it was also indicated as to how a witness can be contradicted in respect of his former statement by drawing his attention to that portion of the former statement.

124. This question was again considered in the case of **Binay Kumar Singh Vs The State of Bihar,** *1997 Vol. 1 SCC 283*. The Apex Court taking note of the earlier decision in **Bhagwan Singh Vs The State of Punjab**, *1952 AIR 214*, explained away the same with the observation that on the facts of that case, there could not be a dispute with the proposition laid down therein. But while elaborating the second limb of Section 145 of the Evidence Act, it was held that if it is intended to contradict a witness, his attention must be called to those part of his writings of his earlier statements which are intended to be used for the purpose of contradicting him. It was further held that if the witness denies having made any statement which is inconsistent with his present stand, his testimony in Court on that score would not be vitiated until cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act.

125. Hence, the procedure prescribed u/s 145 of the Evidence Act if having not been complied, we do not find any reason to discredit the evidence of P.W.1 informant or to hold either that he is not a fully reliable witness or he had not seen the occurrence. The statement of the first informant, P.W-1 stands fully corroborated from the facts deposed by P.W.-2 in his examination-in-chief, who was not examined in Sessions Trial No.129 of 1995. Thus in view of the legal principles propounded hereinabove by the Apex Court, we are not inclined to reject the evidence of P.W.-1 & P.W-2. There is no law which lays down that a conviction cannot be recorded on the basis of the evidence of solitary witness.

126. The purpose of cross-examination is to test the veracity of the statement made by a witness in his examination-in-chief as also to impeach his credit. Not only it is the right of the accused to shake the credit of a witness, but it is also the duty of the court trying an accused to satisfy itself that the witnesses are reliable. It would be dangerous to lay down any hard and fast rule.

127. In our opinion, relevant and material omissions amount to vital contradiction which can be established by cross-examination and confronting the witness with his previous statement. The alleged omissions in the statement of the witnesses to the police could not have made their evidences in court unreliable with respect to material particular concerning the occurrence or identifying the accused. In the present case, there is ample evidence in the shape of oral testimony of P.W-1 Bahaar Singh who is the son of the deceased and P.W-2 Brijendra Singh, on the basis of which, the conclusion has rightly been drawn by the learned trial court that the witnesses had in fact seen the accused persons and their devilish act of dragging the dead body, hence we are in full agreement which does not require any interference.

128. We are of the opinion in a case like the present one the relatives and friends of the deceased would not spare the real culprits and falsely implicate others. We are of the considered view that the

relationship is not a factor to affect the credibility of the aforesaid eye witnesses.

129. In the case of **Dalip Singh vs. State of Punjab** *AIR 1953 SC 364,* Hon'ble Apex Court has held as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

130. In the case of **Veer Singh and others vs. State of U.P**., *(2014) 2 SCC 455,* Hon'ble Apex Court has held as under:-

"Legal system has laid emphasis on value, weight and quality of evidence rather than on quantity multiplicity or plurality of witnesses. It is not the number of witnesses but-quality of their evidence which is important as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. Evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section-134 of the Evidence Act. As a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable."

131. On the analysis of the evidence, it is fully established that the victim succumbed to unnatural death with gun shot injuries whose dead body was dragged and burnt down so as to efface the evidence. Hence the prosecution case cannot be doubted or suspected merely that the witnesses are related to the deceased or on account of some minor variation or aberration in their testimony. The utterances have consistently and umpteen times been repeated by the witnesses who had narrated and unfolded the incident in a very natural and articulate manner. The overt act of the accused appellants at the relevant moment is fully established and is unimpeachable beyond a shadow of doubt consistent with the hypothesis of the guilt that within all human probability the act has been done by the accused appellants. The foul play of destroying the evidence by putting the corpse of the deceased on fire in the field of Sahab Singh after dragging him from his baithak and was decimated on account of bitterness has portrayed very inhuman and gruesome state of mind of the accused appellants. In the course of cross examination, the defence side has tried to evolve a story of false implication in order to overshadow the testimony of the eye witnesses. It cannot be doubted that the eye witnesses had not seen the accused appellant who had perpetuated the crime in a very relentless and devilish manner. The

delay if any, in lodging the first information report will not falsify the entire prosecution version. The trial court has appreciated the evidence in the right perspective. We find from the record that the statement of the prosecution witnesses cannot be said to be untrustworthy simply on the basis that some of the facts deposed for the first time before the Court.

132. From the perusal of the charge sheet it clearly shows that the murder of Ram Sahay had taken place on 18.5.1985 at about 4.30 P.M. and the FIR was lodged on the same day at 6.50 P.M. The criminal law was set in motion and the police started investigating on 19.5.1985. The investigating officer raided the houses of Nawab Singh, Atar Singh and Sughar Singh (sons of Pyarey Lal), Mansha Ram, Phulwari, Kaptan Singh and Deshraj in the presence of Sahab Singh and Soney Lal, but they were not found at their houses nor any weapon was recovered. However, the memos were prepared and handed over to the wives of the accused persons which were marked as Ext. Ka-13, Ext. Ka-14, Ext. Ka-15 & Ext. Ka-16. The appellants had absconded after committing murder from their houses. Atar Singh (since deceased), Mansha Ram, Nawab Singh and Sughar Singh surrendered before the court below on 29.5.1985 and Phulwari was surrendered on 3.6.1985 while Kaptan Singh and Deshraj surrendered on 5.2.1986 & 10.2.1986 respectively. This is the conduct on the part of the accused persons that they had disappeared from the scene of occurrence to some unknown place for considerable period. The charge sheet was submitted on 30.6.1985 against Atar Sing, Nawab Singh, Sughar Singh, Mansha Ram and Phulwari wherein it was mentioned that accused Kaptan Singh and Deshraj are absconding. Thereafter the process under Section 82/83 Cr.P.C. was initiated to secure the presence of the accused appellants Kaptan Singh and Deshraj against whom ultimately charge sheet was submitted on 13.2.1986. Thus the act of absconding is relevant factor to be considered along with other evidence. Such circumstance may also leads to a proof of a guilty mind attempting to evade justice which is inconsistent with their innocence.

133. The long abscondence of the appellants who were seeking adjournment at the pre trial stage by moving exemption application for one reason or the other on each and every date separately and jointly leads to interference about their conduct that they were of guilty mind. Though it is true that even an innocent man may feel panicky and try to evade arrest when suspected of a grave crime such is the instinct of self-preservation. Normally the courts are not inclined to attach much importance to the act of absconding, treating it as a very small and insignificant in the evidence for sustaining conviction and it can scarcely be held as a determining link in completing the chain of evidence determining guilt of the accused. But in the present case soon after lodging of the FIR all the accused persons had absconded for a long period which is quite unnatural showing their guilty conscience. Such act of absconding on the part of all the accused appellants is no doubt relevant piece of evidence to be considered along with other evidence in the present case.

134. In view of the above conspectus, unusual sympathy to the accused persons merely because of long lapse of time would do more harm than justice from the point of view of the victim and the society at large as delay defeats justice. The prolong trial like in the present case has caused gross

miscarriage of justice. We are shocked that the trial remained pending for about 24 years as it has been concluded in 2009 whereby the accused persons were convicted by the learned trial court in both the sessions trial.

135. On the basis of verbose and prolix discussions made above and after going through the materials available on record, we are of the considered opinion that findings of conviction recorded by the learned trial court are well substantiated and the accused persons well appropriately sentenced. Therefore, the conviction recorded by the trial Court against the accused appellants, Mansha Ram, Phulwari and Nawab Singh under Section 302/34,148 I.P.C. is hereby maintained and affirmed.

136. The appeals are devoid of merit and are accordingly dismissed.

137. Let a copy of this judgment and order along with original record be transmitted to the learned trial court for information and compliance.

138. Judgment certified and be placed on record.

(2020)03-05ILR A704
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.02.2020

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

Criminal Appeal No. 4639 of 2009
Connected with
Criminal Appeal No. 4409 of 2009

Kaptan Singh ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rajiv Gupta, Sri Dileep Kumar, Sri Rajrshi Gupta, Sri M.B. Singh, Sri R.P. Singh, Sri S.F.A. Naqvi, Sri Rizwan Ahmad

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

Criminal law- Indian Penal Code - Sections 302 and 148 - Appeal against conviction.

Held – Plea of alibi**-**must be proved with absolute certainty. (para 66)
Minor Discrepancies - Can be ignored unless, completely incompatible with prosecution version. (para 74)
Medical Evidence- Cannot over right medical evidence ocular testimony. (para 106)
Lapses During Investigation- Not to discredit prosecution version in case supporting evidence is consistent and dependable. (para 127)
Relative Witnesses- The testimony cannot be doubted in case of minor variation. (para 130)

Appeal rejected. (E-2)

List of Cases Cited:-

1. Mahavir Singh Vs.St. of MP, (2016) 1 SCC (Cri.) 45,

2. Abdul Sayeed Vs.St.of M.P., (2010) 10 SCC 259,

3. Rana Pratap; Vs. St. of Har. (1983) 3 SCC 327,
4. St.of HP Vs. Jeet Singh 1999 (38) ACC 50 SC,

5. Nathuni Yadav & ors. Vs. St. of Bihar; 1997 (34) ACC 576 SC,

6. Ram Ghulam Chaudhary Vs. St. of Bihar; 2001 (43) ACC 929,

7. Nankaunoo Vs. St. of U.P.; 2016(1) SC Cr.R 237,

8. V.K. Mishra & anr. Vs. St. of Uttrakhand and another; 2015(2) SC Cr.R,

9. Appa Bhai & anr. Vs. St. of Guj.; 1988 (25) ACC168 SC,

10. Karan Singh & ors. Vs. St.of MP, Judgement Today 2003, Suppl. Vol. 2 SC 261,

11. Tahsildar Singh & anr. Vs. St. of UP, 1959 SCR Supl. (2) 875,

12. Binay Kumar Singh Vs. St. of Bihar, 1997 Vol. 1 SCC 283,

13. Bhagwan Singh Vs. St. of Punj., 1952 AIR 214,

14. Dalip Singh Vs.. St. of Punj. AIR 1953 SC 364,

15. Veer Singh & ors. Vs.. St. of U.P., (2014) 2 SCC 455.

(Delivered by Hon'ble Naheed Ara Moonis, J.)

1. The appellants Kaptan Singh and Deshraj have preferred the present appeals bearing Criminal Appeal Nos.4639 of 2009 & 4404 of 2009 respectively against their conviction in Sessions Trial No.129 of 1995. All the above named accused appellants were convicted by the judgment and order dated 22.7.2009 passed by the learned Additional Sessions Judge, Court No.2, Farrukhabad and each were directed to undergo rigorous imprisonment for life and also to pay fine of Rs.15,000/- under Section 302 IPC and three years rigorous imprisonment for the offence punishable under Section 148 IPC. Both the sentences were directed to run concurrently and in case of default of payment of fine they were further directed to undergo simple imprisonment of six months.

2. The prosecution was launched against seven accused persons, namely, Atar Singh, Sughar Singh, Nawab Singh (sons of Pyare Lal), Phulwari S/o Vijay, Mansha Ram S/o Shankar, Kaptan Singh and Deshraj (sons of Babu Ram) in pursuance of the FIR lodged against them by Bahaar Singh registered as Case Crime No.158 of 1985, under Sections 147,148,149,302 IPC at police station Kayamganj, District Farrukhabad on 18.5.1985 at 6.50 P.M.

3. The Sessions Trial No.327 of 1989 pertains to the trial of accused persons, namely, Atar Singh, Sughar Singh, Nawab Singh, Mansha Ram and Phulwari. The aforesaid trial of accused Sughar Singh was separated at the fag end on his plea of juvenility who was acquitted by the court below.

4. The aforesaid accused persons, namely, Atar Singh, Mansha Ram and Phulwari as well as Nawab Singh have preferred separate appeals bearing Criminal Appeal No.4576 of 2009 & Criminal Appeal No.4664 of 2009 against their conviction in Sessions Trial No.327 of 1989.

5. The prosecution case in short conspectus is that the First Information Report was lodged on 18.5.1985 at 6.50 P.M. by Bahaar Singh S/o Ram Sahay in respect of an incident occurred on the same day at 4.30 P.M. which was registered as Case Crime No.158 of 1985, under Sections 147,148,149,302,201 IPC at police Kayamganj, District Farrukhabad. He divulged in the FIR that his father Ram Sahay was Pradhan of his village Lakhanpur for about 35 years. In the last election, Chandrakali, the wife of Kaptan Singh @ Kamta Prasad S/o Babu Ram Yadav had contested election against his father. His father had lost the election for which a petition was filed which is pending. About two & half years ago a

dacoity had been committed in the house of Saudan Singh, who had named Atar Singh S/o Pyarey Lal and Mansha Ram and two others of which the case is pending. Besides this, two years ago a case under Section 396 IPC was filed by Sohan Lal Nuner of village Lakhanpur in which two persons were killed by dacoits. In the said case, Mansha Ram, Atar Singh and Deshraj, the brother of Kaptan Singh were named in the FIR by Sohan Lal. Atar Singh and Kaptan Singh were under the impression that the complainant's father has implicated them in the case of dacoity. About two years ago, Kaptan Singh, Mansha Ram and Atar Singh had fired upon his father and his brother Tahar Singh with intent to kill them but luckily they had escaped from there. In this case all the three accused persons were challaned by the police. On account of the above reasons, Kaptan Singh and Atar Singh were bearing enmity with his father. Two and half months ago family member of Kaptan Singh was murdered in the village in which Kali Charan S/o Ram Naresh Yadav had filed a false report against Vijayee and Mansha Ram along with Tahar Singh who is the brother of the complainant at the instance of Kaptan Singh and on account of which, his brother is in jail. After 2-4 days, the dead body of Nahar Singh, the elder brother of Atar Singh was found in a well in which Atar Singh had implicated the complainant, his father, Nanhey, Rajendra, Tejram etc. of his village in the case, on the basis of mere suspicion that they had committed murder of Nahar Singh. A case under Section 107 IPC was also filed by Kaptan Singh and others, which is still continuing and on account of these reasons Atar Singh and Kaptan Singh were inimical with his father Ram Sahay.

6. Today (on 18.5.1985) in the evening at about 4.30 P.M. his father Ram Sahay was sitting on a cot on the platform situated in front of his baithak. Atar Singh, his younger brother Sughar Singh, elder brother Nawab Singh, Phulwari and Mansha Ram of his village as well as Kaptan Singh and Deshraj emerged out from the house of Atar Singh and passed through the baithak of Rajju and reached at the platform. Atar Singh, Phulwari and Mansha Ram were armed with rifle, Sughar Singh, Kaptan Singh and Deshraj having double barrel gun and Nawab Singh was armed with countrymade pistol came over chabootra. As soon as his father saw them he got up and tried to run towards baithak, at this Atar Singh, Mansha Ram and Kaptan Singh had fired upon his father. After receiving gun shot injury his father ran towards baithak and fell down there. Sughar Singh, Nawab Singh and Phulwari went behind him and entered in the baithak. There too, they had again fired upon him. Atar Singh, Mansha Ram and Kaptan Singh were firing indiscriminately outside which had created reign of terror. His father had succumbed to the injuries in the baithak. All the accused persons thereafter dragged the dead body of his father from baithak and put him on the heap of wood of Arhar kept in an open vacant land of Sahab Singh. Atar Singh and Deshraj exerted that *"Sale Ko Jalakar Rakh Kar Do" (burn him to ashes)* and set the heap of wood of Arhar on fire. Other persons put dry leaves **(patai)** of sugarcane on fire. Thereafter they went towards the house of Kaptan Singh unleashing reign of terror by firing. This incident was witnessed by his mother who was standing at the door he himself, Sahab Singh S/o Bhawani Singh of his village and Brijender Singh who is the son of his brother's 'Sarhu' Soney Lal who resides there but they all were helpless seeing the murder of his father due to fear of accused persons armed with rifles and guns. The dead body of his father burnt to some extent has been lying on the spot, hence action be taken by lodging the FIR.

7. On the basis of the aforesaid FIR lodged by Bahaar Singh S/o Ram Sahai,

police swung into action. A case was registered against Atar Singh, Sughar Singh, Nawab Singh, Phulwari, Mansha Ram, Kaptan Singh and Deshraj under Sections 147,148,149,302,201 IPC as Case Crime No.158 of 1985 on 18.5.1985 at police station Kayamganj, which was written by Constable Clerk Babu Ram marked as Ext. Ka-8 & Ext. Ka-9. S.S. Yadav, Inspector (C.B.C.I.D.) posted as Sub-Inspector at police station Kayamganj on 19.5.1985 had been entrusted to investigate the case. He along with in charge Inspector Jagdamba Prasad Mishra and SSI K.L. Verma with police force reached at the place of occurrence where the deceased Ram Sahay was done to death by firing upon him and his body was burned by the accused persons which was kept on the wood of Arhar. The inquest of the deceased was conducted in the presence of the witnesses and the inquest report was marked as Paper No.16-A/1,16-A/2, 16-A/3. It was duly signed by the Sub-Inspector S.S. Yadav who proved his signature and the same was marked as Ext. Ka-3. Thereafter the dead body was sealed, of which sample seal was prepared. He had further prepared papers of challan nash, police form no.13, letter to Chief Medical Officer, I/C Fatehgarh, letter to R.I., photo nash, chik FIR, copy of GD, site plan, memo of empty cartridges, memo of ashes of heap of Arhar, memo regarding search and arrest of accused persons, recovery of illegal firearm, memo of plain & blood stained earth, which were marked as Ext. Ka-4 to Ext. Ka-17. The recovery memos as mentioned above were made in the presence of Sahab Singh and Soney Lal which were signed by them.

8. The statement of the complainant and other witnesses were recorded under Section 161 Cr.P.C. The papers relating to the inquest of the deceased were handed over to Constable Lal Mani and Constable Balram along with the dead body and sent to the District Hospital for autopsy of the deceased. After conducting the investigation by SSI K.L. Verma, the charge sheet was submitted on 30.6.1985 against the accused persons, namely, Atar Singh, Sughar Singh, Nawab Singh, Mansha Ram and Phulwari, under Sections 147,148,149,302,201 IPC. The charge sheet was marked as Ext. Ka-18. The charge sheet had been submitted separately on 13.2.1986 against Kaptan Singh and Deshraj by SSI Bhanwar Pal Singh, under Sections 147,148,149,302,201 IPC, which was marked as Ext. Ka-20.

9. On submission of charge sheet, as usual the cognizance was taken by the concerned Magistrate and after compliance of provisions of Section 207 Cr.P.C. the case was committed to the court of sessions. The case was transferred to the Special Judge/Additional Sessions Judge, Farrukhabad. The charges were framed against Atar Singh, Sughar Singh, Nawab Singh, Mansha Ram and Phulwari on 30.6.1990, under Sections 148,302/34 IPC in Sessions Trial No.327 of 1989.

10. Against accused appellant Kaptan Singh and Deshraj the charges were framed on 29.9.1995 by the Second Additional Sessions Judge, Farrukhabad under Sections 147/148/302/149 & 201 IPC in Sessions Trial No.129 of 1995. Both the trials were consolidated on 17.9.1998.

11. The charges were read over to the above mentioned accused appellants who abjured the charges and claimed to be tried. Even though the accused appellants Kaptan Singh and Deshraj in Sessions Trial no.129 of 1995 were appearing intermittently in

Sessions Trial No.327 of 1989. but the prosecution witness P.W-1 was again cross-examined in Sessions Trial no.129 of 1995. The accused persons were on trial for murder hence there was no justification to have a criminal trial pending for so long even when charges were already framed against them.

12. To bring home guilt of the accused appellants, the prosecution has examined Bahaar Singh, informant S/o Ram Sahay as P.W-1, Dr. C.N. Bhalla who conducted the autopsy of the deceased Ram Sahay as P.W-2 who was examined as P.W-3 in Sessions Trial No.327 of 1989, S.S. Yadav (Retired Inspector), CBCID as P.W-3. Phool Chandra, Pairokar who was examined as P.W-5 in Sessions Trial No.327 of 1989 has not been examined in the present case.

13. Bahaar Singh, the son of the deceased was examined on oath as P.W-1 on 20.5.2004. He deposed that the incident had taken place 19 years ago. It was about 4.30 P.M. in the evening, at that time, he was present at some distance in front of his house in *gher.* His father Ram Sahay was sitting on a cot over the platform (chabootra). At that moment Atar Singh (since deceased), Sughar Singh, Nawab Singh, Phulwari, Mansha Ram, Kaptan Singh and Deshraj emerged together from the house of Atar Singh (since deceased) and passed through the baithak of Ragghu reached at the platform of his house. Atar Singh (since deceased), Phulwari, Mansha Ram were having rifle, Kaptan Singh, Deshraj and Sughar were armed with gun and Nawab Singh was having Katta. When they came over the platform his father seeing them tried to run inside baithak. At the same time, Atar Singh (since deceased), Mansha Ram and Kaptan Singh fired upon his father which hit him. His father received shots. His father fell down inside baithak. Thereafter Phulwari, Nawab Singh and Sughar Singh entered into the baithak and they had also fired there. He could not count the number of fire made by them. On account of firing the people were under the grip of terror. His father had died on the spot in baithak. Thereafter all the accused persons dragged the dead body of his father towards the open place of Sahab Singh. Piles of wood of Arhar was kept there. They had put the dead body on the wood. Atar Singh (since deceased) and Deshraj had put the fire on the heap of woods of Arhar. Atar Singh (since deceased) and Deshraj had challenged *"Sale ko jalakar rakh kar do"*. All the accused persons thereafter moved towards the house of Kaptan Singh making fire. This incident was witnessed beside him his mother Nisar Devi who was standing at the door at the time of incident. This incident was also witnessed by Sahab Singh and Brijendra Singh as the accused persons were armed with rifle and gun, they could not go near to them. After dousing the fire he left the dead body and went to the police station to lodge the report. He went to police station Kayamganj to lodge the report. The witness accepted that the FIR (Ext. Ka-1) was written by him after the death of his father and was handed over at the police station Kayamganj. On the basis of which, the FIR was registered. He further deposed that on account of old enmity his father was done to death by the accused persons. Detail account of enmity has been given in the report.

14. P.W-1 Bahaar Singh was cross-examined on behalf of the appellants Kaptan Singh and Deshraj. He deposed that the opening door of the baithak of Ram Sahay was towards east. The platform is in

front of the door. The length of baithak is 8-10 hand in length. Platform is equal to baithak in length but its width is about 8-9 f feet. Two trees of gulmohar were at the platform which were a little inside on eastern corner of the platform and about a ft or two inside. The main door of his house and Ragghu's towards north of baithak of house and his baithak is adjacent to the northern side of his house and main door. In this house, Ragghu and his son Munna and many females were residing, but no one lives in baithak. On the northern side of Ragghu's house, house of Faujdar is situated. The family of Faujdar resides therein. In front of house of Faujdar in north side there is a village consisting of 25-30 houses.

15. P.W-1 Bahaar Singh deposed on further cross-examination that at the time of incident his mother and wives of his two brothers were residing in the same house. His brother Tahar Singh was in jail on the day of incident in connection with the murder of Ram Naresh. Elder brother of Ram Sahay was Bhawani. Sahab Singh, who is the son of Bhawani, is witness in the present case. Brijendra Singh is the son of *'Sarhu'* of his brother Tahar Singh. House of Sahab Singh is adjacent to his house. House of Sahab Singh is towards southern side of his house adjacent to the houses of Soney Lal and Ram Prakash who live along with their family member in their houses. Akhunpur is a part of Mauza of Lakhanpur. His father was Pradhan of Lakhanpur for 35 years. Village of Master Kaptan Singh Nagla Akhunpur is away from his village.

16. It is wrong to say that a distance of 500 mtr. Is between the two Akhunpur. Kaptan Singh is a Teacher. He has no knowledge whether he has degree of M.A. or not. He is not aware since when Kaptan Singh was Teacher prior to the date of incident. Accused Deshraj is the brother of Kaptan Singh. Deceased Ram Naresh of Nagla Akhunpur was in the family of Kaptan Singh. Kali Charan is the son of Ram Naresh. Kali Charan had named his brother Tahar Singh and others in the murder of Ram Naresh. He is not aware whether Kali Charan had got the FIR in respect of murder of Ram Naresh by accused Kaptan Singh. He is also not aware that in the case of murder of Ram Naresh his brother Tahar Singh was convicted for life imprisonment. He never went to Kutchehry to do the pairvi in the case of Tahar Singh. He is not aware as to who was doing pairvi in his case. In the case of murder of Ram Naresh, Kali Charan had named his brother Tahar Singh and not Kaptan Singh. His father Ram Sahay had lost the election of Pradhan prior to his murder. Wife of Kaptan had won the election. He is not aware that his father Ram Sahay had given land of Mauza Lakhanpur in favour of National Inter College, Rampur. He has no knowledge whether any objection was raised with regard to the lease. It is wrong to say that said Arazi was sold in his and his brother Tahar Singh's favour. He is not aware as to whether any lease was cancelled which was given in favour of the college. It is wrong to say that Chandrakali had given a notice under Section 120-B for his eviction and fine was imposed upon him or on his brother. It is wrong to say that on account of eviction they had bearing enmity with Kaptan Singh and his family member. His father had never taken any contract of liquor in Kayamganj. He had never heard about that his father taken contract of liquor in Kayamganj. He had no knowledge that his father had taken any shop in share. He had never seen Ram Sahay running shop of liquor or grocery shop in Kayamganj. He is

not aware that his father had various cases in Kayamganj. Bhawani, father of Ram Sahay had died prior to his birth. He is not aware that Bhawani was murdered while committing dacoity at the house of Raja Ram Gupta of Kayamganj. He is not aware about how much land belonged to Ram Sahay at the time of incident. After the death of his father the land was devolved upon him and his brother.

17. P.W-1 was cross-examined in great detail with respect to the location of the field of Ram Sahay, Soney Lal and Saudan Singh. He further deposed that he was at his home and had not gone to Kayamganj. His father used to go Kayamganj prior to the incident. On the day of incident, his father was at his house. He (P.W-1) had witnessed the incident from the *gher*, if the same has not been mentioned in the report he could not say the reason. He had written in the report that his mother had witnessed the incident from the door. He has not written about himself as he had seen the incident from the *gher*. He could not notice as such he did not mention his place from where he had seen the incident. Near the field of Soney Lal he and Brijendra Singh remained there for about 20 minutes. The place where his father was sitting was about 20-25 meters south east where they were sitting. Prior to sitting in *gher* he had come from the field of muskmelon. After returning from the field of muskmelon he and Brijendra Singh were sitting 20-25 minutes in *gher*. Thereafter incident had taken place. His statement has already been recorded in connection with the present case in the same court relating to Atar Singh (since deceased) and other accused persons. The witness was confronted with his statement recorded on 17.1.2001 in the case of State Vs. Atar Singh and others as P.W-1. He had admitted that he had given the statement in the said trial that he had seen the entire incident from 20-25 mtr. southern side from the place where his father was sitting. He was there last 15 -20 minutes prior to that he was at his house. Prior to the incident Brijendra was with him. He was cross-examined by the defence counsel in that case that he was not at his house and Brijendra was at Jasrathpur. Hence he had deposed the above statement. He denied that he has been tutored while giving above clarification. He was never asked in this regard hence he did not disclosed that he had gone to the field of muskmelon. The police had enquired from him at the police station. He does not remember about disclosing to the police that he was returning from the field of muskmelon he could not disclose about the reason if the same is not mentioned. When he saw the accused persons then they had not reached near to the cot of his father rather they had come upto the platform. The cot was lying on the southern side of the platform. The cot was 4-5 ft away from the door of the house. It was towards the south of door. The corner of the chabootra in the south from the door is about 7-8 ft.

18. After his cross-examination on 20.5.2004 he was again recalled and cross-examined on 16.6.2004. He deposed that his father was sitting on the cot which was lying 3-4 ft towards the south door of baithak. On seeing accused persons his father tried to run to enter into baithak. His father was shot dead by the miscreants as he got up and after receiving firearm injury his father fell down in the baithak. Miscreants could not stop his father as he entered in the baithak.

19. He could not say that as to in which year the witness Brijendra had

admitted in school in Rampur, but he knows that he was studying prior to 2-3 years of the incident. Accused Kaptan Singh and Deshraj are not related to his family. His agriculture, house and business has no share with accused Kaptan Singh. It is wrong to say that he was not in his village on the day of incident and had not seen any incident. It is wrong to say that he had falsely named the accused Kaptan Singh and Deshraj as his brother Tahar Singh was named in the murder of Ram Naresh. It is also wrong to say that on account of enmity he is giving false statement today.

20. Dr. C.N. Bhalla has been examined as P.W-2 on 16.7.2009 in the present Sessions Trial bearing No.129 of 1995 (State Vs. Kaptan Singh and another) who was earlier examined as P.W-3 in Sessions Trial No.327 of 1989 (State Vs. Atar Singh & others) on 18.11.2002.

21. In his examination-in-chief, Dr. C.N. Bhalla, P.W-2 deposed on oath that he was posted as Pediatrician in District Hospital, Fatehgarh on 19.5.1985. On that day at about 5 P.M. he had conducted the postmortem of the dead body of Ram Sahay S/o Umrao, resident of village Akhunpur. He was aged about 60 years. The dead body was brought by Constable Lal Mani and Constable Balram. The dead body was received by him in a sealed condition and had identified the dead body. Ram Sahay died one day ago. Body was of average built. The dead body was burned 4-6 degree. Head was partially burned. Muscles were visible. Muscles on his body and under neath bones were seen burnt and visible. At some places, body was severely in burned condition.

22. P.W-2 further deposed that from head two wadding pieces; one from chest and one from abdomen, three tikli from the brain were extracted. Four tiklis from abdomen and two tikli from chest were recovered. 78 pellets were recovered from brain, chest and abdomen.

23. The following ante-mortem injuries were found:

1. Lacerated wound 3cm x 2.5cm x chest cavity in the left side 14cm below left ribs. Direction front to back;

2. Lacerated wound 3cm x 2.5cm x abdomen cavity subcortal margin in M.C.L. just below the right ribs. Direction front to back obliquely;

3. Lacerated wound 3cm x 2.5cm x chest cavity left side of back below 8cm of scapula. Direction back to front;

4. Lacerated wound 8cm x 5cm x depth of skull. Skull was cracked. Brain matter and blood was coming out. Right ear was lacerated. Direction right to left.

24. On Internal Examination: Except frontal bone of head all other bones were broken. Brain and its membranes were lacerated and the brain was coming out from injury. Left part of 4th and 5th ribs of the chest were broken. Both lever and its membranes were lacerated. Blood was filled in both parts of chest. Stomach, small intestine, large intestine and gall bladder, both kidneys and spleen were lacerated.

25. He deposed that in his opinion, the death of Ram Sahay was due to excessive bleeding from head and on account of ante mortem injuries. He opined that death could have occurred on account of the injuries received on 18.5.1985 at about 4.30 P.M. in evening. Firstly he was done to death by causing injury with firing and thereafter he was burned. He proved the postmortem report prepared and signed by him, which was marked as Ext. Ka-2. He further deposed that the instant postmortem has also been included in the

Sessions Trial No.327 of 1989; State Vs. Atar Singh & others.

26. In his cross-examination on behalf of the accused appellants, namely, Kaptan Singh and Deshraj, he deposed that while conducting autopsy he found four injuries. The description of which has been given in the postmortem report. He had not shown any injury of any gun shot as the body was burnt and lacerated wound was found due to firing. The length and width of injury nos.1, 2 & 3 on the body of the deceased were equal and same. This injury could have been caused by one or more than one firearm weapon. If the fire is shot from one place from different distance then the dimension of the injuries would be different. It is always not necessary that when the fire is shot from close range wadding and tikli would not be found in the body, if the fire is shot from the distance of 4 ft tikli would travel into the body. He could not say as to whether firing from within a distance of 4 ft wadding would travel into the body or not. He has no knowledge if the fire is made in contact with the body, the wadding would pierce in the body. It is not known to him that on firing wadding would enter into the body. wadding and tikli were found in all the four injuries of the deceased only due to this, it could not be said that there is a great possibility that the firing was done from close range as the dead body was burnt lacerated wound is found always when firing is made. This witness was put to a question as what he means about wadding, he answered wadding is a part of tikli. At this moment, tikli shots and wadding which were recovered from the body of the deceased were not before him. There could be possibility of 4-5 hours difference about death and the deceased would have died in the night around at 10-11 P.M.

27. S.S. Yadav, Inspector CBCID has been examined on 10.2.2009 as P.W-3 in the present Sessions Trial bearing No.129 of 1995 (State Vs. Kaptan Singh and another) who was examined as P.W-4 in Sessions Trial No.327 of 1989 (State Vs. Atar Singh & others) on 26.5.2003. The defence had sought adjournment on 26.5.2003 to cross-examine him on the next date. Thereafter the case was adjourned incessantly by the defence and on 10.2.2009 he was again summoned and was re-examined with the permission of the court on behalf of all the accused persons of both the sessions trial separately.

28. S.S. Yadav, P.W-3 who was retired as Inspector, CBCID was summoned and was granted permission for examination-in-chief again. He deposed on oath that the Constable Clerk Babu Lal and SSI K.L. Verma were posted along with him at the police station. He knew their writing and signature. The chik FIR paper no.4-A-1 and copy of GD no.21-A-1 were written and signed by Constable Clerk Babu Lal. It was marked as Ext. Ka-8 & Ext. Ka-9. He further deposed that paper no.8-A site plan, paper no.9-A (memo of recovery of empty cartridges), paper nos.9-A-2 & 9-A-4 relating to memo of raid and arrest in recovery of arms and paper no.9-A-5,9-A-6 & 9-A-7 were prepared and signed by SSI K.L. Verma. The above papers were marked as Ext. Ka-10 to Ka-17. Paper no.3-A is the charge sheet against accused persons, namely, Atar Singh, Sughar Singh, Nawab Singh, Mansha Ram and Phulwari under Sections 147,148,149,302,201 IPC which was written and prepared by SSI K.L. Verma on 30.6.1985. The charge sheet was marked as Ext. Ka-18. He deposed that SSI K.L. Verma had retired in 1998 since then his whereabout is not known nor he ever met with him.

29. In his cross-examination he deposed that SSI K.L. Verma reached to the superannuation in 1998. He is not aware about to which place he belongs. He had gone at the place of occurrence in this case. At what time, he reached on 18.5.1985 he could not remember as the incident is quite old. When he reached on 18.5.1985 it was dark. He did not make any arrangement of any light to conduct the autopsy. He did not mention in the inquest report that light was not available. He does not remember whether he read the FIR prior to filling the inquest report. He had mentioned on the last paper of the inquest report about the papers which is at serial no.3 one page copy of chik report. He had not done any overwriting over the number of two in nakal rapat. It is wrong to say that in place of one two figure has been made. Copy of chik report is in two pages. It is wrong to say that nakal rapat was in two pages rather it was in three pages. He had mentioned in the inquest report about the weapon, but he did not mention the nature of weapon used in the incident. In the inquest report at the top he had not made any overwriting in number 8 of case crime no.158. It is also wrong to say that in the inquest report Sections 147,148,149 IPC were added subsequently. On the back of first page of inquest case crime number is not mentioned. It is also wrong to say that on the first page of inquest report, case crime number was mentioned later on.

30. It is wrong to say that at the time of preparing inquest report, chik FIR was not in existence. It is also wrong to say that an oral information was given with respect to the murder of Ram Sahay on 19.5.1985 and then the police official reached at the place of incident. The inquest report bears his signature. He has not mentioned in the inquest report that under the direction of IO K.L. Verma, he has prepared inquest report, but he has mentioned the presence of SHO and SSI K.L. Verma. Recovery of weapon was not before him. Border of police station Campell is adjacent to Etah and Budaun. Various gangs of miscreant were active in the border area in which several big gangs were involved. At the time of incident gang of Sultan Dhanuk was active in that area. He is not aware whether females were also resided along with miscreants in the gang. he is not aware that Rajjo Devi is concubine of Sultan. He has no knowledge as to whether member of the gang of Sultan used to take shelter at the place of deceased Ram Sahay. It is also not known to him that Ram Sahay was a man of criminal nature. In the charge sheet criminal history of Ram Sahay is not described. He has no knowledge whether any criminal history of Ram Sahay is at the police station.

31. This witness was cross-examined by the counsel of the accused appellants Kaptan Singh and Deshraj. He deposed that he is not aware at what time they had departed from the police station to the place of incident. SHO and SSI had accompanied him. He is not aware about other police personnel. They had gone on the official jeep. He does not remember that at what time they reached at the place of incident. He went along with them at the place of occurrence. He does not remember as to what action was taken by SSI K.L. Verma and Inspector. He does not remember as to whose statements were recorded by the Inspector and SSI K.L. Verma. He also not remember as to which place they had raided. He could not say as to what distance from the deceased was lying from his house. His dead body was lying at the outside the village. He has not written mark of fire in the inquest report. He had

mentioned about that the dead body was burnt. He has no knowledge that village Akhunpur and Nagla Akhunpur are two separate villages.

32. Constable Phool Chandra Pairokar of Police Station Kotwali, Farrukhabad was examined on 5.5.2009 as P.W-5. This witness deposed that he knew Babu Lal, Constable Clerk and SSI Bhanwarpal Singh. He was posted along with them and used to see their reading and writing. He knows about their writing and signature. He proved the paper no.4-A/1, 24-A/3, chik FIR and paper no.21-A/1, copy of GD prepared by Constable Clerk Babu Lal which were marked as Ext. Ka-9. Paper no.3-A (charge sheet) in respect of Kaptan Singh and another of Sessions Trial No.129 of 1995 was written by SSI Bhanwarpal Singh was proved by him and the same was marked as Ext. Ka-20. He further deposed that Constable Clerk Babu Lal and SSI Bhanwarpal Singh have been transferred. Since then he had not met with them.

33. This witness was cross-examined by the defence on the same day. He deposed that it is wrong to say that he was never posted along with Constable Clerk Babu Lal and SSI Bhanwarpal Singh and that no proceeding of this case had taken place before him. He also denied that as a mere formality he is deposing falsely under pressure.

34. After examining the witnesses of fact and formal witnesses, the accused appellants were examined under Section 313 Cr.P.C. on 14.5.2009 and 18.7.2009. Accused appellant Deshraj was also examined under Section 313 Cr.P.C. on 14.5.2009 and 18.7.2009. Both the appellants had denied the oral and documentary evidence and stated that they are innocent and they have falsely been implicated.

35. Learned trial court after taking into account the entire documentary and oral evidence of the prosecution witnesses arrived at the conclusion that the prosecution has proved its case against the accused appellants, namely, Kaptan Singh and Deshraj who had motive and shared common intention with other accused persons who were armed with deadly weapon had committed ghastly murder of complainant's father Ram Sahay, hence guilty of the offence punishable under Sections 148,302/34 IPC. It was further held that as the prosecution has not proved the case that the appellants had tried to destroy the evidence of murder, the charge of offence under Section 201 IPC is not proved beyond doubt and hence reached to the conclusion that they deserve acquittal under Section 201 IPC.

36. Learned trial court had found that the offence punishable under Sections 302/34 & 148 IPC is proved to the hilt , hence they were convicted for life imprisonment with a fine of Rs.15,000/- and three years rigorous imprisonment and both the sentences were directed to run concurrently and in case of default, further simple imprisonment of six months.

37. We have heard S/Sri Rajrshi Gupta, Rizwan Ahmad and Rajeev Kumar, learned counsel appearing on behalf of appellants Deshraj and Kaptan Singh in both the abovementioned connected appeals and learned A.G.A. Shri Ashwini Prakash Tripathi appearing on behalf of the State and have gone through the record.

38. Learned counsel Shri Rajrshi Gupta has also filed written submission in

support of his arguments advanced on behalf of the appellants, namely, Kaptan Singh and Deshraj.

39. Learned counsel for the appellants has vehemently argued that the FIR lodged against the appellants and other accused persons with an elaborate narration of previous individual enmity of the first informant with different accused persons which gives rise of suspicion that the FIR has been lodged after due deliberation that too with so promptitude. Not only this, the FIR has been lodged at Kayamganj within 2 hours and 20 minutes of the alleged incident which is about 4 Km. from the police station. It was unnatural on the part of the first informant who is the son of the deceased Ram Sahay to narrate the previous history with regard to the dispute and cases pending between the parties in place of narrating actual incident with respect to killing of his father. It is also very unusual on the part of the police to mention the sections of IPC in the chik FIR which are in variance with the sections mentioned in the inquest report of the deceased. This gives reasonable inference that initially the panchayatnama was done by mentioning sections 302/201 IPC and after the FIR was lodged nominating more than five persons by adding Sections 147,148,149 IPC which was subsequently added. The last page of the panchayatnama of the deceased in the list of documents which were sent to the mortuary enclosed with the report the FIR is mentioned to contain one page and thereafter by interpolating "2" in place of 1 has been mentioned which shows that another FIR was registered under Sections 302 & 201 IPC and subsequently, it was suppressed by the prosecution by introducing the FIR named different person as accused with whom the first informant was inimical. Hence it can very well be said that the FIR was ante-timed and anti-dated which has been lodged by suppressing the genesis of the occurrence. The appellants have been implicated on account of previous enmity merely on suspicion by the first informant.

40. Learned counsel has made further submission that the cases which have been mentioned in the FIR showing previous enmity with the accused appellants, other accused persons with the deceased or with the family of first informant but neither any case crime number or exact date of alleged incident have been mentioned nor any evidence has come forth during trial. The motive has not been established by the prosecution against the accused appellants. In some cases family of the first informant were accused in which appellants and other accused persons were witnesses, as such there was motive to the first informant to falsely implicate the accused appellants and other accused persons in the present case. There is every chance of false implication of the accused appellants, namely, Kaptan Singh and his brother Deshraj. In a case of murder of Ram Naresh, the brother of the first informant Tahar Singh was in jail and was convicted in which the appellant Kaptan Singh was also a witness. Similarly, the complainant's father Ram Sahay, the deceased was an accused in the murder of Nahar Singh who was real brother of co-accused Atar Singh (since deceased), Sughar Singh and Nawab Singh. Hence this might have given motive to the first informant to falsely implicate those persons, namely, Atar Singh (since deceased), Sughar Singh and Nawab Singh in the murder of Ram Sahay.

41. Learned counsel has further submitted that the manner in which the incident has been described in the FIR is

contrary to the ocular testimony, medical evidence and the site plan. It has been disclosed in the FIR that the P.W-1 Bahaar Singh and P.W-2 Brijendra Singh had witnessed the incident. It was narrated that all the accused persons armed with different firearm weapons from north side came to the house of the deceased Ram Sahay, out of whom three accused persons, Atar Singh (since deceased), Mansha Ram and Kaptan Singh, the present appellant started firing. The fire hit to the deceased when he was sitting at the platform and he made an effort to enter into the baithak wherein three other accused persons, namely, Sughar Singh, Phulwari and Nawab Singh had entered and made fire therein. The postmortem report prepared by the Doctor gives narration of four gun shots wound found on the person of the deceased and all the injuries had wadding and tikli of the cartridges lodged in the body and according to Medico Legal and Ballistic finding, it is clear indicative of the fact that the firearm weapon shots were made as a contact shot which belies the ocular version stated by the two witnesses that the firearm wound was sustained by the deceased while he was sitting on his chabootra from a distance of 3-4 ft. As such it creates serious shadow of doubt on the veracity and truthfulness of the ocular testimony of the prosecution witnesses. The dimension of injury nos.1, 2 & 3 has been recorded by the Doctor who had conducted the autopsy of the deceased as 3cm x 2.5cm which further goes to show that these three wounds being contact shots were made by single fire weapon. Further more it is alleged that Ram Sahay was done to death and was dragged about a distance of 50-60 mtr. in an open land in an attempt to hide his dead body which was set to fire under the leaf and wood. When the person has already been killed by the accused persons who were armed with deadly weapon there was no reason to drag him in open place to hide in the presence of the son and wife of the deceased and also other relatives and the P.W-1 had deposed that he was standing 20-25 meter away from the place of incident. It is highly improbable that the accused persons had not caused any harm to him or any other witnesses. During the entire episode no person had made any effort to utter any word or try to stop the accused persons from making any indiscriminate firing and if they were apprehending of any harm to themselves they did not even fled away from the place of incident. This unusual or unreasonable conduct especially on the part of the son of the deceased who is said to be present during entire episode does not pass the test of commonsense and reasonableness or natural human conduct and hence creates doubt about the presence of the witnesses and the veracity of their testimony regarding incident.

42. The Doctor has also opined while conducting postmortem of the deceased that the incident could have taken place during night hours i.e. about 11 P.M., hence the incident could have been carried out in the dark night and no person actually seen the incident. which has been suppressed by the prosecution. When on the next day of the incident, the dead body of the deceased was discovered from the place where it was hidden, prosecution story has been concocted with a view to falsely implicate the persons against whom, the first informant was inimical.

43. The site plan was prepared by the investigating officer SSI K.L. Verma who has not been produced by the prosecution as a witness. The site plan and the memo of recovery of blood from the place of

incident prepared by the investigating officer are highly contentious document worthy of no credence and unreliable in view of the fact that the investigating officer was not produced by the prosecution to give an opportunity to the defence to cross-examine him on material points.

44. Similarly, the two witnesses of recovery, namely, Soney Lal and Sahab Singh were not produced by the prosecution. In the recovery memo of blood it is mentioned that blood stained earth and plain earth were recovered from jaiwaqua place of incident without specifying as to from which place, the said recovery of blood stained and plain earth have been made i.e. whether from baithak or from chabootra or the place where the dead body was dragged for a distance of about 60 meters or the place where the dead body was found in hiding. The testimony of P.W-1 and P.W-2 shows that there was blood at the baithak where the deceased fell down after receiving shot on the cot. The blood was also found on the cot where he was sitting, but the site plan only mentioned blood inside baithak and mark of blood as a result of dragging in the site plan which goes to show that the prosecution is unable to point out the place from where the blood was actually collected. Due to non-examination of the investigating officer or the witnesses of the recovery memos to clarify site plan and the recovery memos, such contentious document are unworthy to place any reliance particularly that when the defence has no opportunity to cross-examine the investigating officer, who was not produced during the course of trial. The examination of the prosecution witnesses of fact alone cannot be made basis to accept that the prosecution has established its case beyond reasonable doubt.

45. According to the prosecution case, all the accused persons named in the FIR came together and had killed the deceased (Ram Sahay). There are two sets of accused persons who are not inter se related one set of accused persons, namely, Nawab Singh, Atar Singh (since deceased) and Sughar Singh who are real brothers and another set Phulwari and Mansha Ram. Hence Kaptan Singh and Deshraj have no concern with the other two sets of accused persons. The prosecution has utterly failed to prove that two separate sets of people had come with common object and intention to carry out the said crime. Individually the informant might have separate reason against each sets of accused persons, but to take revenge he had nominated his detractors in the present case. Except this nothing has been elicited by the prosecution that all the heterogeneous element of accused persons came together on the fateful day to carry the incident against the deceased.

46. P.W-1 who is the son of the deceased is an interested and partisan witness and had sufficient reason to falsely implicated the appellants along with other accused persons. There are material contradiction and improvement in his deposition from his previous statement recorded under Section 161 Cr.P.C. Hence the learned trial court has committed manifest error in ignoring the material contradiction. The evidence of the prosecution witnesses is also in contradiction with the medical evidence which does not pass the test of reasonableness and ordinary prudence to rely upon the entire story of firing and dragging of the dead body and an attempt to destroy by putting on fire and concealing it under the leaves and wood in an open place. Furthermore the conduct of the P.W-1 during the entire episode from the evidence on record that he was present at the time of alleged occurrence. He alleged himself to be standing at about 20-25 meters from the place of alleged assault of his father and during the entire episode he

did not raise single hue and cry. Even he did not make any effort himself by fleeing away or by calling person of the vicinity or by the neighbours to make an attempt to save his father. The reason for which the assailant could have attacked upon the deceased when P.W-1 was standing in front of the assailant they left the place without harming him or any one. In the statement of P.W-1 it has not been mentioned by him that Atar Singh, Mansha Ram and Kaptan Singh had fired upon his father in a close contact which also goes to show that no one was present at the time of incident who had seen the assailants firing at the deceased.

47. Learned counsel has further pointed out that there was no recovery of weapon or incriminating article from the accused persons also creates doubt about their presence at the time of incident to connect them with the crime. The circumstance also points out towards the innocence and false implication of the accused persons in the present case due to previous enmity as the appellant Kaptan Singh was a witness in the case of murder of Ram Naresh and the appellant Deshraj who happens to be the brother of Kaptan Singh have also been falsely implicated along with other accused persons.

48. Learned counsel for the appellants has further argued that the statement of P.W-2 C.N. Bhalla is not reliable as he did not know that wadding will enter into the body or not, if firing caused from a distance of less than 4 ft. He has also deposed that there is no difference between tikli and wadding, hence his statement cannot be accepted as unless the fire is shot in contact of the body wadding cannot enter into the body. The Doctor has admitted that dimension of injury nos.1, 2 & 3 is same which goes to show that all the injuries were caused by same person by using single weapon. The blackening, tattooing and scorching around wounds were not found while conducting autopsy. The Doctor has also deposed that injury nos.1, 2 & 3 may be caused by one or more than one firearm which may be caused by several weapons depending upon the distance, thus it is not ascertainable as to whose fire was hit to the various parts of the deceased.

49. It is further submitted that in view of the contradiction between oral evidence, medical evidence and delay in recording the statement by the investigating officer, non-availability of proper site plan and in the absence of any ballistic expert with regard to the fire, the ocular testimony makes the entire testimony improbable. This is a case where there are material exaggerations and contradictions, which raises reasonable doubt that the appellants were not involved in the commission of offence.

50. Learned counsel while relying upon in the case of Mahavir Singh v. State of Madhya Pradesh, reported in (2016) 1 SCC (Cri.) 45 has submitted that the Hon'ble Apex Court relying upon the decision of Abdul Sayeed v. State of M.P. [Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 held that where the medical evidence goes far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

51. Further relying upon the judgment of this Court in Criminal Appeal No.4623 of 2011 (Rameshwar Vs. State of U.P.) connected with Criminal Appeal No.2941 of 2012 (Vinod and others Vs. State of

U.P.) decided on 13.8.2019, learned counsel has submitted that in the said case two persons were armed with gun; one was armed with shotgun and another was armed with axe. On the exhortation of one accused who was armed with axe that the deceased would not be spared they fired upon the brother of the complainant at about 6.30 P.M. on the fateful day, of which the FIR was registered on 17.2.2006 at 8.15 hours. The deceased was done to death by firing. They had fired upon the complainant's brother who died on the spot. The accused persons were acquitted as the prosecution has failed to prove the motive for the crime.There was delay in recording the statement of the witnesses under Section 161 Cr.P.C. Some of the witnesses introduced as an eyewitness after 8 months by P.W-8 and 2 who reached at the spot when nobody was there. While considering the pros & cons, the accused persons were acquitted by the co-ordinate Bench of this Court.

52. Lastly, it has been argued by the learned counsel for the appellants that the prosecution suffers from fatal error and omissions and as such it cannot be said that the prosecution has proved its case beyond reasonable doubt against all the accused persons including the appellants. Looking into the evidence in its entirety, there is reasonable doubt about the involvement of the accused appellants along with other accused. Learned counsel for the appellants has laid stress that the trial court only relying upon the ocular testimony of highly partisan witness had erred in arriving at the conclusion that the accused appellants had common intention to kill Ram Sahay and convicted them for the offence under Sections 148,302/34 IPC for maximum sentence of life imprisonment hence the appellants are entitled to be acquitted of the charge mentioned hereinabove.

53. Per contra, leaned A.G.A. Shri Ashwini Prakash Tripathi appearing for the State has refuted the submissions advanced by the learned counsel for the appellants while supporting the findings recorded by the learned trial court. He has submitted that both the appellants along with other accused persons, namely, Atar Singh, Sughar Singh, Nawab Singh, Phulwari and Mansha Ram have been named in the FIR, in respect of the incident, by the son of the deceased Bahaar Singh who has also been examined as P.W-1. On account of previous enmity, which has already been divulged in the FIR in great detail, the appellants and other accused persons were bearing grudge with the father of the deceased, Ram Sahay. On the fateful day on 18.5.1985 at about 4.30 P.M. all the accused persons came armed with lethal weapon and fired with their respective firearms without giving any opportunity to Ram Sahay who was sitting at the chabootra on a cot he received firearm injuries in order to save himself, he ran towards baithak few paces away from the cot, when again received firearm injury over his head Ram Sahay fell down inside baithak. It is the specific case of the prosecution that three accused persons, namely, Atar Singh (since deceased), Mansha Ram and Kaptan Singh fired firstly when Ram Sahay was sitting at the chabootra and thereafter three other accused persons, namely, Phulwari, Nawab Singh and Sughar Singh fired when he fell down inside baithak. The incident was witnessed by the complainant and his distant relative Brijendra Singh who was examined as P.W-2. Their statement does not find any material contradiction with respect to firing upon Ram Sahay, who was not only murdered by firing he was further mercilessly dragged 40-50 meter away by them. Atar Singh and co-accused Deshraj had exhorted and instigated that Ram

Sahay be set on fire and they had lit the fire. In committing such a ghastly incident by all the accused persons, the complainant and other persons who are witnessing the incident could not muster courage to move forward to save his father as they were unarmed.

54. To prop up his submission, learned A.G.A. has relied upon the decision of Hon'ble the Apex Court passed in Criminal Appeal No.1479 of 2015 (Moti Ram Padu Joshi & others Vs. State of Maharashtra) wherein the Apex Court relied upon **Rana Pratap; Vs. State of Haryana** *(1983) 3 SCC 327* and observed in reference to reaction of a witness of an occurrence, as under:

"Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

55. In the present case Brijendra Singh who is the relative of P.W-1 was not examined due to the reason he was an eyewitness and who supported P.W-1 in connected trial. Yet it is being tried to create doubt about his presence at the place of incident. The credibility of witness would not be effected merely on the score of relationship. In the case of Mohabbat & Ors vs State Of M.P (2009) 13 SCC 630 the Hon'ble Apex Court has held as under:

"12. Merely because the eyewitnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering the prosecution version."

13. "5. ... Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

.....

56. To the same effect are the decisions in State of Punjab v. Jagir Singh [(1974) 3 SCC 277 : 1973 SCC (Cri) 886] , Lehna v. State of Haryana [(2002) 3 SCC 76 : 2002 SCC (Cri) 526] (SCC pp. 81-82, paras 5-9) and Gangadhar Behera v.State of Orissa [(2002) 8 SCC 381 : 2003 SCC (Cri) 32] ."

57. The above position was also highlighted in Babulal Bhagwan Khandare v. State of Maharashtra [(2005) 10 SCC

404 : 2005 SCC (Cri) 1553] , Salim Sahab v. State of M.P. [(2007) 1 SCC 699 : (2007) 1 SCC (Cri) 425] and Sonelal v. State of M.P.[(2008) 14 SCC 692 : (2009) 3 SCC (Cri) 417] (SCC pp. 695-97, paras 12-13).

58. In view of the catena of decisions it would be unreasonable that the evidence given by related witness should be discarded. It is further submitted that all the accused persons have been specifically named in the FIR and the name of eyewitnesses has also been mentioned in the FIR. Merely because all the witnesses have not been examined would not be fatal to the prosecution as in this particular case the trial proceeding remained pending for a long period and several witnesses who were mentioned in the FIR had died and others refused to depose on account of the pressure of the accused persons they were discharged, hence the evidence of witnesses of fact cannot be termed as highly partisan and interested witnesses or chance witnesses. On the contrary their evidence is consistent and credit worthy.

59. Learned A.G.A. has further relied upon the decision of this Court passed in Criminal Appeal No.668 of 2002 (Abhilakh Singh Vs. State of U.P.) and contended that in the aforesaid case, the investigating officer was not examined and it was the case of the defence that since the investigating officer has not been examined, it has caused great prejudice to the defence. While relying upon the various decisions of the Hon'ble Apex Court in the said case it was observed that it is always desirable for the prosecution to examine the IO. Non-examination of the Investigating Officer does not in any way create any dent in the prosecution case much less affect the credibility of the otherwise trustworthy testimony of the eye witnesses. If the presence of the eye-witnesses on the spot is established and the guilt of the accused is also proved by their trustworthy testimony, non-examination of I.O. would not be fatal to the case of prosecution. In that case despite the two investigating officers were retired the trial court has taken all efforts to procure their attendance but they could not be examined.

60. In the present case also in the absence of the examination of investigating officer as he had retired, the trial court has proceeded to decide the case on the basis of reliable evidence available on record.

61. The FIR was promptly lodged within two hours of the incident. There was strong motive for the accused persons to kill Ram Sahay which has already been given in detail in the FIR. There is no reason for the P.W.-1 being the son of the deceased to falsely implicate the innocent persons leaving behind the actual culprit. The incident had taken place in broad-day-light in a dare devil manner. The charge sheet was submitted in two parts as the accused persons, namely, Kaptan Singh and Deshraj were absconding against whom the process u/S 82/83 Cr.P.C. was initiated. Ultimately the charge sheet was submitted against Atar Singh (since deceased), Nawab Singh and Sughar Singh on 1.6.1985 who had surrendered on 30.6.1985 and Kaptan Singh and Deshraj surrendered on 18.6.1985 who were absconding against whom proceeding u/S 82/83 Cr.P.C. were initiated against them. Thereafter the case was successively adjourned for a long period of ten years when the charges were framed against five accused persons on 30.6.1990 and against the present appellants Kaptan Singh and Deshraj on 29.9.1995. Two separate trials were proceeded as Sessions Trial No.327 of 1989

& Sessions Trial No.129 of 1995. P.W-1 was firstly examined on 17.1.2001 and thereafter on 20.5.2004 again in the aforesaid trials separately.

62. Thus minor discrepancies are bound to occur in the statement of the witnesses due to lapse of period. The testimony of P.W-1 and P.W-2 in the present case is consistent which is fully corroborated by the postmortem report, according to which firing had taken place from close range and internal parts of the body were extensively damage muscles and burnt bones were visible and on some places body was highly scorched. No blackening and tattooing found by the Doctor as the body was burnt. The site plan also shows that the blood was recovered from the platform where Ram Sahay was initially sitting on the cot and when he trying to save himself he was fired at from a very close range which hit him over his head and thereafter he fell down inside baithak. This vivid description given by the two witnesses has proved beyond doubt that Ram Sahay was killed by the accused appellants, who died on the spot on account of indiscriminate firing by Atar Singh, Kaptan Singh and Mansha Ram. It could be difficult to say with certainty as to whose firearm hit the deceased first, but the nature of injuries received by the deceased clearly shows that the fire was made by DBBL Gun as 78 tikli were recovered through the shots which were recovered from different parts of the deceased's body.

63. The Doctor had recovered all the wadding tikli from the body which was sealed by him. The investigating officer had also recovered 8 empty cartridges of 315 bore from the place of incident and inside baithak which shows that all the weapons were used in firing indiscriminately. As such the learned trial court has rightly held that all the accused persons who were armed with deadly weapon arrived at the spot and had fired with a common object to kill Ram Sahay.

64. Accused Sughar Singh whose trial was separated as he had raised his plea of being juvenile at the fag end of the trial and was later on acquitted. The prosecution has proved the guilt of the other accused persons to the hilt. Hence the surviving accused appellants, namely, Nawab Singh, Mansha Ram and Phulwari along with the present appellants Kaptan Singh and Deshraj have rightly been convicted by the learned trial court. Their conviction deserves to be maintained.

65. We have given anxious consideration to the arguments advanced by the learned counsel for the appellants and the learned A.G.A.

66. Every effort has been made to doubt about the presence of P.W-1 Bahaar Singh at the time of incident. In the statement recorded under Section 313 Cr.P.C. the appellant Kaptan Singh deposed that the complainant was not present at the time of incident as he had lodged the report on the next day. Plea of alibi must be proved with absolute certainty so as to exclude the presence of person concerned from the place of occurrence.

67. It has been contended that the appellants had no immediate motive to commit the murder of Ram Sahay even the suggestions made by the prosecution that wife of appellant Kaptan Singh had won the election of Pradhan against Ram Sahay prior to two years of the alleged incident, remained unsubstantiated. Where the positive evidence against the accused is

clear and cogent, omission of motive is of no importance. It is always an impossible task for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended as held in this connection by the Hon'ble Apex Court in the case of State of Himanchal Pradesh Vs. Jeet Singh 1999 (38) ACC 50 Supreme Court observing that "No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution."

68. On the bare perusal of the First Information Report lodged against the accused persons, namely, Atar Singh, Mansha Ram, Phuwari, Nawab Singh, Deshraj and Kaptan Singh on 18.5.1985 at 6 P.M. relating to the incident occurred at 4.30 P.M. on the same day, the complainant Bahaar Singh who is the son of the deceased Ram Sahay has mentioned about the previous cases pending between the parties to show their animosity with the deceased which prompted them to reach at the spot together in a pre-planned manner to execute their evil design.

69. In our opinion, there was nothing unusual on the part of the complainant to narrate the previous animosity and ill-will of the accused persons who were involved individually and collectively in the cases mentioned therein.

70. It was argued that no detail of any case has been mentioned in the FIR as to when such crime had taken place or what was the case crime number and what was the sessions trial number. It was highly impossible for a person to give such details soon after an incident which had occurred suddenly and executed in a barbarous manner, not only shooting the deceased with their respective firearm weapons by the accused appellants, he was dragged by them in a most diabolic manner in broad-day-light up to 50-60 meters away from the actual place of incident which had occurred in front of house of the deceased and was kept on the heap of wood and was set on fire in order to efface the dead body. The entire episode which had occurred in a few minutes it could not have been possible for the son of the deceased who had lodged the FIR to depose the case crime number or the sessions trial number or the dates of incident in which the accused appellants were involved jointly or individually. However, he has broadly narrated the reasons for committing the murder of his father by the accused appellants. In these circumstances, it cannot be said that the FIR has been registered after due deliberation developing false story on the basis of misconceived facts. Nothing has occurred in the cross-examination of P.W-1 to discredit this witness as untrustworthy.

71. It has also been argued that the FIR was lodged after conducting the inquest of the deceased as the crime number as well as Sections of IPC have not been mentioned in sequence.

72. We are again not impressed by such arguments of the learned counsel for the appellants as the FIR has promptly been lodged, of which detail account has been given in the FIR and on this point P.W-1 Bahaar Singh had also articulated in examination-in-chief in the witness box has narrated and has also with stood lengthy

cross-examination. It has also been specifically mentioned by the Inspector S.S. Yadav, who was examined as P.W-4 that the police personnel arrived on the spot on 18.5.1985 but due to darkness, the inquest was started on 19.5.1985. It started at 6 A.M. on the next day and prepared in three hours and concluded at about 9 A.M. The inquest report shows that there is no addition or alternation in the section mentioned in it which has been prepared on 19.5.1985 as it could not be prepared on 18.5.1985 due to darkness. It was prepared in the same hand writing by the same person. The other police personnel who had accompanied after lodging the FIR has also been mentioned in the inquest memo. Hence it cannot be said that the FIR was ante-timed. Mere description of the Sections 302,201 along with Sections 147,148,149 IPC in particular manner , it cannot be said that the said FIR was lodged after great delay or ante-timed as it was in existence when inquest was conducted.

73. Learned counsel has pointed out infirmity in the statement of the complainant P.W-1 Bahaar Singh to doubt about his presence that if he claims himself to be the eyewitness of the incident and the place from where the first informant seen the incident but it has not been mentioned in the FIR nor it has been mentioned that the mother of the complainant had also seen the incident which has been developed during trial. A witness's testimony need not be disbelieved only because certain facts did not find mention in the FIR. Suffice is to say that an FIR is not an encyclopedia of the case.

74. There is no material omission in the statement of the prosecution witnesses as regards the firing by the appellants or other accused persons on the deceased. It has to be borne in mind that some discrepancies in the ocular account of a witness, unless they are vital, cannot per se affect the credibility of the evidence of the witness. Unless the contradictions are material, the same cannot be used to jettison the evidence in its entirety. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. Merely because there is inconsistency in the evidence in this regard, it is not sufficient to impair the credibility of the witness. It is only when the discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court would be justified in discarding his evidence.

75. Minor discrepancy in the statement of the witnesses is not necessarily a false evidence. Such evidence is subject to close scrutiny. No evidence should be at once discarded simply because it came from the interested parties like P.W-1 Bahaar Singh being the son of the deceased Ram Sahay whose evidence cannot be discarded which is natural and trustworthy.

76. Even in the absence of actual assault of members by the unlawful assembly they can be held vicariously liable as there was common object to commit a crime. Where parties go with a common purpose to execute a common intention, each and everyone becomes responsible for the act of each and every other in execution and furtherance of their common object, as the purpose is common so must be the responsibility

77. The prosecution cannot perform miracles and it is not always possible to adduce clinching evidence as to the common bond between or amongst culprits

of a particular crime. The prosecution case could not suffer a setback simply because all accused are not related to each other.

78. **In Nathuni Yadav and others Vs. State of Bihar; 1997 (34) ACC 576 Supreme Court** it was held that motive for doing criminal act is very difficult area for prosecution as one cannot see into the mind of another.

79. The P.W-1 and another witness Brijendra Singh who was examined in connected sessions trial have stated that they had witnessed the incident together from the *gher*. Merely because P.W-1 has not explained that he was coming along with P.W-2 from the field of muskmelon, it can not be presumed that his presence is doubtful as the same was also not put during the course of cross-examination from him that at that time from where he was coming. Their presence has been amply shown in the site plan prepared by the investigating officer which has been indicated as southern of *gher* of Soney Lal. They were standing at a distance of 20-22 ft when the accused persons reached at the chabootra (platform) where the deceased Ram Sahay was sitting on a cot facing towards east. The cot was at a distance of 3-4 ft from the baithak. The accused Atar Singh and Mansha Ram having armed with rifle and Kaptan Singh having DBBL gun fired at Ram Sahay, the father of the P.W-1 when they reached on the platform. As soon as his father had seen them he at once got up to run inside baithak at that time Atar Singh, Mansha Ram and Kaptan Singh had fired from their respective firearm. Then another shot was fired upon him which hit to his father and he fell down inside his baithak. Exact mathematical calculation with respect to distance between the assailants and the deceased would not be possible to arrive at the conclusion that the presence of witnesses is doubtful. When the accused persons arrived near the cot then the distance from which they had fired would be in close contact with the body of the deceased because of the length of the barrel and hence there was no occasion that when the shot was made aiming towards from close distance the wads would fall down and would not pierce in the body rather wads and powder blast had caused laceration penetrating in the organs of the body. The shape of the abrasion of the entrance wounds also varies either circular or oval according to the angle the bullet strike at the body. The question regarding the direction of fire where from right to left or to back, it is necessary to ascertain the position of the victim at the time of the discharge of the bullet when the wound of entrance is present wad would lodge in the body. Wadding pieces, tikli and shots were found lodged in the body. No blackening or tattooing detected by the Doctor as the body was burn 4-6 degree.

80. The injury was hit to the deceased on his forehead when he turned around he made an attempt to save himself by entering into baithak. The Doctor had found two wadding pieces and five tiklis from brain; one wadding and two tiklis from chest and one wad and four tiklis from abdomen. Besides this, 78 small pellets were found from brain, abdomen and chest. The Doctor has only given an opinion with regard to entering of the wadding into the body and had given approximate distance of firing from less than 4 ft. The wadding pieces which had entered into the body of the deceased clearly goes to show that the fire was made from very close range. It's barrel may or may not be touching the body of the victim

while firing indiscriminately at the deceased. It is not necessary that the fire made by all the three accused persons would have hit to the deceased. The nature of injury goes to show that firing made by rifle might have deflected owing to the fact that it was not fired at an immobile object. Some fire missed hence empty cartridges were found at platform as well as inside the baithak.

81. From the postmortem report it is quite evident that the first shot made from behind at the deceased as he tried to stood up who was sitting on the cot which is injury no.3 as it's direction is from back to front. Injury nos.1 & 2 which were on front of chest and abdomen when the deceased had turned around and his face was towards baithak and the assailants were standing facing towards east the direction is front to back. Injury no.4 was on his head hence direction was from right to left when the deceased tried to ran inside baithak the assailants Atar Singh, Kaptan Singh and Mansha Ram were on his right side near the cot. The description of the abovementioned accused persons, when they fired, has been narrated by P.W-1 which fully supports the injuries described in the postmortem report.

82. It has been pointed out by the learned counsel for the appellants that it is alleged that Sughar Singh, Phulwari and Nawab Singh entered into the baithak after the deceased fell down and they had also fired, and at the same time, Atar Singh, Mansha Ram and Kaptan Singh were firing indiscriminately outside to unleash the reign of terror. Though Kaptan Singh did not enter into the baithak but his presence along with other accused persons making fire indiscriminately cannot be doubted.

83. The Doctor has also opined that the dimension of injury nos.1, 2 & 3 were the same meaning thereby it was fired by the same weapon by one person. Inside the body, one wadding piece was recovered from chest and one from abdomen, four tiklis from abdomen and two from chest and 78 small pellets were found from brain, abdomen and chest. The Doctor has also opined that injury may be caused by several weapons depending upon the distance.

84. The fact remains that as the body was burnt by the accused persons it was not possible to the Doctor to find blackening, tattooing and scorching. The site plan indicates that after killing the deceased at platform his dead body was dragged from the baithak by the accused persons and was taken to an open land 50 yards away. The trail of blood was found by the investigating officer which has been specifically mentioned in the site plan in red ink, which further corroborates the testimony of the P.W-1 Bahaar Singh and P.W-2 Brijendra Singh showing that the victim Ram Sahay was killed by firing and his dead body was mercilessly dragged by them and was set ablaze. Hence the ocular testimony has greater evidentiary value which cannot be disbelieved. The case cited by the learned counsel **Mahavir Singh (Supra)** is based upon different facts and circumstances of the case.

85. In Rameshwar (Supra) relied upon by the learned counsel for the appellants, the Hon'ble Apex Court has set aside the judgment of the High Court whereby the High Court has reversed the finding recorded by the trial court and convicted the accused persons and the appeal was allowed setting at liberty the accused appellants, as such the case cited by the

learned counsel would not apply under the circumstances of the present case.

86. In the present case the incident had taken place in the broad-day-light when all the accused persons in a pre-planned manner emerged out at the place of incident and started firing aiming at the deceased, out of them, two accused persons, namely, Atar Singh and Mansha Ram were armed with rifle and Kaptan Singh was armed with DBBL Gun which was specifically narrated by the complainant in the FIR and in his statement recorded before the trial court. Hence we find that there is no material infirmity in the ocular testimony with the medical evidence and the site plan. The plea of Kaptan Singh in statement under Section 313 Cr.P.C. that P.W-1 was not present at the time of incident cannot be accepted as it has to be proved with absolute certainty so as to exclude his presence anywhere else from the place of incident.

87. Accused persons, namely, Atar Singh, Nawab Singh, Sughar Singh belonged to one family & Mansha Ram had surrendered on 29.5.1985 while Phulwari had surrendered on 30.6.1985. However, Kaptan Singh and Deshraj absconded from their houses during the raid conducted by the investigating officer and his team at their houses. Neither they were found in the house nor any recovery of weapon could have been made. Thereafter Kaptan Singh and Deshraj had surrendered on 5.2.1986 and 19.2.1986 respectively and were sent to jail when the incident was of 18.5.1985.

88. There is yet another material aspect of the case with respect to the post trial conduct of the accused appellants when they were held guilty of the crime and convicted for life imprisonment. All the accused persons preferred appeals before this Court with prayer for consideration of bail during pendency of the appeal u/S 389(i) Cr.P.C. It was argued on behalf of Atar Singh, Mansha Ram and Phulwari that they were alleged to be armed with rifle but no rifle injury appears to have been recorded by the Doctor and in addition to this injury nos.3 & 4 had been fired from a very close range, but wads were recovered from chest and abdomen of the deceased which shows that the accused who were allegedly armed with rifle have not fired a shot in other words Ram Sahay died due to gun shot injuries.

89. Considering the entire facts and circumstances of the case, the co-ordinate Bench of this Court rejected the bail application of all the accused appellants by order dated 19.7.2012 and granted bail to Deshraj as there was no allegation of firing against him. Later on second bail application was moved on behalf of Kaptan Singh. It was argued that the incident had taken place in two parts. There are seven accused persons involved in the present case, out of them, accused Deshraj whose shot did not hit the deceased was granted bail. It was also argued that initially Ram Sahay, the deceased was sitting on a chabootra when all the accused shot at him with their respective weapons. Thereafter Ram Sahay, the deceased ran inside the house to save himself where he was shot dead by co-accused Sughar Singh, who was armed with gun, Nawab Singh, who was armed with countrymade pistol and Phulwari who was armed with rifle. So far as appellant (Kaptan Singh) is concerned though he was armed with gun but he did not enter into the house of the deceased, thus Ram Sahay, the deceased died on account of the injuries caused by rifle as the dimensions of the injuries are same.

The appellant was on bail during trial and had not misused the liberty of bail and that he is in jail since 21.7.2009.

90. On the aforesaid submission on the part of the appellant Kaptan Singh, he obtained bail by clearly shifting responsibility of firing by Sughar Singh who was armed with gun and alleging that Ram Sahay, the deceased died on account of firing inside baithak and Nawab Singh and Phulwari caused injury with rifle as the dimensions of the injujry are same. The arguments which were advanced on behalf of the accused appellants initially that there was no shot of fire with rifle and Ram Sahay, the deceased died due to firing made by DBBL Gun. The appellant Kaptan Singh was having DBBL Gun and the postmortem report clearly corroborates the prosecution that cause of death was the result of firing with gun when the deceased was on his chabootra. Thus only for the purpose of somehow getting bail one set of accused have shifted burden upon others for causing injury with gun and vice versa. But the fact remains that they had shared common intention and the firing had taken place and Ram Sahay, the deceased was done to death on the fateful day. It would be very difficult to fix liability upon one person only i.e. Sughar Singh in the entire episode who had pleaded juvenility and acquitted by the court below. When all of them had come jointly with prior meeting of mind to eliminate Ram Sahay then whose shot of fire was fatal cannot be deciphered. Dragging of dead body from baithak to the field of Sahab Singh where he was put on fire further shows that all the accused persons were having common intention and involved in dragging the dead body as such the contention on behalf of other accused appellants has no substance that they had not fired at the deceased who had suffered homicidal death and the injuries sustained by him were all ante-mortem in nature as a result of firing with gun. It is common experience that in the confusion of the moment the witnesses are prone to make some error when they were seized by some fear.

91. It has also been argued that according to the site plan, the blood was found at two places; one on the chabootra (platform) and another inside baithak of the deceased but while preparing the recovery memo of blood stained earth, it has not been specified from which place the blood stained earth was collected and has been mentioned that it was found from the place as *jaiwaqua.*

92. Failure to mention the exact place from where the blood was collected by the investigating officer cannot be doubted about the place of incident as it has been mentioned in the site plan that the same has been found from place B which has been shown as platform where the deceased was firstly fired at by the accused persons. Thus the argument of the learned counsel for the appellants is unrealistic and far-fetched and the Court cannot draw any inference for such imaginative doubt.

93. It is further argued that misfired cartridges and fired cartridges were not sent to the Ballistic Expert, Forensic Science Laboratory and the firearm weapon used by the appellants were never seized.

94. The said lapses on the part of the investigating officer would not necessarily proved fatal to the case of the prosecution where the direct testimony of the two prosecution witnesses is on record.

95. Learned counsel for the appellants submitted that the investigating officer was not examined in this case which has caused

serious prejudice to the accused persons. Non-examination of the investigating officer has deprived them to examine him on material points.

96. We see no substance as the investigating officer was not an eyewitness.

97. In **Ram Ghulam Chaudhary Vs. State of Bihar;** 2001 (43) ACC 929 the Hon'ble Apex Court in paras 25, 26 & 27 has held as under:

"25. In the case of Ram Dev v. State of U.P, reported in [1995] Supp. 1 SCC 547, this Court has held that it is always desirable for the prosecution to examine the Investigating Officer. However, non examination of the Investigation Officer does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye witnesses.

26. In the case of Behari Prasad v. State of Bihar, *reported in [1996] 2 SCC 317, this Court has held that for non examination of the Investigating Officer the prosecution case need not fail. This Court has held that it would not be correct to contend that if the Investigating Officer is not examined the entire case would fail to the ground as the accused were deprived of the opportunity to effectively cross-examine the witnesses and bring out contradictions. It was held that the case of prejudice likely to be suffered must depend upon facts of each case and no universal strait- jacket formula should be laid down that non-examination of Investigating Officer per se vitiate the criminal trial.*

27. In the case of Ambika Prasad v. State (Delhi Admn.), reported in [2000] 2 SCC 646, it was held that the criminal trial is meant for doing justice not just to the accused but also to the victim and the society so that law and order is maintained. It was held that a Judge does not preside over criminal trial merely to see that no innocent man is punished. It was held that a Judge presides over criminal trial also to see that guilty man does not escape. It was held that both are public duties which the Judge has to perform. It was held that it was unfortunate that the Investigating Officer had not stepped into the witness box without any justifiable ground. It was held that this conduct of the Investigating Officer and other hostile witnesses could not be a ground for discarding evidence of P.Ws. 5 and 7 whose presence on the spot was established beyond any reasonable doubt. It was held that non-examination of the Investigating Officer could not be a ground for disbelieving eye witnesses."

98. In the case of **Ram Ghulam Chaudhary (Supra)** the prosecution did not examine the investigating officer, however, all the accused persons were convicted by the trial court which was affirmed by Hon'ble the Apex Court.

99. Learned counsel for the appellant has thus pointed out various infirmities regarding investigation of the case.

100. Such omissions or lapses in the investigation cannot be a ground to discard the prosecution case which is otherwise credible and cogent.

101. In **Nankaunoo Vs. State of U.P.;** 2016(1) SC Cr.R 237 it was held as under:

"Any omission on the part of the investigating officer cannot go against the prosecution case. Story of the prosecution is to be examined dehors such omission by the investigating agency. Otherwise it

would shake the confidence of the people not merely in the law enforcing agency, but also in the administration of justice."

102. In **V.K. Mishra and another Vs. State of Uttrakhand and another;** *2015(2) SC Cr.R* it was held as under:

"The investigating officer is not obliged to anticipate all possible defences and investigate in that angle. In any event any omission on the part of the investigating officer cannot go against the prosecution. The interest of justice demands that such acts or omissions of the investigating officer should not be taken in favour of the accused or otherwise. It would amount to placing a premium upon such omissions."

103. In **Appa Bhai and another Vs. State of Gujarat;** *1988 (25) ACC168 Supreme Court* had emphasised while appreciating the evidence the court should not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. Similarly, the discrepancies which are due to normal error of perception or observation should not be given importance. The so called omission of not mentioning exact portion of the body of deceased where the shot had been fired cannot be said to be the significant omission. The evidence of the two witnesses stands corroborated by the medical evidence which clearly goes to show that several shots were received by the deceased and after firing set on fire to the deceased to erase the evidence. The accused appellants and two others fled away after firing in air creating an atmosphere of terror and fear. The post event conduct of a witness varies from person to person. It cannot be a cast-iron reaction to be followed as a model by every one witnessing such an incident. Different persons would react differently on seeing any serious crime of such a nature and their behaviour and conduct would be different. Therefore, having witnessed a dastardly murdered, it was not unnatural for the son or mother of the deceased to go near to the dead body. Learned trial court was justified in not rejecting the testimony of P.W-1 merely on that score.

104. In the present case where all the accused persons who were armed with firearm weapons emerged from the house of Atar Singh and started firing resulting in death in such a scenario it could not have been possible to meticulously observe all the action of each and every accused. The trial court cannot expect from the witnesses to depose in a parrot like fashion. The overall evidence of the witnesses appears to be untainted. The improvements, if any, made for the first time before the court ,no doubt need, to be eschewed but that does not mean that the entire evidence of the witnesses should be disbelieved only on the said ground.

105. It is well settled proposition of law that the testimony of a witness cannot be discarded in toto merely due to the presence of embellishments or exaggerations. This Court as well as Hon'ble the Apex Court has endorsed the in applicability of the doctrine falsus in uno, falsus in omnibus, which means "false in one things, false in everything". The Doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". The evidence has to be sifted with care. Hardly one comes across a

witness whose evidence does not contain a grain of untruth or at any rate exaggeration or embellishments. But the Court has to separate the grain from the chaff, truth from false. If after considering the whole mass of evidence, a residue of acceptable truth is established by the prosecution beyond any reasonable doubt, the Courts is bound to give effect to the result flowing from it and not to throw it over board on hypothetical and conjectural ground. Minor variations of the evidence will not effect to the root of the matter. Such minor variations need not be given as major contradiction.

106. The prosecution is not obliged to prove its case by leading separate evidence with respect to the common object of all the accused persons. Those factors found by the learned trial court on the available evidence on record, hence we have no reason to ignore the same with regard to the ocular testimony vis-a-vis conflict between the ocular testimony and the medical evidence. It is by now well settled that the medical evidence cannot override the evidence of ocular testimony of the witnesses. If there is a conflict between the ocular testimony and medical evidence naturally the ocular testimony prevails.

107. It has also been argued that very detail account has been given in the FIR with regard to the previous cases but no detail description of the cases have been mentioned in the FIR hence does not prove the immediate motive on the part of the different sets of accused.

108. The description about the enmity has been made in the FIR by the informant without mentioning the details of the criminal cases. The prosecution case cannot be disbelieved only because it did not find mention in detail. We cannot expect from a grief stricken person to give better particulars of the case. The contents of the FIR has given an exhaustive account by the P.W-1, the son of the deceased as such possibility of inventing a story at that juncture trying to implicate all the accused persons is absolutely ruled out. The investigating officer had gathered material of two cases in which the accused persons were involved; one is Case Crime no.301 of 1983 relating to the FIR under Section 307 IPC pending in the court of IInd Additional District Judge as Sessions Trial No.90 of 1984 pertaining to a case filed by Ram Sahay, the deceased against Kaptan Singh, Mansha Ram and Atar Singh (State Vs. Kaptan Singh & others) and another is Case Crime No.300 of 1983, under Section 396 IPC which was against Nakse, Mansha Ram and Atar Singh pending in the court First Additional Chief Judicial Magistrate as Sessions Trial No.229 of 1983 (State Vs. Nakse & others). In spite of cross-examination of prosecution witnesses nothing fragile surfaced in their statement in this regard. Pre and post conduct of all the accused persons while committing crime has left no room of doubt that they had not formed an unlawful assembly sharing common object to eliminate the victim. The court can visualize the common object of the unlawful assembly from the entire evidence on record. Due to prolong continuation of the trial some embellishments in the testimony of the prosecution witnesses has bound to occur. We notice in this case, that there is sufficient evidence to show that barbaric incident had happened on 18.5.1985. It was the appellants who had formed an unlawful assembly with other accused appellants (of the connected Appeal) the common object of which was to use force and violence against the deceased Ram Sahay with deadly weapons and none others who had

committed the crime to satiate their evil design punishable under Section 148 IPC.

109. There is nothing in the cross-examination of P.W.1, the first informant Bahar Singh that his attention was called to that part of his statement recorded u/s 161 Cr.P.C. in which he had omitted either to describe himself as an eyewitness of the incident or to name the place from where he had witnessed the same. We do not find any reason to disbelieve the evidence of P.W.1. Mere inconsistency in evidence is not sufficient to impair the credit of the witness.

110. **Section 145 of The Indian Evidence Act, 1872**

111. Cross-examination as to previous statements in writing.--A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

112. A conjoint reading of the aforesaid provision indicates that any police officer making an investigation under chapter 12 of the Code of Criminal Procedure, 1973 or any police officer making any investigation under this chapter examines any person believed to be acquainted with the facts and circumstances of the case, the police officer may reduce into writing any statement made to him in the course of examination u/s 161 Cr.P.C. and if it is true, he shall make separate entry to record all the statements of such person whose statement he records.

113. Section 162 (1) of Cr.P.C. stipulates that no statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. Proviso to Section 162 (1) of Cr.P.C. mandates that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. Section 162 (2) of Cr.P.C. excludes any statement falling within the provisions of clause 2 of the Indian Evidence Act, 1872 and 27 of that Act from the application of the aforesaid proviso.

114. The object of Section 145 of the Evidence Act is to give a witness a chance of explaining the discrepancy and inconsistency and to clear up the point of ambiguity and dispute.

115. The Hon'ble Apex Court in the case of **Karan Singh & Ors. Vs State of Madhya Pradesh,** *Judgement Today 2003, Suppl. Vol. 2 SC 261,* has held that when a previous statement is to be proved as an

admission, the statement as such should be put to the witness and if the witness denies having given such a statement, it does not amount to any admission and if it is to be proved that he had given such a statement, the attention of the witness must be drawn to that statement. The object behind this provision is to give a witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute.

116. The question of contradicting the evidence and the requirements of compliance in Section 145 of the Evidence Act has been considered by the Apex Court in the case of **Tahsildar Singh and Another Vs The State of Uttar Pradesh,** *1959 SCR Supl. (2) 875.* The Apex Court in the aforesaid case was examining the question as to when an omission in the former statement can be held to be a contradiction and it was also indicated as to how a witness can be contradicted in respect of his former statement by drawing his attention to that portion of the former statement.

117. This question was again considered in the case of **Binay Kumar Singh Vs The State of Bihar,** *1997 Vol. 1 SCC 283.* The Apex Court taking note of the earlier decision in **Bhagwan Singh Vs The State of Punjab,** 1952 AIR 214, explained away the same with the observation that on the facts of that case, there could not be a dispute with the proposition laid down therein. But while elaborating the second limb of Section 145 of the Evidence Act, it was held that if it is intended to contradict a witness, his attention must be called to those part of his writings of his earlier statements which are intended to be used for the purpose of contradicting him. It was further held that if the witness denies having made any statement which is inconsistent with his present stand, his testimony in Court on that score would not be vitiated until cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act.

118. Hence, the procedure prescribed u/s 145 of the Evidence Act if having not been complied, we do not find any reason to discredit the evidence of P.W.1 informant or to hold either that he is not a fully reliable witness or he had not seen the occurrence. The statement of the first informant, P.W-1 stands fully corroborated from the facts deposed by witness Brijendra Singh his examination-in-chief, who was examined as P.W-2 in connected Sessions Trial No.327 of 1989. Thus in view of the legal principles propounded hereinabove by the Apex Court, we are not inclined to reject the evidence of P.W.-1. There is no law which lays down that a conviction cannot be recorded on the basis of the evidence of solitary witness.

119. The purpose of cross-examination is to test the veracity of the statement made by a witness in his examination-in-chief as also to impeach his credit. Not only it is the right of the accused to shake the credit of a witness, but it is also the duty of the court trying an accused to satisfy itself that the witnesses are reliable. It would be dangerous to lay down any hard and fast rule.

120. In our opinion, relevant and material omissions amount to vital contradiction which can be established by cross-examination and confronting the witness with his previous statement. The alleged omissions in the statement of the witnesses to the police could not have made

their evidences in court unreliable with respect to material particular concerning the occurrence or identifying the accused. In the present case, there is ample evidence in the shape of oral testimony of P.W-1 Bahaar Singh who is the son of the deceased and P.W-2 Brijendra Singh examined in connected sessions trial, on the basis of which, the conclusion has rightly been drawn by the learned trial court that the witnesses had in fact seen the accused persons and their devilish act, hence we are in full agreement which does not require any interference.

121. We are of the opinion in a case like the present one the relatives and friends of the deceased would not spare the real culprits and falsely implicate others. We are of the considered view that the relationship is not a factor to affect the credibility of the aforesaid eye witnesses.

122. In the case of **Dalip Singh vs. State of Punjab** *AIR 1953 SC 364,* Hon'ble Apex Court has held as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

123. In the case of **Veer Singh and others vs. State of U.P.,** *(2014) 2 SCC 455,* Hon'ble Apex Court has held as under:-

"Legal system has laid emphasis on value, weight and quality of evidence rather than on quantity multiplicity or plurality of witnesses. It is not the number of witnesses but-quality of their evidence which is important as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. Evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section-134 of the Evidence Act. As a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable."

124. Learned counsel Shri Rajrshi Gupta appearing on behalf of the appellants, namely, Kaptan Singh and Deshraj has made fervent plea on behalf of the appellant Deshraj that his role is distinguishable from the other accused persons who had fired at the deceased. Deshraj has been made an accused as he is the brother of Kaptan Singh.The said plea is clearly untenable that the appellant Deshraj has done nothing with his own hands. The manner in which ghastly murder had taken place, everyone must be taken to have intended the probable and natural result of the combination of the acts

in which the appellant Deshraj had also joined. Appellant Deshraj having armed with gun. Atar Singh (since deceased) and Deshraj had put the fire on the heap of woods of Arhar after the dead body of Ram Sahay dragged from baithak to the field of Sahab Singh. The appellants Deshraj and Atar Singh had exerted to burn the dead body into ashes. It is not necessary that all the persons forming an unlawful assembly must do some overt act. The prosecution is not obliged to prove which specific over act was done by which of the accused. The failure of the prosecution to do so the prosecution case cannot be disbelieved when one person of the unlawful assembly is responsible as a principle for the acts of each and all, merely because he is a member of unlawful assembly overt act and active participation of the accused persons perpetuating the crime, indicates the common intention of the unlawful assembly fastening them vicariously with the requisite common object and knowledge.

125. There are umpteen pronouncements of the Hon'ble Supreme Court that investigation lapses, cannot provide ground of rejection of the prosecution and acquittal by a court in given case cannot be allowed to stand, solely, on the probity of investigation.

126. We will quote a few:

1. State of U.P. Vs. Harbhan Singh; 1998(37) ACC14 Supreme Court;

2. State of Karnataka Vs. K.Y. Reddy; 2000 SAR crime (37) Supreme Court;

3. State of Rajasthan Vs. Kishore; 1996(33) ACC 284 Supreme Court;

4. Karnail Singh Vs. State of Madhya Pradesh; 1995(32) ACC 742 Supreme Court.

127. In the aforesaid cases it was observed that any lapse during investigation of the case cannot be considered sufficient to discredit the prosecution version and if the eyewitnesses testimony is consistent and dependable, it is sufficient to sustain conviction. If there is any lacuna in the site plan, it will also not provide a ground for throwing out the prosecution case as weak and in co-inherent. It is indisputable in the present case that the occurrence took place in front of the house of the informant and at the time of incident, P.W-1 was present near his house.

128. One peculiar feature of the trial is that it prolonged for more than 24 years from the date of incident till the date of decision. Since the trial began in 1989 in respect of other accused persons and the present trial which began in 1995 was also clubbed with that. On such unusual and monumental delay we feel shame in deciding of the case which took about 24 years. There are three stages of the trial when a person commits an offence i.e. pre-stage of trial, trial and post trial. At the pre-stage of trial, the order-sheet indicates that though the charge sheet was submitted on 30.6.1985 against Atar Singh, Phulwari, Nawab Singh and Sughar Singh, but the charge sheet was submitted against the appellants, namely, Kaptan Singh and Deshraj only on 13.2.1986 as they were absconding. Thereafter the committal order was passed on 28.6.1989 and the case was successively adjourned on behalf of the appellants in both the sessions trial and at belated stage, both the trials were consolidated on 17.9.1998. After recording the evidence in Sessions Trial No.327 of 1989 of the other accused persons, the appellants in Sessions Trial No.129 of 1995 who were incessantly getting the case adjourned even after consolidation of both the trial, P.W-1 Bahaar Singh was again called in the witness box to be examined in the present sessions Trial between

20.5.2004 to 16.6.2004 when initially his statement had already been recorded during 17.1.2001 to 9.2.2001 in Sessions Trial No.327 of 1989.

129. From the perusal of the record it is also evident that Brijendra Singh who has been examined as P.W-2 in connected S.T. No.327 of 1989 has not been examined in the present Sessions Trial No.129 of 1995 (State Vs. Kaptan Singh and another) due to the reason that he was deterred by the accused persons to depose against the accused appellants, namely, Kaptan Singh and Deshraj. Not only Brijendra Singh but other accused persons who had witnessed the incident and witness of recovery have been extended with threat of dire consequences and hence they refused to come to court and the prosecution had to move an application claiming discharge of Brijendra Singh, Sahab Singh, Soney Lal and Nisar Devi though their statements under Section 161 Cr.P.C. were recorded by the investigating officer after the incident. There is another reason for the delay in trial as the accused appellants, namely, Deshraj and Kaptan Singh and one Phulwari were absconding against whom process under Sections 82/83 Cr.P.C. was initiated on 1.6.1985.

130. On the analysis of the evidence, it is fully established that the victim succumbed to unnatural death with gun shot injuries whose dead body was dragged and burnt down so as to efface the evidence. Hence the prosecution case cannot be doubted or suspected merely that the witnesses are related to the deceased or on account of some minor variation or aberration in their testimony. The utterances have consistently and umpteen times been repeated by the witnesses who had narrated and unfolded the incident in a very natural and articulate manner. The overt act of the accused appellants at the relevant moment is fully established and is unimpeachable beyond a shadow of doubt consistent with the hypothesis of the guilt that within all human probability the act has been done by the accused appellants. The foul play of destroying the evidence by putting the corpse of the deceased on fire in the field of Sahab Singh after dragging him from his baithak and was decimated on account of bitterness. The manner has portrayed very inhuman and gruesome state of mind of the accused appellants. In the course of cross examination, the defence side has tried to evolve a story of false implication in order to overshadow the testimony of the eye witnesses. It cannot be doubted that the eye witnesses had not seen the accused appellant who had perpetuated the crime in a very relentless and devilish manner. The delay if any, in lodging the first information report will not falsify the entire prosecution version. The trial court has appreciated the evidence in the right perspective. We find from the record that the statement of the prosecution witnesses cannot be said to be untrustworthy simply on the basis that some of the facts deposed for the first time before the Court.

131. From the perusal of the entire record it clearly shows that the murder of Ram Sahay had taken place on 18.5.1985 at about 4.30 P.M. and the FIR was lodged on the same day at 6.50 P.M. The criminal law was set in motion and the police started investigating on 19.5.1985. The investigating officer raided the houses of Nawab Singh, Atar Singh and Sughar Singh (sons of Pyarey Lal), Mansha Ram, Phulwari, Kaptan Singh and Deshraj in the presence of Sahab Singh and Soney Lal, but they were not found at their houses nor any weapon was recovered. However, the

memos were prepared and handed over to the wives of the accused persons which were marked as Ext. Ka-13, Ext. Ka-14, Ext. Ka-15 & Ext. Ka-16. The appellants had absconded after committing murder from their houses. Atar Singh (since deceased), Mansha Ram, Nawab Singh and Sughar Singh surrendered before the court below on 3.6.1985 while the appellants Kaptan Singh and Deshraj surrendered on 18.6.1985. This is the conduct on the part of the accused persons that they had disappeared from the scene of occurrence to some unknown place for considerable period. The charge sheet was submitted on 30.6.1985 against Atar Sing, Nawab Singh, Sughar Singh, Mansha Ram and Phulwari wherein it was mentioned that accused Kaptan Singh and Deshraj are absconding. Thereafter the process under Section 82/83 Cr.P.C. was initiated to secure the presence of the accused appellants, namely, Kaptan Singh and Deshraj against whom ultimately charge sheet was submitted on 13.2.1986. Thus the act of absconding is relevant factor to be considered along with other evidence. Such circumstance may also leads to a proof of a guilty mind attempting to evade justice which is inconsistent with their innocence.

132. The long abscondance of the appellants who were seeking adjournment at the pre-trial stage by moving exemption application for one reason or the other on each and every date separately and jointly leads to interference about their conduct that they were of guilty mind. Though it is true that even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. Normally the courts are not inclined to attach much importance to the act of absconding, treating it as a very small and insignificant in the evidence for sustaining conviction and it can scarcely be held as a determining link in completing the chain of evidence determining guilt of the accused. But in the present case soon after lodging of the FIR all the accused persons had absconded for a long period which is quite unnatural showing their guilty conscience. Such act of absconding on the part of all the accused appellants is no doubt relevant piece of evidence to be considered along with other evidence in the present case.

133. In view of the above conspectus, unusual sympathy to the accused persons merely because of long lapse of time would do more harm than justice from the point of view of the victim and the society at large. The prolong trial like in the present case has caused gross miscarriage of justice as delay defeats justice. We are shocked that the trial remained pending for 24 years as it has been concluded in 2009 whereby the accused persons were convicted by the learned trial court in both the sessions trial.

134. On the basis of verbose and prolix discussions made above and after going through the lower court record, we are of the considered opinion that findings of conviction recorded by the learned trial court are well substantiated by the evidence available on record. Therefore, the conviction recorded by the trial Court against the accused appellants, namely, Kaptan Singh and Deshraj under Section 302/34,148 I.P.C. is hereby maintained and affirmed.

135. The appeals are devoid of merit and are accordingly dismissed.

136. The appellants, namely, Kaptan Singh and Deshraj are on bail. Their personal and surety bonds are hereby

cancelled and they are directed to surrender before the Chief Judicial Magistrate concerned immediately to serve out the sentence imposed upon them by the trial court and affirmed by us. In case they fail to surrender, the Chief Judicial Magistrate concerned is directed to take appropriate action against them in this regard.

137. Let a copy of this judgment and order along with original record be transmitted to the learned trial court for information and compliance.

138. Judgment certified and be placed on record.

(2020)03-05ILR A738
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.02.2020

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE SHEKHAR KUMAR YADAV, J.

Jail Appeal No. 6361 of 2008
&
Criminal Appeal No. 950 of 2005

Gulli @ Nand Kishore ...Appellant(In Jail)
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Pradeep Kumar Mishra(A.C.)

Counsel for the Opposite Party:
Sri J.K. Upadhyay, A.G.A.

Criminal law- Indian Penal Code - Sections 323/34, 324, 325/34 & 302 - Appeal against conviction.Consider under section 304 IPC part-I

Held :- The nature of injuries on part of body and weapon involved and determining factor. (Para 24)

Sentences reduced to period already undergone. (32)

Appeal partly allowed. (E-2)

List Of Cases Cited:-

1. St. of A.P. Vs. Rayavarapu Punnayya & anr. (1976) 4 SCC 382,

2. Budhi Singh Vs. St. of H.P. (2012) 13 SCC 663,

3. Kikar Singh Vs. St. of Raj. (1993) 4 SCC 238,

4. Surain Singh Vs. The St. of Punj., Criminal Appeal No.2284 of 2009, decided on April 10, 2017,

5. Ankush Shivaji Gaikwad Vs. St. of Mah., (2013) 6 SCC 770,

6. Kumaran Vs. St. of Kerala & anr. (2017) 7 SCC 471.

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. As these two appeals arise out of a common judgment and order dated 16.02.2005 passed by Additional Sessions Judge/Fast Track Court No.11, Jalaun at Orai, in Sessions Trial No.111 of 2003 (State Vs. Gulli @ Nand Kishore and others), they are being disposed of by this common order.

2. By the impugned judgment, the Court below has convicted appellant Gulli @ Nand Kishore under Sections 323/34, 324, 325/34 and 302 of IPC and sentenced him to undergo three months imprisonment, with a fine of Rs.500/-, in default of payment of fine, 10 days simple imprisonment; one year imprisonment, with a fine of Rs.1,000/-, in default thereof, two months simple imprisonment; two years

rigorous imprisonment, with a fine of Rs.1,500/-, in default thereof, four months additional simple imprisonment; and life imprisonment, with a fine of Rs. 10,000/- respectively.

The Court below has further convicted appellant Babu Lal, Khachere @ Ashok and Mantole @ Santosh under Sections 323, 325, 324/34 and 302/34 and sentenced them to undergo three months imprisonment, with a fine of Rs.500/- each, in default of payment of fine, 10 days simple imprisonment; two years imprisonment with a fine of Rs.1,500/- each, in default thereof, four months simple imprisonment; one year imprisonment, with a fine of Rs.1,000/-, in default thereof, two months additional simple imprisonment; and life imprisonment with a fine of Rs. 10,000/- respectively with a direction that all the sentences to run concurrently.

3. As per prosecution case, Kiran Devi W/o of Ratan Kumar and sister-in-law of deceased Prem Narayan was having affair with the accused Gulli and the said relation was not liked by the deceased and he had shown his anger. Accused Gulli felt insulted because of this objection and on 18.03.2003, when PW-4 Durjan was returning to his house, at about 10.00 p.m, he was apprehended by the accused persons and was also subjected to abusive language. Seeing this, one Siya Sharan (not examined) informed PW-1 Surendra and PW-3 Prem Narayan about the said incident and it is said that Prem Narayan alongwith his wife Laxmi had gone to save his father. When Prem Narayan reached to the place of occurrence, he saw accused persons quarreling with his father. Prem Narayan intervened in the matter and it is said that accused Gulli caused axe injuries to him. Further case of the prosecution is that when PW-4 Durjan and PW-5 Laxmi also intervened in the matter, they were beaten by other accused persons by club and axe. According to prosecution case, number of villagers gathered there and saw the occurrence. On account of beating given to Prem Narayan by accused Gulli, he died at the spot itself.

4. On the basis of written report, Ex.Ka.1, lodged by PW-1 Surendra on 19.03.2003, FIR, Ex.Ka.16, was registered against all the four accused persons, under Sections 302, 324, 323, 504 and 506 of IPC.

5. Inquest on the dead body was conducted on 19.03.2003, vide Ex.Ka.2, and the body was sent for Postmortem, which was conducted on the same day vide Ex.Ka.6 by PW-6 Dr. Maniram. Autopsy Surgeon has noticed following four injuries on the body of the deceased: -

(i) Wound is 9 cm. above right ear pinna. Skull bone broken in two pieces. Brain Membranes - ruptured and cerebrum exposed. Incised wound of 11 cm X 2.5 cm present on right side of skull. is Horizontal.

(ii) Incised wound of 9 cm X 5 cm present on anterior end left side of neck. Wound is 4 cm deep. Trachea, Internal jugular vein, common and carotid artery and esophagus are cut. External jugular vein, sternohyoid muscle, Sterno eleidce mastoid muscle is also cut. Wound is transverse and is 3.5 cm above to clavicle.

(iii) Incised wound of 5 cm X 1.5 c.m present on right side of chest 10 cm below right nipple. Wound is oblique and is 2.5 cm deep.

(iv) Incised wound of 6 cm X 3 cm present on right hand metacarpal below thinner eminauce is broken and wound is passed from dorsal to palmar side.

Cause of Death - Homicidal death caused due to hemorrhage by ante mortem injuries.

6. Injured Durjan (PW-4) and Laxmi (PW-5) were medically examined, vide Ex.Ka.4 and Ex.Ka.5, by PW-6 Dr. Maniram who found following injuries on them.

Injuries on Durjan (PW-4):

(i) Lacerated wound of 4 cm X 0.8 cm present on left side of skull 11 cm above to left ear pinna. Wound is deep up to bone. Fresh bleeding seen on clearing the wound. Patient is conscious.

(2) Swelling seen on right arm in mid portion. Injury kept under observation and Advised X-Ray right arm.

(3) 3 cm X 2 cm swelling seen on lift scapular region of back.

(4) Abrasion of 1.5 cm X 0.5 cm present on dorsal part of left arm 5 cm below elbow joint. Colour of abrasion is red.

Injuries on Laxmi (PW-5):

(i) Incised wound of 7 cm X 4 cm present on dorsal part of right hand on middle part, wound is extending from 1 cm below writs joint up to metacarpal pharyngeal join. Tendon Fifth Metacarpal bone found to be cut and fracture. Fresh bleeding seen on vertical side. Wound is extending 2 cm below base of ring finger.

(2) Incised wound of 5 cm. X 1 cm present on right side of skull 12 cm above to right ear pinna. Bleeding seen on clearing the wound. Wound is deep upto bone.

7. The trial Judge has framed charge against all the accused-persons under Sections 504, 506(2), 323/34, 324, 325, 302/34 of IPC.

8. So as to hold accused persons guilty, the prosecution has examined nine witnesses. Statements of accused persons were also recorded under Section 313 of Cr.P.C in which, they pleaded their innocence and false implication.

9. By the impugned judgment, the trial Judge has convicted and sentenced the appellants as mentioned in para 1 of this judgment. Hence this appeal.

10. Sri Pradeep Kumar Mishra, learned counsel for the appellant in Criminal Appeal No. 6361 of 2008 submits:-

(i) that the act of accused appellant Gulli would not fall within the definition of murder and it would be culpable homicide not amounting to murder. He submits that quarrel was going on between Durjan and the accused persons and when deceased Prem Narayan reached to the place of occurrence, he seems to have been subjected to injuries unfortunately, resulting his death.

(ii) that the offence has been committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and, therefore, it would fall under Section 304 part-I of IPC.

(iii) that accused appellant Gulli is in jail since last 17 years and, therefore, his conviction be altered into Section 304 part-I of IPC and sentence be reduced to the period already undergone by him. It has been argued that appellant Gulli is a poor person; he is contesting this appeal through the legal aid and, therefore, he can pay very reasonable compensation to the deceased family.

11. In respect of accused-appellants, namely, Babu Lal, Khachere and Mantole

in Criminal Appeal No. 950 of 2005, it has been argued by Shri Vishnu Kant Tiwari that:-

(i) the accused-appellants have not caused any injury to deceased Prem Narayan and, therefore, they cannot be convicted with the aid of Section 34 of IPC for committing the murder of the deceased.

(ii) except accused Gulli, other accused persons can, at best, be convicted under Section 325 of IPC for which, they have already remained in jail for about 4 months. It has been argued that these three appellants are also willing to pay reasonable compensation to injured Durjan.

12. On the other hand, supporting the impugned judgment and order, it has been argued by the State Counsel that the conviction of the appellants is in accordance with law. He submits that apart from accused Gulli, the other accused persons are also liable to be convicted with the aid of Section 34 of IPC and, therefore, their conviction under Section 302/34 of IPC is in accordance with law.

13. We have heard counsel for the parties and perused the record.

14. PW-1 Surendra, is a brother of the deceased and is also a son of PW-4 Durjan. He has stated that the deceased was residing at Orai, was working as a labour and at the eve of Holi, he came to his village. His sister-in- law Kiran Devi W/o Ratan Kumar was having relation with accused Gulli, which was objected by deceased Prem Narayan, as a result of which accused Gulli was not having good relation with the deceased. On the date of occurrence, when his father was returning to his village, after celebrating the Holi festival, at about 10.00 PM, near one culvert, accused persons apprehended him and started abusing him. This incident was witnessed by Siya Sharan (not examined) who immediately informed the same to him (this witness) and also to Prem Narayan. In turn, he, Prem Narayan and Laxmi had gone to the place of occurrence and there, they saw the accused persons carrying weapons with them and were quarreling with Durjan. When deceased Prem Narayan intervened in the matter, accused Gulli caused axe injury on his head and likewise, he also caused injury to PW-5 Laxmi and to Durjan. He states that hearing his cries, other villagers also gathered their and then the accused persons fled away from the spot. He states that deceased succumbed to his injuries at the place of occurrence itself. In his cross-examination but for minor contradiction, this witness remained firm and has reiterated as to the manner in which Prem Narayan was done to death by accused Gulli and Durjan and Smt. Laxmi were subjected to injuries.

15. PW-2 Hari Babu is a witness of inquest.

16. PW-4 Durjan is a father of the deceased Prem Narayan and PW-1 Surendra. He has stated that accused Gulli was having relation with his daughter-in-law Kiran, which was not liked by the deceased who had asked all the family members not to allow appellant Gulli to sit with the family members and on account of this, accused Gulli was not having good relation with the deceased. At the eve of Holi, when he was returning to his village, at about 10.00 p.m. he was apprehended by the accused persons and at that time, accused Gulli was having axe, whereas other accused persons were having club with them. He was being abused by the accused persons and while the quarrel was

going on, deceased Prem Narayan, PW-1 Surendra and PW-5 Smt. Laxmi (PW-5) reached to the place of occurrence and then accused appellant Gulli gave a blow of axe on the head of the deceased, resulting his death, whereas he (Durjan) and PW-5 Laxmi were also beaten by them.

17. PW-5 Smt. Laxmi, is the wife of the deceased, has made almost similar statement as has been made by PW-4 Durjan and PW-1 Surendra. She too has stated that her sister-in law (Jethani) - Kiran was having relation with appellant Gulli and her husband came to know about the same who raised his objection. On the date of occurrence, accused persons apprehended her father-in law and when she along with the deceased and PW-1 Surendra had gone to intervene in the matter, her husband was done to death by accused appellant Gulli, who caused injures on the head of the deceased. She states that she was also beaten by Gulli, whereas her father-in-law PW-4 Durjan was beaten by other accused persons.

18. PW-6 Dr. Maniram, medically examined PW-4 Durjan, vide Ex.Ka.4, and noticed four injuries on his body. He further examined PW-5 Laxmi, vide Ex.Ka.5, and noticed two injuries, including a fracture of a metacarpal and damage to tandom. He also did postmortem of the deceased, vide Ex.Ka.6, and noticed four injuries.

19. PW-7 Dr. T.D. Gupta did X-Ray of PW-5 Smt. Laxmi, vide Ex.Ka.7, and PW-4 Durjan, vide Ex.Ka.8. He noticed fracture of forth and fifth metacarpal of right arm of Durjan.

20. PW-8 Jai Narain Verma, is the Investigating Officer, has duly supported the prosecution case. PW-9 Jagat Pal Singh assisted during investigation.

21. Close scrutiny of the evidence makes it clear that on 18.03.2003 when PW-4 Durjan was returning to his village, on the way at about 10.00 p.m., he was apprehended by the accused persons. There was exchange of words between them and information of this quarrel was given to deceased Prem Narayan, PW-1 Surendra and PW-5 Smt. Laxmi who immediately reached to the place of occurrence and while they were trying to intervene in the matter, they were also assaulted by the accused persons. As per evidence, it is the accused appellant Gulli who caused axe injuries on the head of the deceased, resulting his death. There is no evidence that except accused Gulli any other accused persons caused injuries to deceased Prem Narayan. Evidence also reflects that accused Babu Lal, Kachere @ Ashok, Mantole @ Santosh caused injuries to PW-4 Durjan, whereas injury to PW-5 Smt. Laxmi was caused by Gulli.

22. Considering all these aspects of the case, complicity of the accused persons in commission of the offence has been duly proved by the prosecution. If the evidence is viewed minutely, it is apparent that the deceased was done to death by Gulli and as the basic ingredients of Section 34 are missing, it is only Gulli who is liable to be convicted under Section 302 of IPC, whereas rest of the accused persons namely Babu Lal, Khachere @ Ashok, Mantole @ Santosh are not liable to be convicted under Section 302/34 of IPC or under Section 304 Part I or Part II of IPC. Their conviction under Section 302/34 of IPC for committing the murder of the deceased is accordingly set aside.

23. The next question, which arises for consideration of this Court is as to whether the act of accused-appellant Gulli would fall within the definition of 'murder' or it would be 'culpable homicide not amounting to murder'. Before proceeding further, it is relevant to refer to the provisions of Section 300 of IPC, which read as under:-

"300. Murder. - Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly. - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or -

Thirdly. - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly. - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1. - **When culpable homicide is not murder.** - Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above Exception is subject to the following provisos:-

First. - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly. - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. - That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation. - Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2. - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3. - Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5. - Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen

years, suffers death or takes the risk of death with his own consent."

24. Exception 4 to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two persons to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

25. Considering all these aspects of the case, we are of the view that the offence has been committed without premeditation in a sudden fight in the heat of passion upon sudden quarrel and the offender has not taken undue advantage or acted in a cruel or unusual manner.

26. The Apex Court in **State of A.P. vs. Rayavarapu Punnayya and Another1** while drawing a distinction between Section 302 and Section 304 of IPC held as under:

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The *first* is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The *second* may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is *prima facie* found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code."

27. In **Budhi Singh vs. State of Himachal Pradesh2,** the Supreme Court held as under:

"18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden

provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

19. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder....."

28. In **Kikar Singh vs. State of Rajasthan3** the Apex Court held as under:

"8. The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to Exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is excepted and the offences committed would be one of murder.

9. The occasion for sudden quarrel must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is specially so where the attack is made with dangerous weapons. Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted and commission must be one of murder punishable under Section 302. Equally for attracting Exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4...."

29. All the above three cases were considered by the Apex Court in **Surain**

Singh v The State of Punjab4 and ultimately, it has been held by the Apex Court in that particular case, that the accused was liable to be convicted under Section 304 Part II of IPC and not under Section 302 of IPC.

30. In view of above, according to us, case of appellant Gulli would thus fall under Exception 4 of Section 300 of IPC and it can be safely held that the appellant is liable to be convicted for committing 'culpable homicide not amounting to murder'.

31. Now the question is whether appellant Gulli is liable to be convicted under Section 304 Part I or Part II of IPC. Considering the nature of injuries caused by him to the deceased, the weapon and the portion of body of the deceased, we are of the view that the appellant is liable to be convicted under Section 304 Part I of IPC and not under Section 304 Part II of IPC, whereas other accused persons, namely, Babu Lal, Khachere @ Ashok, Mantole @ Santosh are liable to be convicted under Section 323, 325 and 324/24 of IPC.

32. So far as the sentence part is concerned, accused-appellant Gulli @ Nand Kishore, has remained in jail for about 17 years. According to us, ends of justice would be served, if his sentence is reduced to the period already undergone by him under Section 304 Part-I of IPC. Order accordingly. He is reported to be in jail, he be set free forth, if not required in any other case.

So far as the sentence of other accused persons, namely, Babu Lal, Khachere @ Ashok, Mantole @ Santosh is concerned, they have remained in jail for about 4 months, the incident occurred on 18.03.2003, they are reported to be on bail since long and, therefore, their sentence is also reduced to the period already undergone by them. They need not surrender, and their bails bonds are discharged.

33. However, looking to the provisions of Section 357 of Cr.P.C. and judgment of the Apex Court in **Ankush Shivaji Gaikwad v State of Maharashtra5,** we are of the view that accused-appellant Gulli @ Nand Kishore is liable to compensate PW-5 Smt. Laxmi by paying a total compensation of Rs. 15,000/- (Fifteen Thousands). Likewise, other accused persons, namely, Babu Lal, Khachere @ Ashok, Mantole @ Santosh are liable to compensate PW-4 Durjan and PW-5 Smt. Laxmi by paying a total compensation of Rs. 12,000/- to them i.e. Rs.6,000/- to PW-4 Dujan and Rs.6,000/- to PW-5 Smt. Laxmi.

Accordingly, accused-appellant Gulli @ Nand Kishore is directed to deposit Rs. 15,000/- within a period of three months after being released from jail before the trial court and, in turn, the trial court shall disburse the said amount to PW-5 Smt. Laxmi. Accused-appellants Babu Lal, Khachere @ Ashok, Mantole @ Santosh are directed to deposit Rs.4,000/- each before the trial court within three months from today. Out of the total amount to be deposited by accused-appellants Babu Lal, Khachere @ Ashok, Mantole @ Santosh, the trial court shall reimburse Rs.6,000/- to PW-4 Durjan and Rs. 6,000/- to PW-5 Smt. Laxmi.

In case the appellants fail to deposit compensation within stipulated time, the court below shall proceed against them in the light of judgment of the Apex Court reported in **Kumaran Vs State of Kerala and another** (2017) 7 SCC 471.

34. The appeal is **partly allowed**.

35. We appreciate the assistance rendered by Shri Pradeep Mishra, Amicus

and direct the State Government to pay Rs.7,000/- to him as his remuneration.

(2020)03-05ILR A748
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.02.2020

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

First Appeal From Order No. 51 of 2020

Laxmi Kant Verma & Anr. ...Appellants
Versus
Mandir Shri Mahabir Ji Trust & Ors. ...Respondents

Counsel for the Appellants:
Atul Kumar Dwivedi, Govind Sharan Soni

Counsel for the Respondents:
Brijesh Kumar, Avtar Singh

A. Civil Law- Civil Procedure Code – Section 92 – Public trust or Private trust – Method to determine nature of trust – Intention of Testator – Essence of a public or private trust is to be derived and ascertained from the expression of any trust deed or on the basis of any constructive criteria which may be relevant for the purpose. (Para 8)

Held- 18. Analysing the present case in the light of principles embodied in the apex court judgment, it is found that the trust deed succinctly provides that the endowments stand dedicated for maintenance of temple and shall vest in the deity. The management of the dedicated properties circumscribed amongst the family descendants of the founder trustee is yet another significant dimension which leans towards the nature of trust being a private Hindu Religious Endowment Trust.

B. Constitution of India – Article 25 – Freedom of religion – In our life we are governed by constitutional morality but there is freedom of religion too within the scope of Article 25 of the Constitution of India, therefore, this freedom is equally significant and personal – It is within the scope of this personal right that the Religious Endowments Act still has its application to subserve the will of an individual within our constitutional framework . (Para7)

Appeal dismissed (E-1)

Cases relied on :-

1. Deoki Nandan Vs. Murlidhar & ors., AIR 1957 SC 133

2. Mulla Gulam Ali & Safiabai D. Trust Vs. Deelip Kumar & Co.; (2003) 11 SCC 772 (I)

3. Sri Radhakanta Deb Vs. Commissioner of Hindu Religious Endowments; 1981) 2 SCC 226

4. Kuldip Chand & anr. Vs. Advocate General to Government of H.P. & ors., (2003) 5 SCC 46

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

1. Heard Sri Atul Kumar Dwivedi, learned counsel for the appellants and Sri Brijesh Kumar Saxena, assisted by Sri Avtar Singh, learned counsel for respondents no. 1 and 2.

2. Permission for marking respondents no. 3 and 5 as "dead' was granted on the pointing out of a defect in the appeal due to their death while pendency of the suit.

3. The instant First Appeal From Order under Section 104 of Code of Civil Procedure (CPC) has arisen out of a judgement/order dated 16.1.2020 passed in Misc. Case No. 350/2013 instituted under Section 92 CPC seeking leave to initiate a suit proceeding for protection of the properties stated to belong to a public trust and maintaining accounts thereof.

4. After filing of the misc. case, parties appear to have exchanged objections and counter objections. The counter objections

which were not filed alongwith the appeal were also placed before this Court during the course of arguments.

5. The court below by means of the impugned judgement/order has refused to grant leave observing that the Mandir Shri Mahabir Ji Trust, Bajranj Nagar, Gosainganj, Lucknow is not a religious public trust hence the prayer was turned down.

6. The point that crops up for consideration before this Court is as to whether the court below has rightly rejected the application filed by the appellants observing that the trust in question is not a public trust within the meaning of Section 92 of CPC and; as to whether the finding so recorded suffers from any illegality.

7. In our life we are governed by constitutional morality but there is freedom of religion too within the scope of Article 25 of the Constitution of India, therefore, this freedom is equally significant and personal. It is within the scope of this personal right that the Religious Endowments Act still has its application to subserve the will of an individual within our constitutional framework.

8. It is well settled that the essence of a public or private trust is to be derived and ascertained from the expression of any trust deed or on the basis of any constructive criteria which may be relevant for the purpose. In the present case, there does not appear to be much difficulty for the reason that the trust in question was established on the basis of a deed duly registered on 16.10.1973.

9. The issue as to whether Religious Endowment Trust is a public or private trust is essentially a question of facts and law both, but as stated above, the controversy in the present case hinges on the construction of registered trust deed.

10. The appellants have taken this Court through the contents of the trust deed in reply to which the respondents have also referred to the same by pointing out an empirical consideration thereof.

11. This Court has carefully noted the submissions put forth by learned counsel for the appellants to the effect that the trust deed does not exclude the worship by the public at large and the endowments mentioned in the trust deed being utilized for various public purposes thus, would lead to one and the only inference that the trust in question is a public trust. The details of income derived through properties was pointed out which is stated to have been aligned with the objects set out in the rules of governance that were registered by the successor-Manager after the death of the founder of the trust.

12. It is in the light of these objects that the appellants have heavily stressed to construe the nature of the trust as public.

13. Learned counsel for the appellants has further argued that the court below somehow has failed to consider the judgement rendered by the apex court reported in ***AIR 1957 SC 133 (Deoki Nandan v. Murlidhar and others)*** alongwith the judgement reported in ***(2003) 11 SCC 772 (I) (Mulla Gulam Ali & Safiabai D. Trust v. Deelip Kumar & Co.)***, which clearly indicate that once the beneficiaries are public, the religious trust must be construed as "Public'.

14. Per contra, Sri Brijesh Kumar Saxena, learned counsel for the respondents drawing attention of this Court to the trust deed has specifically pointed out the purpose of the trust within the meaning of

sentences which for ready reference may be extracted hereunder:

"मिनमुकिर ने श्री महाबीर जी महराज का मन्दिर वाकै बजरंग नगर गोसाईगंज मजकूर बनवा कर उसमे श्री महाबीर जी महराज की स्थापना कराई है और समय समय पर श्री महाबीर जी के लिए जायदादे भी खरीदी है और इस मन्दिर व जायदाद के प्रबन्ध के लिए श्री महाबीर जी के हक मे एनडाउमेन्ट endownment कर दिया है जिसके कि इस समय मिनमुकिर मैनेजर ट्रस्टी है और इसके अलावा श्री गणेश प्रसाद पुत्र मिनमुकिर पं0 चन्द्रभूषण शास्त्री पुत्र श्री बल्देव प्रसाद जी व श्री विद्याधर त्रिपाठी पुत्र श्री चन्द्रभूषण शास्त्री व श्री लछिमन प्रसाद पुत्र श्री बल्देव प्रसाद कुर्मी निवासी गोसाईगंज मजकूर ट्रस्टी हैं और मनमुकिर ने यह व्यवस्था की है कि अपने जीवन भर वह मैनेजर रहेगा और उसके बाद उसके खानदान में से जिसको वह नामजद कर देगा वह मैनेजर होगा और इसी प्रकार हर मैनेजर को अधिकार होगा कि वह अपने बाद के लिए जहॉ तक हो सके मेरे ही खानदानियों में से किसी को नामजद कर देवे और अगर वह किसी कारण नामजद न कर सके तो उस समय जितने ट्रस्टी हो वह जहॉ तक हो सके मेरे खानदानियों में से किसी को जो उसकी राय में मैनेजरी की काबिलियत रखता हो कसरत राय से चुन लेवे यदि मेरी राय में कोई ट्रस्टी ठीक प्रकार से काम न करें तो मुझे अधिकार है कि उसको हटा दूॅ और यदि ऊपर लिखे चार ट्रस्टियों में से किसी का स्थान किसी भी कारण से खाली हो जावे तो उस कि जगह पर मुझको या इसी प्रकार जो कोई भी मैनेजर हो उसको अधिकार होगा कि जिस किसी को इस कार्य के योग्य समझे नियुक्त कर देवे इस प्रकार इस मन्दिर का सुचारू रूप से काम चल रहा है अब मेरी इच्छा है कि अपनी ऊपर लिखी जायदाद श्री महाबीर जी महराज विराजमान मन्दिर वाकै बजरंग नगर को समर्पित करके इसी ऊपर लिखे एनडाउमेन्ट मदकवूउमदज में शामिल कर दूॅ अतः मैने अपनी ऊपर लिखे जायदाद श्री महाबीर जी महराज को समर्पित कर दी और अब श्री महाबीर जी महाराज के सारे अख्त्यारात मालिकाना व भूमिधरी जो मुझको थे वह उनको प्राप्त हो गये और इस जायदाद का दाखिल खारिज मै श्री महाबीर जी के नाम नियमानुसार करा दूॅगा अब मुझको या मेरे वारिसान या कायम मुकामान को कोई अख्त्यार इस जायदाद मे बाकी नही रह गया और इसकी पाबन्दी सब पर लाजिम व आयद होगी और अगर कोई शख्स इसके खिलाफ कोई दावा या उज्र करे तो वह काबिल सुनवाई न होगा।'

15. Pointing out the essence of the trust being private, it is submitted that once the trust deed itself mentions the use of endowments to be utilized in the maintenance of temple, the intention of the testator is doubtlessly clear. It is submitted that not only the construction of Mahabirji temple was made by the founder trustee out of his own means and property but for future maintenance /management of the same, endowments were dedicated to the deity the management whereof was entrusted to his own family members. Thus, the future maintenance of the temple as per the trust deed stood secured through the means of dedicated property which also belonged to the founder trustee.

16. Having pointed out these two aspects of the trust deed very clearly, it is submitted that the judgement placed reliance upon by the court below, in fact, proceeds on a clear understanding of the apex court judgement reported in ***(1981) 2 SCC 226 (Sri Radhakanta Deb v. Commissioner of Hindu Religious Endowments)*** as followed in the case reported in ***(2003) 5 SCC 46 (Kuldip Chand and another Vs. Advocate General to Government of H.P. and others)***. The appeal is thus prayed to be dismissed.

17. Learned counsel for the appellant has ably argued the matter, however, he was unable to dispute the purpose and management of the endowments for the maintenance of Mahabirji temple. The trust deed has placed a blanket ban on the alienation of trust property for the same having been vested in the deity. The trust

deed clearly makes out that the intention of the founder trustee was to constitute a Hindu Religious Endowment for a specific purpose of which the management was circumscribed in the descendants of the founder. It may be useful to extract para-14 of the judgement reported in **(1981) 2 SCC 226** (supra) as under:-

"14. Thus, on a conspectus of the authorities mentioned above, the following tests may be laid down as providing sufficient guidelines to determine on the facts of each case whether an endowment is of a private or of a public nature:

(1) Where the origin of the endowment cannot be ascertained, the question whether the user of the temple by members of the public is as of right;

(2) The fact that the control and management vests either in a large body of persons or in the members of the public and the founder does not retain any control over the management. Allied to this may be a circumstance where the evidence shows that there is provision for a scheme to be framed by associating the members of the public at large;

(3) Where, however, a document is available to prove the nature and origin of the endowment and the recitals of the document show that the control and management of the temple is retained with the founder or his descendants, and that extensive properties are dedicated for the purpose of the maintenance of the temple belonging to the founder himself, this will be a conclusive proof to show that the endowment was of a private nature;

(4) Where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment."

18. Analysing the present case in the light of principles embodied in the apex court judgment, it is found that the trust deed succinctly provides that the endowments stand dedicated for maintenance of temple and shall vest in the deity. The management of the dedicated properties circumscribed amongst the family descendants of the founder trustee is yet another significant dimension which leans towards the nature of trust being a private Hindu Religious Endowment Trust.

19. This Court may also note that by virtue of Section 92(2) CPC, for any trust which falls within the trappings of Religious Endowments Act, 1863, no relief specified in Section 92(1) CPC would lie through a suit under the said Rule.

20. Lastly learned counsel for the appellants has submitted that the public worship and the dedicated properties being utilised for public purpose in terms of the registered rules of administration have altered the status of the trust to be public, hence the impugned order passed by the Court below is in gross violation of law.

21. The submissions made are attractive but unconvincing. The rules registered subsequently cannot eclipse the intention of trust deed but are rather a guidance for management evolved subsequently. This Court may note that the

dedicated properties are a means to preserve the religious heritage which is inclusive of deity worship of Lord Hanuman unlike in Islam, Christianity or Judaism. A temple constructed for worship by all without there being any intention of receiving offerings from worshipers to maintain the same is strongly a circumstance that supports the case of the respondents. Therefore, this Court is of the considered opinion that the trust deed under consideration essentially constitutes a private Religious Endowment Trust, hence the impugned judgment/order passed by the court below refusing to grant leave under Section-92 CPC for want of elaborate discussion does not suffer from any illegality in the eyes of law.

22. The appeal is accordingly dismissed.

(2020)03-05ILR A752
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.02.2020

BEFORE
THE HON'BLE SAURABH LAVANIA, J.

Service Single No. 343 of 1999

Atul Kumar Singh ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Kapil Deo, , Abhishek Yadav, Ashwani Kumar, G.L. Yadav

Counsel for the Respondent:
Amarjeet Kaur, C.S.C., I.H. Farooqui, R.K. Katiyar, Rakesh Kumar Tiwari, Shobhit Mohan Shukla, Vikash Singh

(A) Civil Law- U.P. Recognized Basic Schools (Junior High School) (Recruitment and Condition of Service of Ministerial Staff and Group 'D' Employees) Rules, 1984- Appointment - Rule 4 of - minimum qualification given for selection on the post of Clerk - minimum speed of 30 words per minute in Hindi typewriting is required - not holding "Type Test" vitiates the selection process - recommendation of Selection Committee in favour of the petitioner to the respondent no. 3 is in itself nullity being de hors the Rules - consequent appointment by the respondent no. 4 is also nullity

(B) Pleadings - in response to the averments in the counter affidavit filed by the respondents - no rejoinder affidavit was filed by the petitioner - averments in the counter affidavit are treated as correct

(C) Burden of proof - plaintiff has to prove his own case - cannot succeed on the weakness of defence

Writ Petition Rejected. (E-10)

List of cases cited:

1. Ravindra Pratap Yadav @ Mahajan Vs. St. of U.P. & ors. 2004 (22) LCD 1445 *(followed)*

2. Yogesh Kumar Vs. Govt. of NCT Delhi & ors. (2003) 3 SCC 548*(followed)*

3. Mohd. Sartaj Vs. St. of U.P. (2006) 2 SCC 315*(followed)*

4. Sushil Kumar Dwivedi Vs/. Basic Siksha Adhikari, Banda (DB) (2003) 2 UPLBEC 1216*(followed)*

5. Mamta Mohanty (not fully cited) *(followed)*

6. St. of Karnataka Vs. KGSD Canteen Employees Welfare Ass. (2006) 1 SCC 5667*(followed)*

7. St. of Manipur Vs. Y Token Singh (2007) 5 SCC 65*(followed)*

8. Pramod Kumar Vs. U.P. Secondary Education Services Commission & ors. (2008) 7 SCC 153*(followed)*

9. Regional Manager, C.B.I. Vs. Madhulika Guruprasad Dahir & ors. (2008) 13 SCC 170*(followed)*

10. Gadde Venkateshwara Rao Vs. Govt. of A.P. AIR 1966 SC 828*(followed)*

11. Maharaja Chintamani Saran Bath Shahdeo Vs. St. of Bihar (1999) 8 SCC 16: AIR 1999 SC 3609: 1999 AIR SCW 3623*(followed)*

12. M.C. Mehta Vs. UOI (1999) 6 SCC 237: AIR 1999 SC 2583*(followed)*

13. Mallikarjuna Mudhagal Nagappa Vs. St. of Karn. (2000) 7 SCC 238: AIR 2000 SC 2976: 2000 AIR SCW 3289*(followed)*

14. Chandra Singh Vs. St. of Raj. (2003) 6 SCC 545: AIR 2003 SC 2889: 2003 AIR SCW 3518*(followed)*

15. Raj Kumar Soni Vs. St. of U.P. (2007) 10 SCC 635*(followed)*

16. Sachchida Nand Chaturvedi Vs. St. of U.P. 2019 (6) ADJ 189 *(followed)*

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel Sri Gyanendra Srivastava, Sri Shobhit Mohan Shukla for respondent nos.2 and 3, Sri Vikas Singh for respondent no.4.

2. In the present writ petition, the following main reliefs have been sought:-

"(A) A writ, order or direction in the nature of Mandamus commanding the opposite parties to treat the petitioner having been approved by the District Basic Shiksha Adhikari, Sitapur and to allow him all benefits arising out of appointment on the post of Clerk including payment of salary etc.

(B) A writ, order or direction in the nature of Mandamus commanding the Accounts Officer of District Basic Shiksha Adhikari, Sitapur to pass salary bill in respect of the petitioner without any objection treating the petitioner to have been duly approved by the District Basic Shiksha Adhikari, Sitapur.

(B)(i) Issue a writ, order or direction in the nature of Certiorari quashing the order dated 21.11.1998 passed by the opposite party no.2, B.S.A., Sitapur which is annexed as CA-1 with the counter affidavit."

3. After filing of the counter affidavit by the opposite party no.2, the order dated 21.11.1998 has been challenged by amending the writ petition.

4. By the order dated 21.11.1998, under issue, the respondent no.2 District Basic Education Officer, Sitapur, (hereinafter referred to as "BSA"), cancelled the selection process/interview wherein the petitioner was selected for the post of Clerk, the effect of which is that the BSA disapproved the appointment of the petitioner made by respondent no.4-Manager, Sri Dharwal Devi Vidya Mandir, Madhyamik Vidyalaya, Dharauli, District Sitapur, (in short "Institution") on the post of "Clerk". The main ground for cancellation of selection process/interview and disapproving the proposal of appointment of the petitioner made by the Institution on the post of Clerk is that the '"Type Test", as required under Rule 4 of the Rules of 1984 namely the U.P. Recognized Basic Schools (Junior High School) (Recruitment and Condition of Service of Ministerial Staff and Group 'D' Employees) Rules, 1984, was not held during the selection process.

5. Brief facts of the case are to the effect that the respondent no.4 sent the

relevant documents vide letter dated 15.06.1998 to the respondent no.2-BSA. It was with regard to seeking permission to fill up the vacancy of Clerk, which came into existence on account of death of one Sri Mahesh Prasad, who was working on the post of Clerk in the Institution. Thereafter, vide letter dated 24.08.1998, BSA accorded the permission and in furtherance thereof, an advertisement dated 24.09.1998 was published in daily newspaper "Dainik Jagran" for making recruitment on the post of Clerk in the Institution. Pursuant to the the advertisement dated 24.09.1998, petitioner along with other candidates applied for the post in issue i.e. Clerk. The selection was held on 25.10.1998 by the duly constituted Selection Committee comprising of Manager, Principal and nominee of BSA. The petitioner was selected in the selection process and thereafter relevant documents including the select list was sent for approval of BSA vide letter of respondent no.4 dated 28.10.1999.

6. Thereafter, in absence of any response from the BSA on the select list within one month, the Committee of Management of the Institution approved recommendation of Selection Committee and appointment order dated 29.11.1998 was issued by the respondent and pursuant to the same the petitioner joined on the post of Clerk on 03.12.1998.

7. After considering the relevant documents, respondent no.2-BSA cancelled the selection process/interview held for selecting the candidate for the vacant post of Clerk in the Institution, the effect of which is that the BSA disapproved the appointment of the petitioner and the decision was duly communicated to the respondent no.4 vide letter dated 21.11.1998, Annexure No.1 to the Counter Affidavit dated 05.05.1991 filed on behalf of opposite party nos. 2 and 3. The letter dated 21.11.1998, as stated by the respondent no.4, was received by respondent no.4 on 06.12.1998.

8. The appointment of the petitioner was disapproved on the ground that during selection process 'Type Test' was not held.

9. For the purposes of reliefs sought in the writ petition as also assailing the order dated 21.11.1998, learned counsel for the petitioner submitted that it is unsustainable in the eye of law keeping in view the provisions of Rule 15 particularly Sub Rule 5(iii) and Rule 16 of the Rules of 1984.

10. Elaborating his arguments, the learned counsel for the petitioner further submitted that the Committee of Management-respondent no.4 sent the relevant documents for approval of proceedings of Selection Committee dated 25.10.1998 including the select list wherein the name of petitioner find place and he was selected Selection Committee, duly constituted, before the respondent no.2-BSA vide letter dated 28.10.1998 and on the proposal of appointment of petitioner the decision ought to have been taken by the BSA within a month from the date of receipt of the letter dated 28.10.1998, as required under Rule 15 of the Rules of of 1984, which was not taken in the said time nor any decision was communicated by BSA to respondent no.4 within the said time and in absence of any decision or communication within statutory period provided under Rule 15 of the Rules of 1984,the Committee of Management-respondent no.4, taking into consideration of provision as envisaged in Rule 15(5)(iii),

issued the appointment order dated 29.11.1998 to the petitioner. Rule 15(5)(iii) provides deemed approval of recommendation made by the Selection Committee if any decision thereon is not communicated by BSA within one month from the date of receipt of paper/select list. Pursuant to the appointment order dated 29.11.1998 the petitioner joined on the post in question on 03.12.1998.

11. It is further submitted that the order dated 21.11.1998, whereby the appointment of petitioner was disapproved, was served in the office of respondent no.4-Committee of Management of college on 06.12.1998, is antedated and prior to service of order dated 21.11.1998 the appointment of the petitioner was made on the post in issue i.e. Clerk. Thus, keeping in view provisions as envisaged in Rule 15 and 16 of the Rules of 1984 and facts of the case including the fact that appointing authority of the petitioner is Management of the Institution the order dated 21.11.1998 is unsustainable.

12. Learned counsel for the petitioner further submitted that the impugned order dated 21.11.1998 passed by the respondent no.2-BSA whereby he disapproved the appointment of petitioner and cancelled the Selection Process/Interview related to appointment of petitioner on the ground that no "Type Test" was held in the selection process is also unsustainable in view of the fact that the "Type Test" was held and thereafter the Selection Committee recommended the name of the petitioner for providing appointment on the post in issue i.e. Clerk and on the basis of recommendation of the Selection Committee as also keeping in view the provisions of Rule 15 of Rules 1984 the appointment of petitioner was made by the respondent no.4 vide appointment order dated 29.11.1998. It is also stated that the respondent no.2 has no power to cancel the appointment of the petitioner, who was appointed against Group-C post, as the appointing authority of the petitioner is Committee of Management and not the respondent no.2-BSA. In this regard, reliance has been placed on paras 26(i) to 26(v) of the amended Writ Petition as also on the order dated 21.11.1998.

13. Lastly it is stated by the learned counsel for the petitioner that prior to passing of order dated 21.11.1998 no opportunity of hearing was given to the petitioner and as such the order dated 21.11.1998, on this ground, is liable to be interfered by this Court.

14. In view of aforesaid, the prayer is to allow the writ petition and quash the impugned order dated 21.11.1998.

15. Per contra, learned counsel for the respondent no.2-BSA, Sri Shobhit Mohan Shukla on the basis of counter affidavit submitted that the writ petition for the reliefs sought is liable to be dismissed. Elaborating his argument, it is stated that as per the Rule 4 of Rules 1984, which is applicable in the instant case and not disputed by learned counsel for the petitioner, the 'Type Test', which was necessary for providing appointment on the post in issue i.e. Clerk, was not held and accordingly selection process was dehors the Rules and as such is nullity and taking into account the same the Selection Process/Interview was cancelled. It is also stated that on the basis of vitiated selection process appointment given to petitioner is also nullity as it is settled proposition of Law that an appointment dehors the Rules is nullity.

16. In support of his contention to the effect that "Type Test" was not held in the selection/recruitment process, the learned counsel for the respondent no.2-BSA placed reliance on para 26 & 29 of the counter affidavit dated 19.01.2020 filed in response to the amended writ petition, which on reproduction reads as under:-

"26. That the averments made in paragraphs 26(i) to 26 (iii) of the writ petition are vehemently denied. In this regard, it may be stated that vide a letter dated 28.12.1998 bearing No.3875/98-99 the Manager of the Institution was informed in reference to the letter dated 03.12.1998 that type test was not taken in utter derogation to the Rules. True copy of letter dated 28.12.1998 is being annexed herewith as Annexure No.CA-3 to this affidavit.

29. That it would not be out of place to mention here again that after the interview held on 25.10.1998 complaints were made which received in the office of the answering opposite party no.2 on 29.10.1998. The facts of the complaints were inquired into and found to be correct inasmuch as various irregularities were committed in the interview held on 25.10.1998. In these circumstances it was quite necessary to maintain the fairness and legality in the selection and appointment to cancel the unfair and irregular selection held on 25.10.1998. Accordingly the answering opposite party no.2 vide his order dated 21.11.1998 cancelled the selection dated 25.10.1998 and intimated the opposite party no.4, but the opposite party no.4 ignoring the order of the opposite party no.2 dated 21.11.1998 issued the appointment letter dated 29.11.1998 to petitioner which is absolutely illegal and invalid. The answering opposite party no.2 again vide his letter dated 28.12.1998 (Annexure CA-3) apprised the opposite party no.4 that the appointment of the petitioner on the post of Clerk made by him is invalid. But one of the orders of the opposite party no.2 were complied with.

17. On the basis of the averments made in the counter affidavit dated 19.01.2020, Sri Shobhit Mohan Shukla further submitted that in response to the counter affidavit, no rejoinder affidavit has been filed and as such in view of observation made by the Division Bench of this Court in para 5 of the judgment reported in 2004 (22) LCD 1445 (Ravindra Pratap Yadav @ Mahajan Vs. State of U.P. & Ors.) the averments made in counter affidavit to amended Writ Petition filed by respondent nos.2 and 3 are liable to be treated as correct and in view of the same the admitted position is that no "Type Test" was held, which is mandatory and accordingly neither the selection process nor the appointment of petitioner is legally sustainable. The relevant part of the judgment reads as under:-

"5. Various others allegations have been made in the writ petition but in our opinion it is not necessary for us to go into same in view of the allegations in the counter-affidavit of the Nagar Nigam, Allahabad, respondent No. 4 to which no rejoinder affidavit has been filed and hence these allegations in the counter-affidavit have to be treated as correct."

18. On the basis of the documents annexed to the rejoinder affidavit dated 27.09.1999, Sri Shobhit Mohan Shukla, learned counsel for the respondent no.2-BSA further stated that on perusal of the same it is crystal clear that the "Type Test" was not held and only interview was held and thereafter the name of petitioner was

recommended for providing appointment on the post in issue i.e. Clerk.

19. It is stated that in absence of type test, which is mandatory as per Rule 4 of Rules of 1984 the recommendation for appointment of petitioner on the post in issue i.e. Clerk in the office of respondent no.4 is *void ab initio* and nullity and being so appointment of petitioner is also nullity and keeping in view same as well as the principle laid down by the Hon'ble Apex Court and by this Court to the effect that issuance of a writ or quashing/setting aside of an order if revives another illegal order then in that eventuality the writ court should not interfere in the matter on any ground including the ground of failure to follow the principle of Natural Justice. The writ petition for relief sought is liable to be dismissed.

20. In regard to the decision taken by the respondent no.2-BSA dated 21.11.1998 Sri Shobhit Mohan Shukla submitted that the decision was taken, within time as prescribed under Rule 15 of Rules 1984 and accordingly the appointment of the petitioner is unsustainable in the eye of law and in view of the same, the petitioner is not entitled to any benefit of Rule 15(5)(iii) of the Rules 1984.

21. On the basis of the affidavits on record, the learned counsel for Committee of Management-respondent no.4, Sri Vikas Singh, stated that the petitioner was a trained "Typist" from Khanna Commercial College, Alambagh, Lucknow, U.P. which is a recognized institute, as appears from the record, and taking into account the said fact, it appears that the appointment of the petitioner was made by the respondent no.4.

22. On query made to the learned counsel for the respondent no.4, Sri Vikas Singh, specifically on the issue of "Type Test", it has been stated that it appears that "Type Test" was not held and all the candidates who were before the Selection Committee participated in the selection process and they were interviewed and thereafter the select list was prepared. It is further stated that in the short counter affidavit dated 22.09.1999 as also in the detailed counter affidavit dated 19.12.2010 filed by the Committee of Management-respondent no.4 it has not been specifically stated that the "Type Test" was held.

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

24. Admitted facts of the present case, as appears from the pleadings and documents on record, are to the effect that the selection process was initiated for making recruitment/ appointment on the post of Clerk, which fell vacant on account of death of incumbent of the post, on 24.09.1998 (the date of advertisement). The advertisement was published after due permission of BSA vide letter dated 24.08.1998. The advertisement was published in daily newspaper "Dainik Jagran". In response to the advertisement 26 candidates applied for one post of Clerk in the Institution and 17 appeared in the Selection Process. The duly constituted Selection Committee considered the candidature of 17 candidates and being found suitable, the name of the petitioner was recommended by the Selection Committee for providing appointment on the post in issue i.e. Clerk.

25. The relevant records for the purposes of giving approval to the recommendation of Selection Committee and providing appointment to the petitioner was sent by the respondent no.4 vide letter dated 28.10.1998. The letter dated 28.10.1998 sent by Committee of Management-respondent no.4 was duly

replied by respondent no.2-BSA vide letter dated 21.11.1998. Vide letter dated 21.11.1998 the selection process which includes recommendation of Selection Committee for providing appointment to the petitioner on the post of Clerk was cancelled on the ground to the effect that the "Type Test" was not held during selection process.

26. On the issue of "Type Test" in the Writ Petition it has not been stated that "Type Test" was held on 25.10.1998, the date on which selection was held. It appears further from the contents of the para 7 of the short counter affidavit filed by respondent no.4-Committee of Management dated 22.09.1999, which on reproduction reads as under, that no "Type Test" was held for the purpose of appointment on the post in issue i.e. Clerk.

"7. That since the petitioner was a trained typist from Khanna Commercial College which is recognized institution from the State Government and the petitioner was having requisite typing speed which was also confirmed and the petitioner was selected as per provisions of the above said rule, 1984 and a copy of the typing certificate is being filed herewith as Annexure No.-C-3 to this counter affidavit."

27. It is also evident from the documents annexed as Annexure No.R-1 to the rejoinder affidavit dated 27.09.1999 and the averments made therein as also from Annexure No.7 to the writ petition that no "Type Test" was held prior to making recommendation for providing appointment to the petitioner by the Selection Committee on the post of Clerk in the Institution.

28. In view of the aforesaid as well as keeping in view specific averments made in paras 26 and 29 of the counter affidavit dated 19.01.2020, quoted above, not refuted by filing the rejoinder affidavit and in view of the law laid down by this Court in the case of Ravindra Pratap Yadav (Supra) the same are liable to be treated as correct, this Court is of the view that "Type Test" was not held prior to making recommendation for providing appointment to the petitioner on the post in issue i.e. Clerk by the Selection Committee.

29. The Rule 4 of Rules 1984, which is quoted below, specifically provides the Minimum Qualification for the post of Clerk. The Rules of 1984 are admittedly applicable in the Institution. According to Rule 4 of Rules of 1984 a person having certificate of Intermediate Examination of the Board of High School and Intermediate Examination, Uttar Pradesh, or equivalent examination (with Hindi) and a minimum speed of 30 words per minute in Hindi Type Writing can be appointed on the post in issue i.e. Group -C post/post of Clerk.

30. Rule 4 of Rules of 1984 reads as under:-

"4. Minimum Qualification:-*(1) The minimum qualifications for the post of clerk shall be Intermediate Examination of the Board of High School and Intermediate Education, Uttar Pradesh, or equivalent examination (with Hindi) and a minimum speed of 30 words per minute in Hindi typewriting.*

(2) The minimum qualification for the post of a Group 'D' employee shall be Class V from an institution recognized by the Government of Uttar Pradesh or equivalent examination with Hindi."

31. Admittedly 17 persons appeared before the Selection Committee and to select the best amongst them as also to ascertain that a candidate is having minimum speed of 30 words per minute in

Hindi Typewriting the "Type Test" was required, which as per record was not held. In addition, taking into account the Rule 4 of Rules of 1984, this Court is of the view that for fair and impartial selection the "Type Test" was/is mandatory and not holding the "Type Test" would vitiate the selection process.

32. At this stage, it is stated by the learned counsel for the petitioner that the side opposite (respondent nos.1 to 4) have failed to prove the fact that the "Type Test" was not held on 25.10.1998 and accordingly benefits should be given to the petitioner.

33. In regard to the aforesaid, it is relevant to point out that it is settled principle of law that plaintiff has to prove his own case and he can not succeed on the weakness of defense and the petitioner herein has failed to prove the fact, on the basis of pleadings and documents on record particularly documents annexed as Annexure R-1 to the rejoinder affidavit dated 27.09.1999 and Annexure No.7 to the writ petition, that the "Type Test" in selection process was held and thereafter the Selection Committee recommended the name of petitioner.

34. In view of aforesaid, this Court is of the view that the recommendation of Selection Committee and appointment of the petitioner made by the respondent no.4-Committee of Management vide appointment order dated 29.11.1998, in absence of "Type Test", both were/are de-hors the Rules and being so are nullity and void ab initio and accordingly the petitioner has no right to hold the post nor he is entitled to continue on the post nor he is entitled to salary from the State-Exchequer.

35. The Supreme Court in Yogesh Kumar vs. Government of NCT Delhi and others (2003) 3 SCC 548 held that appointment has to be strictly as per statutory rules. A person not possessing requisite qualification and appointment made dehors of the rules without following procedure, the appointment is illegal since inception, nonest, nullity and no legal right to continue or right over the post and length of continuous service of such illegal appointment will not help the petitioner.

36. Vide Mohd. Sartaj vs. State of U.P. (2006) 2 SCC 315, Sushil Kumar Dwivedi vs. Basic Shiksha Adhikari, Banda (DB) (2003) 2 UPLBEC 1216, in Mamta Mohanti case (supra) and Mohd. Sartaj case (Supra), Committee of Management vs. State of U.P. (DB) (2009) 2 ALJ 528 it was held that in case, approval is granted by the authority to a person who lacks qualification then it is a serious lapse on the part of the authority, justifying suitable disciplinary action against such careless and negligent authorities. Illegal appointments cannot be regularized. There is a distinction between irregularity and illegality. Irregularity can be regularized but not illegality.

37. In State of Karnataka vs. KGSD Canteen Employees Welfare Ass. (2006) 1 SCC 567, Mamta Mohanty case (Supra) and Sushil Kumar Dwivedi case (Supra) it was held that any action of an officer or authority of the State which is contrary to law, as in the facts of the present case approval granted by the B.S.A. in spite of the fact that the petitioners were not qualified and there was no sanctioned posts, such approval cannot bind the State to pay the salary from the State Exchequer (refer; State of Manipur vs. Y Token Singh (2007) 5 SCC 65).

38. In Pramod Kumar vs. U.P. Secondary Education Services Commission and others (2008) 7 SCC 153 Supreme Court held mandamus can be sought when there is a legal right and corresponding

duty upon the State Agency. Petitioners who did not possess valid degree held had no right to appointment and, therefore, could not seek mandamus.

39. In Regional Manager, Central Bank of India vs. Madhulika Guruprasad Dahir and others (2008) 13 SCC 170 Supreme Court held that a person appointed against a reserved post for S.T. against forged social status certificate cannot upon termination claim to be retained merely on the ground that he has worked for over 20 years.

40. With regard to the other pleas taken by the learned counsel for the petitioner for interfering in the matter and allowing the writ petition, which are to the effect that opportunity of hearing was not given to the petitioner prior to passing of order dated 21.11.1998 and the respondent no.2-BSA has no power to cancel the appointment of petitioner, are concerned this Court is of the view that on the said grounds the interference in the matter is not required. It is in view of the principle to the effect that issuance of a writ or quashing/setting aside of an order if revives another pernicious or wrong or illegal order then in that eventuality the writ court should not interfere in the matter and should refuse to exercise its discretionary power conferred upon it under Article 226 of the Constitution of India. The writ court should not quash the order if it revives a wrong or illegal order. Vide : Gadde Venkateswara Rao v. Government of Andhra Pradesh, AIR 1966 SC 828; Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar, (1999) 8 SCC 16: AIR 1999 SC 3609: 1999 AIR SCW 3623; M.C. Mehta v. Union of India, (1999) 6 SCC 237: AIR 1999 SC 2583; Mallikarjuna Mudhagal Nagappa v. State of Karnataka, (2000) 7 SCC 238: AIR 2000 SC 2976: 2000 AIR SCW 3289; and Chandra Singh v. State of Rajasthan, (2003) 6 SCC 545: AIR 2003 SC 2889: 2003 AIR SCW 3518 and Raj Kumar Soni v. State of U.P., (2007) 10 SCC 635.

41. By the Order in issue dated 21.11.1998 the respondent no.2-BSA has cancelled/disapproved the selection process/interview wherein the petitioner was selected for the post of Clerk in the Institution on the ground that "Type Test" was not held during selection process. As the "Type Test" was not held, which was required as per Rule 4 of the Rules of 1984, quoted above, this Court is of the view that the recommendation of Selection Committee in favour of petitioner itself is nullity being dehors the Rules and being so the consequent appointment of the petitioner vide order dated 29.11.1998 on the post of Clerk made by Committee of Management (Manager)-respondent no.4 is also nullity and therefore taking into consideration the above stated legal proposition the cancellation thereof can not be interfered on the ground that no opportunity of hearing was given to the petitioner prior to passing of order dated 21.11.1998 as also on the ground that BSA, being not the appointing authority, has no power to cancel the appointment of petitioner.

42. In the judgment dated 14.05.2019 passed in the case of ***Sachchida Nand Chaturvedi Vs. State of U.P. reported in 2019(6) ADJ 189,*** this Court, on being found that the promotion order is nullity, decline to interfere in the matter. The relevant portion of the judgment reads as under:-

"28. Now both the aspects, whether an appointment made by a person holding charge of the Office only can be valid and whether if such appointment is illegal then principles of natural justice

will apply or not, has been considered in a recent decision of Supreme Court in Union of India and another v. Raghuwar Pal Singh, MANU/SC/0240/2018 : (2018) 15 SCC 463, wherein it was held that a person looking after charge/duties of Office, could not discharge statutory power of appointment to Group 'C' or Group 'D' post. In fact even the question of applicability of principles of natural justice in such case where appointment has not been made by Competent Authority in accordance with Rules, which requires prior approval, has been considered in Raghuwar Pal Singh (supra), and it has been held that appointment de hors the Rules is nullity, hence, even principles of natural justice are not applicable in such cases. Paras 16 and 17 of judgment reads as under:

"16. We shall now consider the efficacy of the reason so recorded in the office order. The recruitment procedure in relation to the post of Veterinary Compounder is governed by the statutory Rules titled 'Central Cattle Breeding Farms (Class III and Class IV posts) Recruitment Rules, 1969, as amended from time to time and including the executive instructions issued in that behalf. As per the stated dispensation for such recruitment, the appointment letter could be issued only by an authorised officer and after grant of approval by the competent authority. Nowhere in the Original Application filed by the Respondent, it has been asserted that such prior approval is not the quintessence for issuing a letter of appointment.

17. For taking this contention forward, we may assume, for the time being, that the then Director Incharge H.S. Rathore, Agriculture Officer had the authority to issue a letter of appointment. Nevertheless, he could do so only upon obtaining prior written approval of the competent authority. No case has been made out in the Original Application that due approval was granted by the competent authority before issue of the letter of appointment to the Respondent. Thus, it is indisputable that no prior approval of the competent authority was given for the appointment of the Respondent. In such a case, the next logical issue that arises for consideration is: whether the appointment letter issued to the Respondent, would be a case of nullity or a mere irregularity? If it is a case of nullity, affording opportunity to the incumbent would be a mere formality and non grant of opportunity may not vitiate the final decision of termination of his services. The Tribunal has rightly held that in absence of prior approval of the competent authority, the Director Incharge could not have hastened issuance of the appointment letter. The act of commission and omission of the then Director Incharge would, therefore, suffer from the vice of lack of authority and nullity in law."

29. Court also relied on its earlier judgment in Kendriya Vidyalaya Sangathan and others v. Ajay Kumar Das and others, MANU/SC/0385/2002 : 2002 (4) SCC 503, wherein it had observed that if appointment letters are nullity, having been issued by an officer who did not wield authority to do so, there was no question of observance of principles of natural justice even though affected party was not before Court.

30. In Union of India and another v. Raghuwar Pal Singh (supra), Court clearly held that letter of appointment was issued by Director Incharge, without prior approval of Competent Authority is a nullity and that being so principles of natural justice are not attracted. It has also held that it was not an essential requirement and would have been an exercise in futility.

31. Since, in the present case also, promotion has been made under Rules 2001, not applicable in this case, it was a nullity and therefore, cancellation thereof cannot be interfered on the ground that no opportunity was given, since principles of natural justice are not attracted in the case in hand.

32. There are some other principles applicable in a writ jurisdiction which are attracted in the present case and go against petitioner. An order is not to be interfered in violation of principles of natural justice if in the given facts and circumstances of the case, only view possible is that order which is affected by impugned order, was patently illegal.

33. It is well established that principles of natural justice cannot be put in a straight jacket formula and there are certain circumstances particularly when the facts are not in dispute wherein non compliance of principles of natural justice will not vitiate administrative or quasi judicial order and/or High Court in exercise of writ jurisdiction may not interfere. One such exception to the application of principles of natural justice is where only one conclusion is possible. In the present case, it is evident from record that very promotion of petitioner as Junior Accounts Clerk was illegal, hence this Court, while exercising power under Article 226 of the Constitution is not bound to interfere. Observance of principles of natural justice is not an empty formality. Where only one conclusion is possible, this Court can decline to interfere in exercise of power under Article 226 of the Constitution.

34. In Karnataka State Road Transport Corporation and another v. S.G. Kotturappa, MANU/SC/0177/2005 : AIR 2005 SC 1933, Court held:

"The question as to what extent, principles of natural justice are required to be complied with would depend upon the fact situation obtaining in each case. The principles of natural justice cannot be applied in vacuum. They cannot be put in any strait-jacket formula. The principles of natural justice are furthermore not required to be complied with when it will lead to an empty formality. What is needed for the employer in a case of this nature is to apply the objective criteria for arriving at the subjective satisfaction. If the criterias required for arriving at an objective satisfaction stands fulfilled, the principles of natural justice may not have to be complied with...".

35. In Punjab National Bank and others v. Manjeet Singh and another, MANU/SC/8807/2006 : AIR 2007 SC 262, Court said:

"The principles of natural justice were also not required to be complied with as the same would have been an empty formality. The Court will not insist on compliance with the principles of natural justice in view of the binding nature of the award. Their application would be limited to a situation where the factual position or legal implication arising thereunder is disputed and not where it is not in dispute or cannot be disputed. If only one conclusion is possible, a writ would not issue only because there was a violation of the principle of natural justice."

(emphasis added)

36. In P.D. Agrawal v. State Bank of India and others, MANU/SC/8122/2006 : (2006) 8 SCC 776, it has been observed:

"The Principles of natural justice cannot be put in a straight jacket formula. It must be seen in circumstantial flexibility. It has separate facets."

37. In Writ Petition No. 31995 of 2000 (Ganesh Singh v. District Magistrate

and others), decided on 29.4.2011, Court has held as under:

"16. The principles of natural justice cannot be kept in a straight jacket formula. They apply in the facts and circumstances of each and every case. If the appointment of petitioner would have been made in accordance with law or at least some prima facie material would have to be placed to show what has been stated by respondents is not ex facie correct, then the matter may have required some further investigation. In the case in hand no such thing has been placed on record by petitioner or even pleadings to show that procedure prescribed under 1974 Rules was observed and thereafter petitioner was appointed. The appointment, therefore, is ex facie illegal and in the teeth of the Rules.

17. In the circumstances, this Court under Article 226 of the Constitution do not find it a fit case warranting interference. The writ petition, therefore, lacks merit and is dismissed."

(emphasis added)

38. In Writ Petition No. 38893 of 2008 (Brijendra Singh v. State of U.P and others) decided on 18.5.2011 this Court has taken somewhat similar view as under:

"... it is well-settled that if only one conclusion is possible, the Court would not interfere in the impugned order...."

(emphasis added)

39. Another principle well established when a Court is required to exercise its extraordinary jurisdiction under Article 226 of Constitution, it would be justified in declining to interfere in an order which has been passed in violation of principles of natural justice, if setting aside of such an order would result in revival of another illegal order. In other words, Court will not set aside an order merely on the ground that opportunity was not given or principles of natural justice were not followed, if as a result of setting aside such an order would revive in favour of petitioner concerned, another illegal order for the reason that this Court will not perpetuate illegality and no person can be allowed to enjoy benefit of an illegal order, by taking recourse to Institution of justice under Article 226 of Constitution.

40. A Division Bench of this Court (of which 1 was also a member) in Amarendra Singh v. State of U.P., MANU/UP/1480/2007 : 2008(1) ADJ 397 (DB) : 2008(1) ESC 734 has held that since the petitioner has invoked extraordinary jurisdiction under Article 226 of the Constitution, the remedy is not as a matter of right and this Court is not bound to interfere even if technically or otherwise the order impugned is found to be illegal or erroneous. There are certain exceptions which are well recognised and one of such exceptions is where setting aside of an order will result in revival of another illegal order.

41. In Champalal Binani v. The Commissioner of Income Tax west Bengal and others, MANU/SC/0170/1969 : AIR 1970 SC 645, Court while dealing with jurisdiction of the Court with respect to issuance of writ of certiorari held that "a writ of certiorari is discretionary, it is not issued merely because it is lawful to do so."

42. In Durga Prasad v. The Chief Controller of Imports and Exports and others, MANU/SC/0004/1968 : AIR 1970 SC 769 (para 7) and in Bombay Municipal Corporation for Greater Bombay v. Advance Builders (India) Pvt. Ltd., MANU/SC/0053/1971 : AIR 1972 SC 793 (para 13), it was held that writ jurisdiction is discretionary and the Court is not bound to interfere even if there is error of law.

43. It would be appropriate to refer the view expressed in Municipal Board, Pratabgarh and another v.

Mahendra Singh Chawla and MANU/SC/0190/1982 : 1982(3) SCC 331, which reads as under:

"...this Court is not bound to tilt at every approach found not in consonance or conformity with law. The interference may have a deleterious effect on the parties involved in the dispute. Laws cannot be interpreted and enforced divorced from their effect on human beings for whom the laws are meant. Undoubtedly, rule of law must prevail but as is often said, 'rule of law must run akin to rule of life. And life of law is not logic but experience'. By pointing out the error which according to us crept into the High Court's judgment the legal position is restored and the rule of law has been ensured its pristine glory. Having performed that duty under Article 136, it is obligatory on this Court to take the matter to its logical end so that while the law will affirm its element of certainty, the equity may stand massacred. There comes in the element of discretion which this Court enjoys in exercise of its extraordinary jurisdiction under Article 136."

44. What has been observed by the Apex Court with reference to Article 136 of the Constitutions, in my view would equally be applicable when this Court is required to exercise its equitable extraordinary jurisdiction under Article 226 of the Constitution of India. In a given case, having set legal position straight, still this Court may decline to interfere where the equity justifies the same or where the facts and circumstances warrant that discretionary relief should be declined. Where interference with an illegal order may result in revival lot another illegal order, the Court would be justified in refusing to interfere.

45. In Employees' State Insurance Corporation and others v. Jardine Henderson Staff Association and others, MANU/SC/3424/2006 : AIR 2006 SC 2767, Court held that relief in a writ of certiorari can be denied inter alia when it would be opposed to public policy or in a case where quashing of an illegal order would revive another illegal order. In para 62 of the judgment Court held that High Court under Article 226 and Supreme Court under Article 136 read with 142 of the Constitution has the power to mould relief in the facts of the case.

46. In Ramnik Lal N. Bhutta and another v. State of Maharashtra, MANU/SC/0279/1997 : AIR 1997 SC 1236, Court observed:

"The power under Article 226 is discretionary. It will be exercised only in furtherance of interest of justice and not merely on the making out of a legal point."

47. In State of H.P. v. Raja Mahendra Pal and others, MANU/SC/0227/1999 : (1999) 4 SCC 43, in para 6 of the judgment, Court held:

"...It is true that the powers conferred upon the High Court under Article 226 of the Constitution are necessary in nature which can be invoked for the enforcement of any fundamental right or legal right but not for mere contractual right arising out of an agreement particularly in view of the existence of an efficacious alternative remedy. The constitutional Court should insist upon the party to avail of the same instead of invoking of extraordinary writ jurisdiction of this Court. This does not however debar the Court from granting the appropriate relief to a citizen under peculiar and special facts notwithstanding the existence of an alternative efficacious remedy. The existence of special circumstances are required to be noticed before issuance of the direction by the High Court while invoking the jurisdiction under the said Article...."

48. Similarly, in Director of Settlement V.M.R Apparao, MANU/SC/0219/2002 : (2002) SCC 638 in para 17 Court held that the power vested in High Court under Article 226 of the Constitution is discretionary.

49. Following the principle laid down in the aforesaid decisions, this Court has reiterated the same view in a number of cases, including R.K. Shukla v. Chairman Town Area Committee and another (Writ A No. 19889 of 1991 decided on 17.1.2013). Suffice it to say that this Court is not bound to interfere even if technically or otherwise, order impugned, is found to be illegal or erroneous.

50. In Amrendra Singh v. State of U.P. and others, MANU/UP/1480/2007 : 2008(1) ADJ 397 (DB), this Court has declined to interfere in intra Court appeal with an order of Single Judge even though legally it was not sustainable since substantial justice had been done therein and setting aside order may have resulted in revival of another pernicious order."

43. The settled principles considered by this Court in the judgment passed in the case of Sachchida Nand Chaturvedi (supra), in my view, are fully applicable in the present case.

44. For the reasons aforesaid, this Court is of the view that order dated 21.11.1998 is not liable to be interfered in exercise of power under Article 226 of the Constitution of India and the petitioner is not entitled to the reliefs sought in the present writ petition. Writ petition lacks merit and it is dismissed. No order as to costs.

(2020)03-05ILR A765
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 04.02.2020

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Service Single No. 1772 of 1995

Bal Krishan Misra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
L.P. Shukla

Counsel for the Respondents:
C.S.C., O.P.M. Tripathi

(A) Service Law- U.P Secondary Education [Services Selection Boards] Act, 1982 - Section 18 read with U.P Secondary Education Service Commission (Removal of Difficulties) Order, 1981 - ad-hoc appointment should be made by the Committee of Management on substantive vacancy - it can be done if the management notified the vacancy to the Commission - the post of Lecturer, Sanskrit fell vacant substantively on 10.07.1989 on which DIOS treated the said vacancy as substantive vacancy

Writ Petition Rejected.(E-10)

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Som Kartik, learned counsel for the petitioner and Sri Jogendra Nathi Verma, learned State counsel.

2. In view of the order proposed to be passed and keeping in view the age of litigation,
notice to respondent Nos. 4 and 5 is dispensed with.

3. Initially, the writ petition was filed for the following main reliefs:-

"(i) Issue a writ, direction or order in the nature of mandamus commanding the opposite parties no. 1 to 3 to grant approval to the Petitioner's appointment on the post of ad-hoc Sanskrit Lecturer and allow him all the consequential benefits including salary on the said post from the date of joining the said post i.e. 1.8.1985.

(ii) Issue a writ, direction or order in the nature of mandamus commanding the opposite parties no. 1 to 3 to regularise the petitioner's appointment on the post of Sanskrit Lecturer from the date of the G.O. dated 6.4.1991 and allow him all the consequential benefits of the post from the said date including arrears of salary."

4. During the pendency of the present writ petition, the respondent No. 5/Regional Selection Committee, Allahabad Region, Allahabad passed the order dated 21.12.2010, whereby the case of the petitioner for regularization on the post of Lecturer, Sanskrit was taken up he was regularized keeping in view the provisions of ***Section 33-C of the U.P. Secondary Education [Services Selection Boards] Act, 1982 (in short "Act, 1982")***, which reads as under:-

*"**[33C. Regularisation of certain more appointments.** - (1) Any teacher who -*

(a)(i) was appointed by promotion or by direct recruitment on or after May 14, 1991 but not later than August 6, 1993 on ad hoc basis against substantive vacancy in accordance with section 18, in the Lecturer grade or the Trained Graduate grade;

(ii) was appointed by promotion on or after July 31,1988 but not later than August 6,1993 on ad hoc basis against a substantive vacancy in the post of a Principal or Head Master in accordance with Section 18;

(b) possesses the qualification prescribed under, or is exempted from such qualification in accordance with, the provisions of the Intermediate Education Act, 1921;

(c) has been continuously serving the Institution from the date of such appointment up to the date of the commencement of the Uttar Pradesh Secondary Education Services Commission (Amendment) Act, 1998;

(d) has been found suitable for appointment in a substantive capacity by a Selection Committee constituted under sub-section (2);

shall be given substantive appointment by the Management.

(2) (a) For each region, there shall be a Selection Committee comprising, -

(i) Regional Joint Director of Education of that region, who shall be the Chairman;

(ii) Regional Deputy Director of Education (Secondary) who shall be member;

(iii) Regional Assistant Director of Education (Basic) who shall be a member.

In addition to above members, the District Inspector of Schools of the concerned district shall be co-opted as member while considering the cases for regularisation of that district.

(b) The Procedure of selection for substantive appointment under sub-section (1) shall be such as may be prescribed.

(3) (a) The names of the teachers shall be recommended for substantive appointment in order of seniority as determined from the date of their appointment.

(b) If two or more such teachers are appointed on the same date, the teacher who is elder in age shall be recommended first.

(4) Every teacher appointed in a substantive capacity under sub-section (1) shall be deemed to be on probation from the date of such substantive appointment.

(5) A teacher who is not found suitable under sub-section (1) and a teacher who is not eligible to get a substantive appointment under that sub-section shall cease to hold the appointment on such date as the State Government may by order specify.

(6) Nothing in this Section shall be construed to entitle any teacher to substantive appointment, if on the date of commencement of the Ordinance referred to in clause (c) of sub-section (1) such vacancy had already been filled or selection for such vacancy has already been made in accordance with this Act.]"

5. As per the order of regularization dated 21.12.2010, the petitioner was regularized w.e.f. 20.04.1998. It is without going to say that Section 33-C was inserted in the Act, 1982 vide U.P. Act No. 25 of 1998 dated 25.07.1998 w.e.f. 20.04.1998.

6. After the order dated 21.12.2010 passed by the respondent No. 5, the petitioner moved an application for amendment in the writ petition, thereby seeking incorporation of certain facts and grounds as well as the reliefs. The reliefs incorporated in the writ petition by moving the application for amendment, which was allowed vide order dated 04.03.2013, are as under:-

"(ii)(a) To issue a writ, order or direction in the nature of certiorari quashing the order dated 21.12.2010 [Annexure No. 11(a)] of the Regional Committee to the extent it has regularized the services of the petitioner w.e.f. 20-4-1998.

(ii)(b) To issue a writ, order or direction in the nature of mandamus commanding the Regional Committee to regularize the petitioner w.e.f. the date of his appointment i.e. 1-8-1985."

7. Sri Som Kartik, learned counsel for the petitioner submitted that the present writ petition survives only for the relief Nos. (ii) (a) and (ii) (b).

8. Assailing the order dated 21.12.2010, whereby the services of the petitioner have been regularized w.e.f. 20.04.1998 and consequential relief(s) sought by the petitioner to the effect that his regularization be considered w.e.f. 01.08.1985, learned counsel for the petitioner submitted that the petitioner was initially appointed on the post of Lecturer, Sanskrit vide order of appointment dated 27.07.1985, for which the resolution was also passed by the respondent No. 3/Committee of Management on 25.07.1985.

9. The appointment on the post of Lecturer, Sanskrit was made by way of promotion on vacant post of Lecturer, Sanskrit as per the procedure prescribed under para-2 of the Uttar Pradesh Secondary Education Service Commission (Removal of Difficulties) Order, 1981 (in short "Order, 1981").

10. Keeping in view the appointment of the petitioner by way of promotion by the competent Authority in the year 1985, as per the procedure prescribed under para-2 of Order, 1981 as well as the provisions inserted in the Act, 1982 i.e. Section 33-A

(1-A), inserted in the Act, 1982 vide U.P. Act No. 26 of 1991, which provides deemed regularization, the case of the petitioner ought to have been considered by the respondents for regularization under Section 33-A (1-A) of the Act, 1982 and ignoring the same, the appointment of the petitioner by way of promotion was considered by the respondent No. 5 for regularization under Section 33-C of the Act, 1982 and accordingly, the respondent No. 5 committed error of law and fact both. Section 33-A of the Act, 1982 on reproduction reads as under:-

*"[**33A. Regularisation of certain appointment.** - (1) Every teacher directly appointed before the commencement of the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Ordinance, 1985, on ad hoc basis against a substantive vacancy in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, as amended from time to time, who possesses the qualifications prescribed under, or is exempted from such qualification in accordance with the provisions of the Intermediate Education Act, 1921, shall, with effect from the date of such commencement, be deemed to have been appointed in a substantive capacity provided such teacher has been continuously serving the Institution from the date of such appointment up to the date of such commencement.]*

[(1A) Every teacher appointed by promotion on ad hoc basis against a substantive vacancy in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, as amended from time to time, who possesses the qualifications prescribed under or, is exempted from such qualifications in accordance with the provisions of the Intermediate Education Act, 1921 shall, with effect from the date of commencement of the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Act, 1991, be deemed to have been appointed in a substantive capacity, provided such teacher has been continuously serving the Institution from the date of such ad hoc appointment to the date of such commencement.

(1B) Every teacher directly appointed after June 12, 1985 and before May 13, 1989 on ad hoc basis against a substantive vacancy in the Certificate of Teaching Grade in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981 as amended from time to time who possesses the qualifications prescribed under, or is exempted from such qualification in accordance with the provisions of the Intermediate Education Act, 1921 shall with effect from the commencement of the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Act, 1991, be deemed to have been appointed in substantive capacity provided such teacher has been continuously serving the Institution from the date of such ad hoc appointment to the date of such commencement.

(1C) Every teacher appointed by promotion or by direct recruitment before July 31,1988 on ad hoc basis against a substantive vacancy in accordance with Section 18, who possesses the qualifications prescribed under, or is exempted from such qualification in accordance with the provisions of the Intermediate Education Act, 1921, shall, with effect from the date of commencement of the Uttar Pradesh Secondary Education

Services Commission and Selection Boards (Amendment) Act, 1991, be deemed to have been appointed in a substantive capacity, provided such teacher has been continuously serving the Institution from the date of such ad hoc appointment to the date of such commencement.]

[(2) Every teacher deemed to have been appointed in a substantive capacity under sub-section (1) or (1-A) or (1-B) or (1-C), shall be deemed to he on probation from the date of commencement referred to in sub-section (1) or (1-A) or (1-B) or (1-C) as the case may be.]

(3) Nothing in this Section shall be construed to entitle any teacher to substantive appointment -

(a) if on the date of [commencement referred to in sub-section (1) or (1-A) or (1-B) or (1-C) such post had already been filled or selection for such post had already been made in accordance with this Act, or

(b) if such teacher was related to any member of the Committee of Management or the Principal or Head Master of the Institution concerned.

Explanation. - For the purposes of this sub-section a person shall be deemed to be related to another if -

(i) they are members of a Hindu undivided family; or

(ii) they are husband and wife; or

(iii) the one is related to the other in the manner indicated in the Second Schedule to the Intermediate Education Act, 1921.]"

11. It is further stated that the case of the petitioner for regularization was considered under Section 33-C of the Act, 1982, whereas the petitioner was appointed by way of promotion within the cut off date provided under Section 33-A (1-A) of the Act, 1982, as such keeping in view the same, the petitioner is entitled for regularization w.e.f. 01.08.1985 and in not providing the same, the respondents erred in law and facts both.

12. The prayer is to interfere in the matter and allow the writ petition.

13. Per contra, Sri Jogendra Nath Verma, learned State counsel, on the basis of the counter affidavit filed to the amended paras of the writ petition and in support of the order dated 21.12.2010, submitted that the order dated 21.12.2010 is just and proper in the eye of law and is not liable to interfered with.

14. Elaborating his arguments, Sri Jogendra Nathi Verma, learned State counsel submitted that in fact, five posts of Lecturer, Sanskrit in the institution namely Ram Naresh Intermediate College, Pure Dhanau, Kunda, Pratapgarh (in short "College") were created vide order dated 11.03.1981 of the Deputy Director of Education, Faizabad.

15. On the post in issue, an adhoc appointment was made on 21.02.1983 and thereafter, the person who was appointed on the said post did not turn back and subsequently, the vacancy was notified. The selection was held by the Board as per the procedure provided in the Act, 1982 and the Board selected one Sri Jitendra Kumar Sashtri.

16. Taking into account the selection of Sri Jitendra Kumar Sashtri on the vacant post of Lecturer, Sanskrit, the respondent No. 2/DIOS vide letter dated 27.05.1985 directed the respondent No. 3 to permit the joining of Sri Jiterndra Kumar Shashtri. The person selected by the Board namely

Sri Jitendra Kumar Shastri never turned up and joined the post in question.

17. Keeping in view the said fact, the vacancy was considered as substantive vacancy vide order dated 10.07.1989, passed by the DIOS and thereafter, the vacancy was again notified.

18. After the order dated 10.07.1989, whereby the DIOS considered the vacancy as substantive vacancy, the Committee of Management passed the resolution dated 12.01.1992 in favour of the petitioner.

19. By the resolution dated 12.01.1992, the petitioner was promoted on the post of Lecturer, Sanskrit in the institution and the appointment of the petitioner was approved. Thereafter, the case of the petitioner for regularization was considered vide order dated 21.12.2010. The service of the petitioner were regularized under the provisions as envisaged under Section 33-C of the Act, 1982.

20. In this factual background, learned State counsel submitted that in fact the substantive vacancy came into existence in the year 1989 and subsequent to the same, the petitioner was appointed by way of promotion by the Committee of Management and keeping in view the date of appointment i.e. 01.01.1992 as well as the provisions as envisaged under Section 33-C of the Act, 1982, the regularization of the petitioner was done. Thus, the order dated 21.12.2010 is not liable to be interfered with by this Court. The prayer is to dismiss the writ petition.

21. Heard the submissions made by learned counsel for the parties and perused the record.

22. In the instant case, the claim of the petitioner is that he was appointed by way of promotion on 27.07.1985 under the Order of 1981 and joined on the post on 01.08.1985 and accordingly, he is entitled for regularization under Section 33-A (1-A) w.e.f. 01.08.1985.

23. It appears from the above quoted provisions including Section 33-A (1-A) that for the purposes of regularization under the aforesaid provisions of the Act, 1982, one of the relevant contingency is that the vacancy should be "substantive vacancy" and if promotion is made on the substantive vacancy on adhoc basis after following the proper procedure as mentioned in relevant provision i.e. Order of 1981 and a candidate also fulfills other eligibility provided under the aforesaid provision(s) then in that event the incumbent of the post can be regularized under the above quoted provision(s).

24. In view of the aforesaid, the question which is to be considered in the present case is that on which date the "substantive vacancy" came into existence?

25. For coming to the conclusion on the above said question, to the view of this Court, in addition to above referred provision, Section 18 of the Act, 1982, on relevant time, and Order of 1981 are also relevant. Accordingly, the relevant portion of the same are quoted below for ready reference:-

Section 18 of the Act, 1982:-

"18 Ad hoc Teachers.-*(1) Where the management has notified a vacancy to the Commission in accordance with the provisions of this Act, and-*

(a) the commission has failed to recommended the name of any suitable

candidate for being appointed as a teacher specified in the Schedule within one year from the date of such notification ; or

(b) the post of such teacher has actually remained vacant for more than two months, then, the management may appoint, by direct recruitment or promotion, a teacher on purely ad hoc basis from amongst the person possessing qualifications prescribed under the Intermediate Education Act, 1921 or the regulations made thereunder."

Order of 1981:-

*"**1. Short title and commencement.**- The Order may be called the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981.*

(2) It shall come into force at once.

***2. Vacancies in which ad hoc appointment can be made.**-The management of an institution may appoint by promotion or by direct recruitment a teacher on purely ad hoc basis in accordance with the provisions of this Order in the following case, namely ;*

(a) in the case of a substantive vacancy existing on the date of commencement of this Order caused by death, retirement, resignation or otherwise;

(b) in the case of a leave vacancy, where the whole or unexpired portion of the leave is for a period exceeding two months on the date of such commencement ;

(c) Where a vacancy of the nature in Clause (a) or Clause (b) comes into existence within a period of two months subsequent to the date of such commencement.

***3. Duration of ad hoc appointments.**-Every appointment of an ad hoc teacher under Paragraph 2 shall cease to have effect from the earliest of the dates, namely :*

(a) when the candidates recommended by the Commissioner or the Board joins the post ; or

(b) when the period of six months from the date of such ad hoc appointment expires.

***4. Ad hoc appointment by promotion.**-(1)" Every vacancy in the post of the Head of an institution may be filled by promotion :*

(a) in the case of an Intermediate College, by the seniormost teacher of the institution in the lecturer's grade ;

(b) in the case of a High School raised to the level of an Intermediate College, by the Headmaster of such High School ;

(c) in the case of a Junior High School raised to the level of a High School, by the Headmaster of such Junior High School ;

(2) Every vacancy in the post of a teacher in Lecturers grade may be filled by promotion by the sernior-most teacher of the institution in the trained-graduate (L. T.) grade.

(3) Every vacancy in the post of a teacher in the trained graduate (L. T.) grade shall be filled by promotion by the serniormost teacher of the institution in the trained Under-graduate (C. T.) grade.

(4) Every vacancy in the post of a teacher in the trained under-graduate (C. T.) grade shall be filled by promotion by the seniormost teacher of the institution in the J. T. C. grade or B.T.C. grade.

Explanation.-For the purposes of clauses (1) to (4) of this paragraph, the expression "senior-most teacher" means the teacher having longest continuous service in the Lecturer's grade or the trained graduate (L. T.) grade, or trained Under-graduate (C. T.) grade or J. T. C. or B. T. C. grade as the case may be."

26. From the aforesaid provisions, so far as it relates to regularization of appointment is concerned, it appear that:-

(i) Ad-hoc appointment should have been made by the Committee of Management on "substantive vacancy"

(ii) Ad-hoc appointment can be made against "substantive vacancy" by the Committee of Management, if the Management has notified the vacancy to the Commission and-

(a) the Commission failed to recommend the name of suitable candidate for being appointed as a Teacher within one year from the date of notification of vacancy by the Management, or

(b) the post of such teacher has actually remained vacant for more than two months.

(iii) Such Ad-hoc appointee (Teacher) has been continuously serving the institution from the date of appointment to the date of commencement of the Amending Act of 1991.

(iv) "Vacancy" would be "substantive vacancy" if it comes into existence on account of death, retirement, resignation or otherwise.

27. For considering the issue involved in the instant case, this Court is also of the view to quote the resolution of the Committee of Management dated 25.07.1985 and the second resolution dated 12.01.1992, the same read as under:-

Resolution dated 25.07.1985:-

"प्रबन्ध समिति का प्रस्ताव सं03
दिनांक 25.07.85

विषय– विद्यालय में प्रवक्ता (संस्कृत) पद पर तदर्थ नियुक्ति के सम्बन्ध में विचार।

संस्था प्रबन्धक ने प्रबन्ध समिति को अवगत कराया कि संस्था में संस्तुत प्रवक्ता हेतु माध्यमिक शिक्षा सेवा आयोग द्वारा चयनित अभ्यर्थी श्री जितेन्द्र कुमार शास्त्री का नाम जि0वि0निरीक्षक, प्रतापगढ़ द्वारा संसूचित किये जाने के बाद ही श्री श्यामलाल तदर्थ प्रवक्ता (संस्कृत) ने संस्था में कार्य करना छोड़ दिया है जिससे सत्र 84–85 के अन्त से ही इण्टर कक्षाओं में संस्कृत शिक्षण में कठिनाई हो रही है। मा0शि0सेवा आयोग उ0प्र0 इलाहाबाद द्वारा चयनित अभ्यर्थी श्री जितेन्द्र कुमार शास्त्री को प्रबन्ध समिति की सहमति से प्रबन्धक द्वारा नियुक्ति पत्र प्रेषित किया जा चुका है, किन्तु श्री शास्त्री ने संस्था में कार्यभार ग्रहण नहीं किया। ऐसी स्थिति में इण्टर कक्षाओं में संस्कृत विषय के अध्यापन हेतु संस्था में कार्यरत प्रवक्ता संस्कृत पद हेतु एकमात्र अर्ह शिक्षक श्री बालकृष्ण मिश्र, एम0ए0 (संस्कृत) बी0ए0 को पदोन्नति प्रदान कर तदर्थ नियुक्ति हेतु प्रकरण विचारर्थ प्रबन्ध समिति के समक्ष प्रधानाचार्य की प्रतापगढ़ में कार्यरत शिक्षकों में श्री बालकृष्ण मिश्र ही एकमात्र संस्कृत प्रवक्ता पद हेतु अर्ह शिक्षक हैं। संस्था को इण्टरमीडिएट की मान्यता प्राप्ति कालावधि से अद्यतः समय समय पर प्रवक्ता के अभाव में श्री बालकृष्ण मिश्र ही इण्टर संस्कृत विषय का अध्यापन करते रहे हैं। इनके अध्यापन से छात्र एवं अधिकारीगण पूर्ण संन्तुष्ट रहे हैं। अतः श्री बालकृष्ण मिश्र स0 अ0 को पदोन्नति देकर तदर्थ प्रवक्ता (संस्कृत) पद हेतु मा0शि0सेवा आयोग से चयनित अभ्यर्थी के कार्यभार ग्रहण करने की तिथि तक के लिए प्रबन्धक महोदय द्वारा प्रस्तावित किया गया।

प्रबन्ध समिति के सदस्यगण द्वारा गहन विचारोपरांत श्री बालकृष्ण मिश्र स0 अ0 को पदोन्नति प्रदान कर तदर्थ प्रवक्ता (संस्कृत) पद पर चयन की प्रबल संस्तुति सर्वसम्मति से की जाती है। अग्रिम कार्यवाही हेतु प्रबन्धक महोदय को अधिकृत किया जाता है।

सत्य प्रतिलिपि
प्रमाणित
ह0 राघव राम पाण्डेयष

Resolution dated 12.01.1992:-

"प्रस्ताव संख्या 2 दिनांक 12.01.92

विद्यालय में संस्कृत प्रवक्ता के पद पर पदोन्नति के सम्बन्ध में विचार।

निर्णय– *संस्था प्रबन्धक ने प्रबन्ध समिति के बैठक में संस्कृत प्रवक्ता के मौलिक रिक्त पद पर आज तक नियमित नियुक्ति न हो पाने की स्थिति पर अपनी आख्या प्रस्तुत करते हुये बताया कि संस्कृत प्रवक्ता का पद सर्वप्रथम कठिनाई*

निवारण आदेश के अन्तर्गत जि0वि0नि0, प्रतापगढ़ के पत्रांक मा./10001–10002 दिनांक 15.1.82 द्वारा श्री श्यामलाल की तदर्थ नियुक्ति से भरा गया था। तत्पश्चात मा0 शि0 सेवा आयोग उ0प्र0 द्वारा इस पद को भरने हेतु नियमानुसार चयन हुआ। आयोग द्वारा चयनित हुये अभ्यर्थियों का नाम जि0 वि0 नि0 प्रतापगढ़ के पत्रांकः मा./9311–14/84–85 दि0 16.1.85 के अनुसार श्री जीतेन्द्र कुमार शास्त्री पता द्वारा कु0 पुतुल डे मुख्य वाणिज्य अधीक्षक, कार्यालय स्टेशन भवन उत्तर रेलवे वाराणसी कैन्ट तथा द्वितीय अभ्यर्थी श्री दयाशंकर पता द्वारा रोशनलाल पोस्टमैन 32 बटालियन पो0 आफिस पी0ए0सी0 लखनऊ जि0वि0निरीक्षक, प्रतापगढ़ के पत्रांक मा./6681–82/86–87 दिनांक 22.8.86 के अनुसार नियुक्ति हेतु क्रमशः एक–एक करके प्राप्त हुआ था जिन्हें रजिस्टर्ड पत्र द्वारा रजिस्ट्री सं0 26 दि0 10.2.85 एक रजिस्ट्री सं0 5596 दि0 27–9–86 द्वारा क्रमशः ग्रहण किया गया न इस सम्बन्ध में उन्होंने कोई सूचना ही दिया। तत्पश्चात जि0वि0नि0 प्रतापगढ़ द्वारा कठिनाई निवारण आदेश के अन्तर्गत उक्त तदर्थ नियुक्त अध्यापक श्री श्यामलाल जुलाई 85 से इस संस्था से संस्कृत प्रवक्ता पद पर कार्य करना छोड़ दिया। ऐसी स्थिति में संस्कृत प्रवक्ता का पद जुलाई 85 से रिक्त रहा किन्तु इस बीच इण्टर कक्षाओं में संस्कृत विषय के पठन–पाठन का कार्य विद्यालय में कार्यरत ब्ण्ज्/स्ण्ज् वेतनक्रम के अर्ह अध्यापक श्री बालकृष्ण मिश्र एम0ए0बी0एड0 द्वारा कार्य किया जाता रहा। संस्कृत विषय के शिक्षण कार्य का भार अधिक देखते हुए दि0 31–12–90 से संस्था में संस्कृत प्रवक्ता पद पर श्री त्रिभुवन नाथ मिश्र की तदर्थ नियुक्ति भी इस शर्त पर की गई की तदर्थ नियुक्ति का अनुमोदन जि0वि0नि0 प्रतापगढ़ द्वारा मिलने पर ही वेतन देय होगा। किन्तु ज0वि0नि0 प्रतापगढ़ ने अपने पत्रांक मा0कुण्डा/10016/91–92 दि0 10.12.91 द्वारा श्री त्रिभुवन नाथ मिश्र अनुमोदन सम्बन्धी पत्रावली अनानुमोदित विद्यालय को वापस कर दिया। उसके पश्चात से श्री त्रिभुवन नाथ मिश्र 1 जनवरी 92 से बिना किसी सूचना के अपने पद से कार्य करना छोड़ दिया और न तो विद्यालय में उपस्थित ही हुए। ऐसी स्थिति में संस्था में पहले से स्नातक वेतनक्रम में कार्यरत सहायक अध्यापक श्री बाल कृष्ण मिश्र, एम0ए0(संस्कृत) बी0एड0 जो दि0 1.1.91 से अपने अनुभव के आधार पर प्रवक्ता वेतन क्रम में 50ः कोटे के अन्तर्गत पदोन्नति में अर्ह भी है। उक्त अनानुमोदित तदर्थ प्रवक्ता श्री त्रिभुवन नाथ मिश्र द्वारा अपना पद छोड़कर चले जाने के बाद से ही दि0 1.1.92 से श्री बालकृष्ण मिश्र एम0ए0 (संस्कृत) ब0एस0 द्वारा ही इण्टर कक्षाओं में संस्कृत विषय पढ़ाया जा रहा है।

चूंकि संस्कृत प्रवक्ता का पद दि0 1.1.92 से पूर्णतः रिक्त है इण्टर शिक्षकों में संस्कृत विषय के प्रवक्ता पद हेतु एक मात्र अर्ह शिक्षक श्री बाल कृष्ण मिश्र एम0ए0(संस्कृत) बी0एड को पदोन्नति कर तदर्थ नियुक्ति हेतु प्रकरण विचारार्थ प्रबन्धक द्वारा प्रबन्ध समिति के समक्ष प्रस्ताव किया गया।

प्रबन्ध समिति के सदस्यों ने सर्व सम्मति से प्रबन्धक जी के प्रस्ताव का समर्थन करते हुए विचारोपरान्त निर्णय लिया कि श्री बालकृष्ण मिश्र जो संस्था को इण्टर की मान्यता प्राप्त से समय से ही आज तक समय≤ पर आवश्कतानुसार प्रवक्ता के अभाव में इण्टर संस्कृत विषय का अध्यापन कार्य करते रहे हैं, उन्हें संस्कृत प्रवक्ता के रिक्त पद पर जबसे यह पद पूर्णतः रिक्त चल रहा है दि0 1.1.92 से तदर्थ पदोन्नति करने का निर्णय लिया और प्रवक्ता पद के वेतन भुगतान हेतु विभाग से सहमति प्राप्त करने एवं इस सम्बन्ध में अन्य आवश्यकतानुसार अग्रिम कार्यवाही करने एवं रिक्त पदोन्नति के अनुमोदन हेतु पत्रजात मा0 शि0 सेवा आयोग उ0प्र0 को प्रेषित करने हेतु प्रबन्धक को अधिकृत किया साथ ही समिति ने सर्व सम्मति से यह भी निर्णय लिया कि श्री बालकृष्ण मिश्र को जब तक तदर्थ पदोन्नति का विभागीय अनुमोदन न प्राप्त हो जाय उन्हें प्राप्त होने वाला पूर्व वेतन उसी क्रम में भुगतान किया जाता रहे।

सत्य प्रतिलिपि
प्रमाणित
ह0/– राघव राम पाण्डेय
रामनरेश इण्टरमीडिएट कालेज पूरे धनऊ
पोस्ट धनोखी (कुण्डा), प्रतापगढ़"

28. From the bare perusal of the resolution dated 25.07.1985, it appears that the appointment of the petitioner by way of promotion on the post of Lecturer, Sanskrit was made purely on temporary basis taking into account the fact that the selected person namely Sri Jiterndra Kumar Shashtri

did not join on the post in issue and the appointment was made subject to the joining of the selected candidate.

29. It is evident from the record that the post of Lecturer, Sanskrit was created vide order dated 11.03.1981 and prior to appointment on the post of Lecturer, Sanskrit by way of promotion of the petitioner, the said vacancy/post was notified, as appears from the resolution dated 27.07.1985, and one person namely Sri Jitendra Kumar Shastri was selected by the Commission, as per the procedure prescribed under the Act, 1982, and thereafter, on the directions issued by the DIOS, Pratapgarh vide letter dated 27.05.1985, the Committee of Management issued the letters dated 16.01.1985 and 09.07.1985 to the selected person Sri Jitendra Kumar Shastri for joining on the post, who did not responded to the said letters and never joined the institution.

30. Further, the petitioner was appointed by way of promotion in the year 1985 vide order dated 27.07.1985, on account of non joining of selected candidate namely Sri Jitendra Kumar Shastri and at that point of time, the vacancy was not notified by the Committee of Management. The vacancy was treated to be substantive vide order dated 10.07.1989. Thereafter, one Sri Tribhuvan Nath Mishra was also promoted on the post of Lecturer, Sanskrit w.e.f. 31.12.1990, who subsequently left the college. Thereafter, the petitioner was again promoted on the post of Lecturer, Sanskrit.

31. From the aforesaid facts and the provisions quoted hereinabove, it is apparent that on 27.07.1985, the date on which the petitioner was promoted on the post of Lecturer, Sanskrit, the vacancy was not substantive vacancy, as no requisition with regard to post/vacancy of Lecturer, Sanskrit was pending before the Commission.

32. Vide letter dated 10.07.1989, the vacancy was treated as substantive vacancy by the DIOS. After treating the vacancy as substantive vacancy vide letter dated 10.07.1989 issued by the DIOS, the petitioner was appointed by way of promotion on the post of Lecturer, Sanskrit w.e.f. 01.01.1992, as appears from the resolution dated 12.01.1992. This appointment of the petitioner by way of promotion was approved.

33. It is also evident from the resolution dated 12.01.1992, which was passed after the letter of the DIOS dated 10.07.1989 by which the vacancy was considered as substantive vacancy, the promotion of the petitioner was considered and he was promoted under 50% quota and the promotion of the petitioner vide second resolution dated 12.01.1992 appears to be made by the Committee of Management as per the procedure prescribed.

34. Considering the aforesaid facts, the case of the petitioner for regularization was considered and thereafter, the order dated 21.12.2010 for regularizing the services of the petitioner w.e.f. 20.04.1998 was passed by the respondent No. 5.

35. From the aforesaid facts including the resolution of Committee of Management, quoted above, it is evident that the post of Lecturer, Sanskrit fell vacant substantively on 10.07.1989, on which date the DIOS treated the said vacancy as substantive vacancy. Prior to that date, the vacancy in question is not liable to be treated as "substantive

vacancy". It is in view of conjoint reading of the facts of the case as also Section 18, on relevant time, and Order of 1981.

36. Accordingly, the appointment of the petitioner by way of promotion on the post of Lecturer, Sanskrit vide order dated 27.07.1985 was not against "substantive vacancy" and being so, he is not entitled for regularization w.e.f. 01.08.1985 (date of joining) under Section 33-A (1-A) of the Act, 1982.

37. In view of the reasons recorded hereinabove, this Court is of the view that the petitioner is not entitled to the reliefs sought.

38. For the foregoing reasons, the writ petition lacks merit. It is hereby dismissed with no order as to costs.

(2020)03-05ILR A775
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.03.2020

BEFORE

THE HON'BLE MANISH MATHUR, J.

Service Single No. 4336 of 1988

Ram Anand ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
D.P. Dewadi, U.C. Pandey

Counsel for the Respondent:
C.S.C.

(A) Service Law - U.P. Lekhpal Service Rules, 1958 - Rule 212 and 214-B - Chapter XIV - Land Record Manual - Cancellation of Lekhpal Examination Certificate - Rule 5 and 212- of the - petitioner was not held guilty of serious misconduct in obtaining certificate which can be the sole ground for cancellation of certificate - no opportunity of hearing provided - no provision either in Rules of 1958 or in Manual requiring a candidate to have three years of experience as on 30.04.1980 for the purpose of admission and issuance of certificate upon completion of training in lekhpal schools were given

The petitioner was granted appointment as a Lekhpal on a temporary basis on a temporary post in the year 1978 thereafter he took a special lekhpal examination in the year 1981. After verification it was found that as per the Government Order dated 15.05.1980 he did not completed three years of service as on 08.05.1980 as an untrained lekpal therefore his certificate was cancelled and was subsequently terminated from service. The non completion of three years of service as on 30.04.1980 for the purpose of admission and issuance of certificate upon completion of training in a lekhpal schools was laid down by aforementioned government order and not by any statutory provision. The condition imposed by the government order restricts condition of appointment as required under service rules. Such a fact exceeds the authority of competent government since it has effect of diluting or restricting the service conditions indicated in the service rules, without amendment to the same.

(B) Interpretation - purposive interpretation of subordinate legislation - statutory provision cannot be diluted, modified or overridden by government order - government order can fill up the gaps and supplement the rules by issuance of instructions no inconsistent with the already existing rules

The condition imposed by the government order dated 15.05.1980 is merely an enabling provision which has been passed to enable proper implementation of Rules 5 and 6 of the Service Rules. Therefore the condition are to be seen in its purposive character. It is apparent that the entire purpose of the government order was that a person entitles to be regularized in service should have sufficient experience in the

field. In view of the facts of the case, the petitioner as already cleared the certificate examination in the year 1981 and was bereft of required service for only one year, it can be seen that the purpose of condition imposed by the government order stood fulfilled. It is also admitted that the at the time of passing of the impugned order, petitioner had completed more than 10 years of service and therefore to hold him ineligible foe regularization only on the basis that he had not completed requisite one year extra service is unreasonable.

Writ Petition Allowed. (E-10)

List of cases cited:

1. Dr. Rajendra Singh Vs. St. of Punjab (2001) 5 SCC 482 *(followed)*

2. Vijay Singh & ors. Vs. St. of U.P. &ors. 2005 (23) LCD 1696*(followed)*

3. Afsar Shahin Vs. Basic Shiksha & ors. 2004 (22) LCD 1164*(followed)*

4. State of Haryana Vs. S.J. Bahadur (1972) 2 SCC 188

5. Abhiram Singh Vs. C.D. Commachen & ors. (2017) 2 SCC 629 *(followed)*

6. EERA Vs. State (NCT of Delhi) & anr. (2017) 15 Supreme Court Cases 133*(followed)*

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard Mr. U.C. Pandey learned counsel for petitioner and learned State Counsel appearing on behalf of opposite parties.

2. Petition has been filed against order dated 13th May, 1988 and the order dated 15th February, 1988 whereby petitioner's temporary services as Lekhpal have been terminated. There was no interim order granted to petitioner and the petitioner has thereafter attained the age of superannuation in the year 2012.

3. As per averments made in the petition, petitioner was appointed as Lekhpal in Tehsil Bikapur on Ist May, 1978 in a temporary vacancy and subsequently appointment was made on 31st January, 1982 against permanent vacancy of one Bhawani Prasad who superannuated. It has been stated that thereafter petitioner appeared in Special Lekhpal Examination in the year 1981 and completed the same but by means of impugned orders, the training undergone by petitioner and certificate issued in pursuance thereof has been cancelled and petitioner's services have been terminated on account of the fact that he had not completed three years of continuous service as on 30th April, 1980 as required by the Government order dated 15th May, 1980.

4. Learned counsel for petitioner has submitted that it is an admitted fact that petitioner was appointed in a temporary vacancy on a temporary basis on Ist May, 1978. It has been further submitted that as per the U.P. Lekhpal Service Rules, 1958, the source of recruitment as required under Rule 5 is only for a candidate to have obtained the Patwari or Lekhpal School certificate. Names of such candidates having obtained the aforesaid certificate were required to be included in the list mentioned in Rule 6 for the purposes of procedure for recruitment. Learned counsel has also drawn attention to Rule 212 of Chapter XIV of Land Records Manual wherein it has been provided that candidates for admission to Lekhpals' schools will be selected by the District Officer of the District in which candidate resides. Attention has also been drawn to paragraph 214-B pertaining to cancellation of Lekhpal Examination Certificate and the conditions under which such cancellation can be effected. Learned counsel for

petitioner has further submitted that it is an admitted fact that petitioner was prmitted to complete the special lekhpal examination in the year 1981 and was also issued a certificate to that effect, which however has been cancelled by means of the impugned orders. In view of aforesaid provisions, it has been submitted that cancellation order being contrary to provisions of paragraph 214-B of the Land Records Manual is thus liable to be quashed.

5. Learned counsel for petitioner has submitted that the condition for completion of three years in service prior to appearance in the Lekhpal examination has been incorporated in terms of the government order dated 15th May, 1980 which is only an enabling provision and can not run counter to the specific service rules governing the petitioner.

6. Learned State Counsel appearing on behalf of opposite parties has rebutted the submissions advanced by learned counsel for petitioner with the submission that petitioner's engagement in service was on a purely temporary basis in terms of rule 7(3) read with 18(b) of the Rules of 1958. It has been submitted that although there is no provision in the service rules with regard to requirement of a candidate having completed three years in service as on 30th April, 1980 but the same has been introduced by means of government order dated 15th May, 1980, which is not contradictory to any service regulations. It is an independent provision included by government order and is thus required to be seen in that light.

7. After consideration of submissions advanced by learned counsel for parties and perusal of record, it is evident that the opposite parties have admitted the fact that petitioner was granted appointment as a Lekhpal purely on a temporary basis on a temporary post in the year 1978. In the counter affidavit filed to the amended portion of writ petition, it has been admitted that petitioner was allowed to appear in the special lekhpal examination in the year 1981 but after verification, it was found that till the cut off date of 8th May, 1980 as required by the government order dated 15th May, 1980 he had completed only two years of service as untrained Lekhpal due to which the certificate issued to petitioner was cancelled.

8. A perusal of the entire counter affidavit makes it evident that the only ground taken for passing of impugned orders rests on the government order dated 15th My, 1980 and the fact that petitioner had not completed three years of service as on the cut off date of 8th May, 1980 provided by government order. No other reason for passing of impugned orders have been indicated either in the impugned orders or in the counter affidavit. As such adjudication in the present writ petition rests only with regard to condition of three years service having been rendered by petitioner in terms of government order dated 15h May, 1980.

9. The U.P. Lekhpal Service Rules, 1958 specifically governs the service conditions of petitioner. Rule 5 pertains to source of recruitment while Rule 6 indicates procedure for recruitment. Rule 8 pertains to educational qualifications required. Admittedly petitioner was appointed in terms of Rule 18(b) of the aforesaid rules pertaining to temporary vacancies read with Rule 7(3).

10. Regarding the source and procedure of recruitment, Rules 5 and 6 of the said Rules are as follows:-

*"5. **Source of recruitment.**-- (1) Only such candidates as have obtained the patwari or lekhpal School Certificate and whose names have been brought on the list mentioned in Rule 6 shall be eligible for appointment to the service.*

(2) Notwithstanding anything contained in sub-rule (1), persons who belong to the category mentioned in Paragraph 2(3)(d) of revenue (B) Department G.O. No.4434/B, dated April 27, 1953, and are working in a temporary or officiating capacity, with or without break in service, shall be deemed eligible for appointment to the service.

(3) The ex-patwari who had a good record of service and fulfil other qualifications and conditions prescribed for appointment shall also be eligible for appointment to the service.

(4) Ex-patwaris shall be treated as new candidates and shall not get the benefit of their past service in any matter.

(5) Ex-patwaris who have already been absorbed in the service shall be deemed to have been appointed under these rules.

*6. **Procedure for recruitment.**-(1) For purposes of recruitment, the Collector shall maintain in the following form a list of candidates who have passed the Patwari or Lekhpal School Examination.*

xxxx xxxx xxxx

(2) Necessary material for the maintenance of this list shall be supplied each year, as soon as examination results are out, by the Collector in whose district the Lekhpal School is located. The Collection may, subject to the approval of the Director, add to the list so received the name of any other candidate who has passed the Patwari of Lekhpal School Examination.

(3) The names, in the list shall be arranged in order of seniority as determined by the year of examination. Seniority as between the candidates of the same year shall be judged on the basis of the aggregate marks obtained at the examination. Where the aggregate marks are equal, the seniority shall be determined on the basis of age.

[(3-A) A district-wise list of ex-patwaris fulfiling the conditions laid down in sub-rule (3) of Rule 5 shall be maintained by each Collector. The names in this list shall be arranged according to the length of service. If the length of service of two or more ex-patwaris is the same the names shall be arranged according to age.

NOTE- If any is is already maintained in this behalf under executive orders of Government it shall be deemed to be maintained under this sub-rule.

(4) The lists referred to the examination and the Collector shall remove the names of-

(a) Candidates who have received permanent appointment;

(b) Other candidates for good and sufficient reasons to be recorded in writing;

(c) Those candidates in the list prescribed in sub-rule (3) of Rule 6 who have exceeded the maximum age-limit for appointment."

11. Provision with regard to admission, training and examination of lekhpal school candidates is required to be done in terms of Chapter XIV of the Land Record Manual. Paragraph 212 of the aforesaid chapter pertaining to candidates for admission is as follows:-

"212. Candidates for admission-* (i) Candidates for admission to Lekhpal Schools will be selected by the District Officer of the district in which the candidate resides.*

(ii) The candidates to be selected must fulfil the conditions of nationality, as defined under Part II of the Constitution of India, and must have passed the Hindustani Middle or Junior High School or an equivalent or higher examination and shall not be less than 17 years and not more than 21 years of age on or before the date of admission

(iii) No candidate who has once been enrolled in some Lekhpal School will be admitted to another Lekhpal School except for good and sufficient reasons if so certified by the offer-in-charge. A certificate of qualifications obtained by concealment of the fact of previous enrolment in another school shall be void."

12. A perusal of aforesaid statutory provisions make it evident that there is no provision either in the rules or in the land record manual requiring a candidate to have three years of service as on 30th April, 1980 for purposes of admission and issuance of certificate upon completion of training in a lekhpal schools. The only such condition which forms the basis of impugned order is to be found in the government order dated 15th May, 1980.

13. Hon'ble the Supreme Court in the case of **Dr. Rajendra Singh versus State of Punjab** reported in (2001) 5 SCC 482 has held that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. It has been further held that following any other course would be disastrous and would be against the constitutional scheme and accepted service jurisprudence. The relevant portion of the judgment is as follows:-

"The settled position of law is that no Government Order, Notification or Circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the rules, the Class II of the service can be treated as Class I only by way of notification. Following such a course in effect amounts to amending the rules by a Government Order and ignoring the mandate of Article 309 of the Constitution."

14. Similarly a full bench of this Court in the case **Vijay Singh and others versus state of U.P. and others** reported in 2005 (23) LCD 1696 has held that it is a settled legal proposition that executive instructions can not over ride the statutory provision nor can be issued in contravention of statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law. Relevant portions of the judgment are as follows:-

" 6. It is settled legal proposition that executive instructions cannot override the statutory provisions [Vide B.N. Nagrajan v. State of Mysore, AIR 1966 SC 1942; Sant Ram Sharma v. State of Rajasthan and Ors., AIR 1967 SC 1910; Union of India and Ors. v. Majji Jangammyya and Ors., AIR 1977 SC 757; B.N. Nagarajan and Ors. v. State of Karnataka and Ors., AIR 1979 SC 1676; P.D. Agrawal and Ors. v. State of U.P. and Ors., (1987) 3 SCC 622; M/s. Beopar Sahayak (P) Ltd. and Ors. v. Vishwa Nath and Ors., AIR 1987 SC 2111; State of

Maharashtra v. Jagannath Achyut Karandikar, AIR 1989 SC 1133; Paluru Ramkrishananiah and Ors. v. Union of India and Ors., AIR 1990 SC 166; Comptroller and Auditor General of India and Ors. v. Mohan LalMalhotra and Ors., AIR.1991 SC 2288; State of Madhya Pradesh v. G.S. Dall and Flour Mills, AIR 1991 SC 772; Naga People's Movement of Human Rights v. Union of India and Ors., AIR 1998 SC 431; C. Rangaswamaeah and Ors. v. Karnataka Lokayukta and Ors., AIR 1998 SC 96.]

7. Executive instructions cannot amend or supersede the statutory rules or add something therein, nor the orders be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory Rule nor does it have any force of law; while statutory rules have full force of law provided the same are not in conflict with the provisions of the Act. (Vide State of U. P. and Ors. v. Babu Ram Upadhyaya, AIR 1961 SC 751; and State of Tamil Nadu v. M/s. Hind Stone etc., AIR 1981 SC 711)."

15. This court in the case of **Afsar Shahin versus Basic Shiksha Parishad and others** reported in 2004 (22) LCD 1164 has also held to the same effect that a statutory provision can not be diluted, modified or overridden by government orders which fall within domain of the government under executive functions.

16. Upon applicability of aforesaid judgments, as is evident the only requirement not being fulfilled by petitioner for continuance and regularization in service has been imposed by government order dated 15th May, 1980. It is thus seen that requirement of three years of service as on 30th April, 1980 has been imposed for the first time by means of the aforesaid government order. As has been held by aforesaid judgments of Hon'ble the Supreme court, such a condition restricting the conditions of appointment under Rules 5 and 6 of the Service Rules of1958 could not have been imposed without necessary amendment in the relevant provision of Rule.

17. Learned State Counsel has however placed reliance upon judgment of Hon'ble Supreme Court in the case of **State of Haryana versus S.J. Bahadur** reported in (1972) 2 SCC 188 wherein it has been held that while the government can not amend or supercede the statutory rules by administrative instructions, at the same time if the rules are silent on any particular point, the government can very well fill up the gaps and supplement the rules by issuance of instructions not inconsistent with the rules already framed.

18. So far as aforesaid submission is concerned, it is evident that the judgment would be applicable only where rules are silent on any particular point which is a necessary requirement for the purposes of appointment and such instructions can be issued which are not inconsistent with the rules already framed. While there is no dispute with regard to the aforesaid proposition of law as held by Hon'ble the Supreme court but at the same time it is also a relevant issue as to whether the government order dated 15th May, 1980 merely fills in a gap or dilutes the very condition of appointment envisaged under the extant service rules. In the present case, it is evident that the condition imposed by the government order restricts conditions of appointment as required under service rules. Such a fact exceeds the authority of competent government since it has effect of diluting or restricting the service conditions

indicated in the service rules, without amendment to same. This can not be done in view of judgments of Hon'ble the Supreme court indicated herein above.

19. The matter can be examined from another aspect as well that the condition imposed by the government order dated 15th May, 1980 is merely an enabling provision and has been passed to enable proper implementation of Rules 5 and 6 of the Service Rules. As such the conditions imposed by government order are to be seen in its purposive character.

20. With regard to purposive interpretation of statute or subordinate legislation, Hon'ble the Supreme Court in **Abhiram Singh versus C.D. Commachen and others** reported in (2017) 2 SCC 629 has held as follows:-

"37. In the same decision, Lord Steyn suggested that the pendulum has swung towards giving a purposive interpretation to statutes and the shift towards purposive construction is today not in doubt, influenced in part by European ideas, European community jurisprudence and European legal culture. It was said: [R. *(Quintavalle) case [R. (Quintavalle) v. Secy. of State for Health,* 2003 UKHL 13 : (2003) 2 AC 687 : (2003) 2 WLR 692 (HL)] , AC p. 700 C-F, para 21]

"*21*... the adoption of a purposive approach to construction of statutes generally, and the 1990 Act [Human Fertilisation and Embryology Act, 1990] in particular, is amply justified on wider grounds. In *Cabell v. Markham [Cabell v. Markham,* 148 F 2d 737 (2d Cir 1945)] Learned Hand, J. explained the merits of purposive interpretation [at p. 739]:

"Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in *River Wear Commissioners v. Adamson [River Wear Commissioners v. Adamson,* (1877) LR 2 AC 743 at p. 763 (HL)] . In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, e.g. social welfare legislation and tax statutes may have to be approached somewhat differently." (emphasis supplied)

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39. We see no reason to take a different view. Ordinarily, if a statute is well drafted and debated in Parliament there is little or no need to adopt any interpretation other than a literal interpretation of the statute. However, in a welfare State like ours, what is intended for the benefit of the people is not fully reflected in the text of a statute. In such legislations, a pragmatic view is required to be taken and the law interpreted

purposefully and realistically so that the benefit reaches the masses. Of course, in statutes that have a penal consequence and affect the liberty of an individual or a statute that could impose a financial burden on a person, the rule of literal interpretation would still hold good."

21. Similarly in the case of **EERA versus State (NCT of Delhi) and another** reported in (2017) 15 Supreme Court Cases 133, while following the judgment of Abhiram Singh (supra), it has been held as follows:-

" 30. The above expansion of purposive interpretation has been approvingly quoted by the majority in *Abhiram Singh v. C.D. Commachen [Abhiram Singh v. C.D. Commachen, (2017) 2 SCC 629* : (2017) 2 SCC (Civ) 68] and that is why Section 123(3) of the Representation of the People Act, 1951 has been construed keeping in view electorate-centric interpretation rather than candidate-centric one. The submission is that the purposive interpretation has become the *lan vital* of statutory interpretation because of progressive social climate and the Judges' statesmanship. Krishna Iyer, J., in his inimitable style, had said ?when legislative purpose or intention is lost, then the process of interpretation is like to adorn the skin, and to miss the soul?. A court has to be progressive in its thought and should follow the path of construction that comprehensively meets the legislative intention. If a Judge gets stuck with the idea that construction is the safest, the enactment is not fructified, the purpose is missed and the soul is dismissed. A narrow construction of a concept invites a hazard whereas a broad exposition enlarges the sweep and achieves the statutory purpose. These are certain abstractions. It will apply in a different manner in different statutes, like Tax law, Penal law, Social Welfare legislation, Excise law, Election law, etc. That apart, the law intends to remedy a mischief. It also sets goal and has a remedial intent. It also states certain things which clearly mean what has been said. In that case, there is no room for the Judge and solely because he is a constructionist Judge, cannot possess such tool to fly in the realm of fanciful area and confer a different meaning. His ability to create in the name of judicial statesmanship is not limitless. It has boundaries. He cannot afford to romance all the time with the science of interpretation. Keeping these aspects in mind, I shall presently refer to some authorities where purposive construction has been adopted and where it has not been taken recourse to and the cardinal principle for the same."

22. Although the aforesaid judgments pertained to interpretation of statute viz-a-viz the Constitution of India but the same can be made applicable in the present case in view of the fact that statutory provisions regarding appointment have been sought to be diluted or conditions imposed by means of administrative orders.

23. In the light of aforesaid judgments of Hon'ble the Supreme court, it can be seen that the purpose of imposing the condition as indicated in the government order is only for a candidate to have necessary experience in the filed or subject prior to which he can be considered for regularization.

24. In the present case, it is admitted by opposite parties that petitioner was not only enrolled in the certificate examination but had successfully cleared the same in 1981. It is also admitted between parties

that petitioner had completed two years of service as on 30th April, 1980. The only deficiency was with regard to one year service which was yet to be rendered by petitioner as on the cut off date.

25. If seen through the spectrum of purposive construction of any provision, it is apparent that the entire purpose of the government order was that a person entitled to be regularized in service should have sufficient experience in the field. In view of the fact that petitioner has already cleared the certificate examination in the year 1981 and was bereft of required service for only one year, it can be seen that the purpose of condition imposed by the government order dated 15th May, 1980 stood fulfilled by the petitioner.

26. It is also an admitted factor that at the time of passing of the impugned order, petitioner had completed more than 10 years of service and therefore to hold him ineligible for regularization only on the basis that he had not completed requisite one year extra service is unreasonable.

27. Another aspect of the matter as submitted by learned counsel for petitioner is that petitioner was permitted to be admitted and trained in terms of paragraph 212 of Chapter XIV of the land record manual whereafter he has successfully completed the examination and was issued the certificate thereof in the year 1981. Once a lekhpal examination certificate has been issued, the same can be cancelled only in terms of paragraph 214-B of Chapter XIV of land record manual which imposes the following conditions:-

"214-B. Cancellation of Lekhpal Examination Certificate- *The Director may, at any time, cancel the Lekhpal Examination Certificate of a candidate if he is satisfied on the report of the collector that the candidate has been guilty of serious misconduct in circumstances connected with his securing the certificate; provided that no candidate's certificate will be cancelled unless either his explanation has been taken or he refuses to give his explanation or is not traceable. The Director may also report his case to Government for debarring him from service under the State Government."*

28. Upon a perusal of the aforesaid provision, it is clear that there is no allegation against petitioner of serious misconduct regarding circumstances connected with his securing the certificate. It is also not the case of opposite parties that any opportunity of hearing was provided to petitioner prior to passing of the impugned orders. As such the conditions required for cancellation of lekhpal examination certificate also do not stand fulfilled in case of petitioner.

29. In view of aforesaid facts, it is apparent that the impugned order has been passed in violation of statutory provisions and without considering the purposive construction of the government order dated 15th May, 1980.

30. In view of the aforesaid, a writ in the nature of certiorari is issued quashing the orders dated 13th May, 1988 and 15th February, 1988. Since the petitioner has not actually performed the duties of post subsequent to passing of the impugned orders, he shall not be entitled to any salary for the said period but would be entitled to pensionary benefits of the post including pension with allowances with effect from the date of superannuation, as admissible and revised from time to time. The service

period between 15.2.1988 till superannuation shall count as qualifying service for calculation of pensionary benefits. Orders pertaining to same shall be passed within a period of two months from the date a copy of this order is produced before the competent authority.

31. Consequently, the writ petition stands allowed.

(2020)03-05ILR A784
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2020

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Service Single No. 6603 of 2010

Shailendra Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
V.K. Bajpai, Alok Gupta, Richa Srivastava, Sanjay Kumar Srivastava, Shailendra Kumar Singh, Shikha Srivastava, Suneel Kumar Singh Kalhan, Yogendra Kumar Mishra

Counsel for the Respondents:
C.S.C., Shubham Gupta

(A) Compassionate Appointment - should not be provided after an expiry of 22 and a half years of the death of the petitioner's father - can be considered as per the scheme/rule applicable at the time of death of employee.

When the father of the petitioner expired on 17.05.1986, there was no Rule or statutory provision for appointment on compassionate ground existed in an unaided school/college covered under the U.P. Intermediate Education Act, 1921. Therefore, no such vested right accrued after the death of the petitioner's father. Thereafter the School/Institution was taken up in grant-in-aid in 01.04.1996. Even after the appointment of the petitioner in the year 2008, no such provision or rule existed for appointment of dependent of deceased in an unaided school/college covered under the U.P. Intermediate Education Act, 1921 which subsequently taken up in grant. However, till date no such provision has come up in this regard.The appointment of the petitioner is not only in violation of Regulation 105 under Chapter III of the Act, 1921 as it is without the recommendation of the Committee required for appointment on compassionate grounds but has been filed belatedly after an expiry of 22 and a half years of the death of the petitioner's father.

(B) Appointment - in violation of Rules and Article 14 and 16 of the Indian Constitution are void

Writ Petition Rejected. .(E-10)

List of cases cited:

1. Rani Srivastava Vs. St. of U.P. 1989 SCC OnLine All 535 : (1990) 1 LLN 633 : (1990) 16 ALR 357 : (1990) 1 AWC 342

2. Abdul Qadir Vs. St. of U.P. Special Appeal No. 264 of 2017 *(followed)*

3. Umesh Kumar Nagpal Vs. St. of Haryana (1994) 4 SCC 138*(followed)*

4. Commissioner of Public Instructions Vs. K.R. Vishwanath (2005) 7 SCC 206*(followed)*

5. St. of J & K Vs. Sajad Ahmad Mir (2006) 5 SCC 766 : 2006 (6) AWC 6209 (SC) *(followed)*

6. V. Shivamurthy VS. St. of A.P. (2008) 13 SCC 730*(followed)*

7. UOI Vs. Shashank Goswami (2012) 11 SCC 307: 2012 (5) AWC 4734 (SC) *(followed)*

8. Chief Commissioner, Central Excise & Customs, Lucknow Vs. Prabhat Singh (2013) (5) AWC 5062 (SC) *(followed)*

9. MGB Gramin Bank Vs. Chakrawarti Singh (2014) 13 SCC 583: AIR 2013 SC 3365*(followed)*

10. Vishal Singh Vs. St. of U.P. 2018 (2) ESC 1036 (All.) (DB) *(followed)*

11. Shiv Kumar Dubey Vs. St. of U.P. 2014 AWC 3016*(followed)*

12. Secretary, St. of Karn. & ors Vs. Umadevi & ors. (2006) 4 SCC 1: 2006 SCC (L&S) 753*(followed)*

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the petitioner, Sri Gyanendra Srivastava, learned Standing Counsel for the respondent Nos. 1 to 3 and Sri Shubham Gupta, learned counsel for the respondent No. 4.

2. The writ petition has been filed seeking direction to the respondents to accord financial approval to the appointment of the petitioner as Assistant Teacher in Amar Shahid Chandra Shekhar Azad Inter College, Haraipur, District-Unnao (in short "College") and for payment of regular salary from the State Exchequer w.e.f. 01.11.2008.

3. Prior to filing of the present writ petition, the petitioner approached this Court by means of the Writ Petition No. 5854 of 2008 (Shailendra Kumar v. D.I.O.S. Unnao and others), thereby seeking direction to the respondents to appoint the petitioner on suitable post on compassionate ground under the Dying in Harness Rules. The said writ petition was finally disposed of by means of the judgment and order dated 19.09.2008, which reads as under:-

"Heard learned counsel for the petitioner and learned Standing Counsel.

The instant writ petition has been preferred with the following reliefs:-

1. To issue a writ, order or direction in the nature of Mandamus commanding the Opp. Parties particularly Opp. Party No. 2 to consider the case of the petitioner for his appointment on compassionate grounds under Dying-in-harness Rules on any post as per qualification of the petitioner.

2. To issue a writ, order or direction in the nature of Mandamus commanding the Opposite Parties to decide the petitioner's latest representation dated 12.07.2007 as contained in Annexure No. 9 to this writ petition.

3. To issue any such other order which this Hon'ble Court may deem fit and proper in the circumstances of the case.

4. To award cost of the writ petition.

The petitioner restricts his prayer only to the extent that his representation as contained in Annexure No. 9 to the writ petition may be directed to be disposed of within the stipulated period.

Learned Standing Counsel has no objection to this innocuous prayer.

In the facts and circumstances of the case, I direct the petitioner to file a fresh comprehensive representation along with certified copy of this order as well as complete copy of the writ petition with all Annexures before opposite party no. 2 within a week from today and on such representation being filed, as stipulated above, the concerned competent authority shall decide the same by a speaking and reasoned order within three weeks of the receipt of representation, as contemplated above, exercising its unfettered discretion on the basis of record before him in accordance with relevant Rules, recent Government Orders, Scheme/Policy without being influenced by any of the observations in this judgment, since this

Court has not entered into the merits of the present case.

Subject to the above observations and directions, writ petition stands partly allowed by moulding the relief to the extent indicated above.

No costs."

4. In compliance of the judgment and order dated 19.09.2008, the Committee of Management of the College considered the case of the petitioner for appointment on compassionate ground and vide order dated 16.10.2008, the petitioner was appointed by the respondent No. 4/Committee of Management of the College on the post of Assistant Teacher in the pay-scale of Rs. 5500-9000/-.

5. The respondent Nos. 1 to 3/State filed the counter affidavit annexing therewith the order dated 29.05.2009, passed by the District Inspector of Schools (DIOS), Unnao, whereby the claim of the petitioner with regard to appointment on suitable post on compassionate ground under the Dying in Harness Rules was rejected. On coming to know about the order dated 29.05.2009, the petitioner amended the writ petition and also challenged the order dated 29.05.2009.

6. In regard to the reliefs sought in the writ petition, learned counsel for the petitioner stated that the father of the petitioner was a Headmaster of the Institution and he expired on 17.05.1986. At that point of time, the petitioner was minor (one and half year old). On attaining the age of majority and being found himself eligible for appointment on the post of Assistant Teacher, the petitioner applied for appointment on compassionate ground before the competent authority and on account of inaction on the part of the respondents in not providing the appointment on suitable post on compassionate ground, the petitioner approached this Court by means of the Writ Petition No. 5854 of 2008 (Shailendra Kumar v. D.I.O.S. Unnao and others), which was disposed of vide judgment and order dated 19.09.2008 and in compliance thereof, the Committee of Management of the College appointed the petitioner on the post of Assistant Teacher, as such the appointment of the petitioner is valid and he is entitled to salary from the State Exchequer.

7. Per contra, Sri Gyanendra Srivastava, learned Standing Counsel for the respondent Nos. 1 to 3, on the basis of counter affidavit as also the contents of the impugned order dated 29.05.2009, submitted that the father of the petitioner expired on 17.05.1986 and at that point of time, the College was not in grant-in-aid. The Institution was taken up in grant-in-aid on 01.04.1996.

8. It is further stated that the provision for providing compassionate appointment to the employee of the Institution/College in grant-in-aid came into force on 30.07.1992 subsequently, amended in the year 1995. It is also stated that at the time of death of the father of the petitioner i.e. on 17.05.1986, there was no provision to provide appointment to the dependent of the employee of unaided school or college, as the case may be, covered under U.P. Intermediate Education Act, 1921 (in short "Act, 1921") nor there exits any provision under the Act, 1921, under which compassionate appointment can be provided to the dependent of deceased employee of unaided school or college, covered under the Act, 1921. The Institution was taken up in grant-in-aid on

01.04.1996 and beings so, under Regulations 103-107 of Chapter III of the Act, 1921, the petitioner is not entitled for appointment on compassionate ground as when the father of the petitioner expired, the College in issue was not in grant-in-aid. The provisions as envisaged under Regulation 103-107 of the Act, 1921 were/are applicable only on the Institution/College which were/are in grant-in-aid and the same would apply if an employee of the college, during service tenure, expires after college is taken in grant-in-aid and it would not apply in relation to the employee of unaided college.

9. It is further stated that even otherwise the mandatory provision as prescribed under Regulation 103-107 of the Act, 1921 have not been followed for providing appointment on compassionate ground to the petitioner. Without following the procedure prescribed under Regulation 103-107 of the Act, 1921, the Committee of Management of the College appointed the petitioner on the post of Assistant Teacher in the pay-scale of Rs. 5500-9000/-.

10. Accordingly, it is submitted that the appointment of the petitioner is not valid and he is neither entitled to continue on the post in issue nor he is entitled to payment of salary from the State Exchequer.

11. The prayer is to dismiss the writ petition.

12. In response to the submissions made by Sri Gyanendra Srivastava, learned Standing Counsel for the respondent Nos. 1 to 3, learned counsel for the petitioner submitted that the appointment of the petitioner was made in the year 2008 vide order dated 16.10.2008 and he is still continuing in the College on the post of Assistant Teacher and in view of the facts and circumstances of the case particularly the continuation of the petitioner on the post of Assistant Teacher since 16.10.2008 (the date of appointment of the petitioner), the petitioner is entitled to continue on the post in question and his appointment on compassionate ground, at this stage, is not liable to be interfered with.

13. In support of his contention, learned counsel for the petitioner placed reliance on the judgment of this Court passed in the case of *Rani Srivastava v. State of Uttar Pradesh*, **1989 SCC OnLine All 535 : (1990) 1 LLN 633 : (1990) 16 ALR 357 : (1990) 1 AWC 342**. The relevant portion of the same on reproduction reads as under:-

"2. Undisputedly, Sri Gita Bal Mandir Junior High School, Kashipur (Nainital), is recognised under Uttar Pradesh Basic Education Act, 1972. In June 1984, the petitioner was appointed on a fixed salary on probation till 30 November 1984. By letter, dated 15 November 1984, she was made permanent with effect from 1 December 1984. In August 1985, a fresh letter was issued that she is being appointed temporary and her services were liable to be terminated at any time. The petitioner immediately made representation that she having become permanent by letter, dated 15 November 1984, she could not be appointed afresh temporary. No action was taken on it. And the process of issuing letter by secretary that she was being appointed temporarily either till June or May or April continued in 1986, 1987 and 1988. Each time petitioner objected. In 1985, she represented to secretary, that she having been appointed permanently the fresh

letters of appointment treating her temporary were illegal. In 1989, it appears one of the members raised an issue that for better administration of college it was necessary to appoint a male principal and Basic Shiksha Adhikari also raised peculiar objection and wrote to the management that unless regular principal was appointed he was not willing to grant approval to the appointment of teachers. Consequently management issued advertisement, aggrieved by which petitioner approached this Court.

3. Doubt was raised on the language of letter appointing petitioner permanently in November 1984, and it was urged that the second clause indicated that petitioner was not a permanent employee. Needless to say that the order was issued in printed form containing various clauses. Therefore, no assistance could be derived from it. Moreover the original filed with supplementary affidavit dispelled any doubt as Cl. 2 and other clauses which were not relevant were either scored or crossed to show that it was not applicable.

4. Resignation by petitioner was yet another issue which was attempted to be pressed, but it could not be supported by any document. Even the letters issued in 1985, 1986 and 1987 do not state that since petitioner had resigned she was being appointed afresh temporarily. It was a futile attempt to give strength to letter appointing petitioner temporarily in 1985. Mere vague assertion that petitioner being headmistress must have removed papers was of no consequence. How could she remove the record of secretary or committee of management? No material thus could be brought on record to show that petitioner resigned in 1985.

5. Principal infirmity in appointment of petitioner, that could be pointed out, was that it was made without issuing any advertisement and recommendation by selection committee. May be; but could the management which appointed petitioner in 1984, and the Basic Shiksha Adhikari, who did not raise any objection to payment of salary for five years raise this objection in 1989? The appointing authority under rules is the committee of management. And the approving authority is the Basic Shiksha Adhikari, who under Uttar Pradesh Act 6 of 1979, is also to supervise the payment of salary and is empowered to inspect and check. For five years no objection was raised by him. And then suddenly when one of the members desired that a male principal should be appointed, he also raised an objection. The petitioner had raised objection as far back as 1985, against her being treated as temporary employee. No action was taken on it. Nor any decision was given. For procedural irregularity the petitioner should not be made to suffer. Normally it is to be presumed that management must have sent papers for appointment of petitioner to Basic Shiksha Adhikari who must have granted approval unless it is rebutted either by placing any communication by management or from record of Basic Shiksha Adhikari to show that things did not proceed as they are provided in the Act. In absence of any material there is no reason to doubt that committee of management would have appointed without intimating Basic Shiksha Adhikari and would have even issued letter appointing petitioner permanently and Basic Shiksha Adhikari would not have raised any objection in respect of payment of salary, etc., from 1984 to 1989. Change of secretary or Basic Shiksha Adhikari should not be permitted to create any difference, otherwise it shall result in creating arbitrariness and expose teachers of being

thrown out of employment on one or the other pretext and shall never have security which is necessary for efficient discharge of duty. Equity stands in her favour and prevents both the appointing and approving authority from taking recourse to their own mistakes, for causing prejudice to petitioner. Estoppel, the principle of equity, is the shield for such unjust and unfair actions."

14. The prayer is to allow the writ petition.

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

16. From the pleadings made in the writ petition as also the documents on record, it is undisputed fact that the petitioner was appointed vide order dated 16.10.2008 on the post of Assistant Teacher in the pay-scale of Rs. 5500-9000/- by the Committee of Management/respondent No. 4 of the College.

17. It is also undisputed that prior to issuing the order of appointment dated 16.10.2008, the procedure as prescribed under Regulation 103-107 of the Act, 1921 was not allowed.

18. It is also undisputed that the provisions for providing appointment came into existence on 30.07.1992 subsequently amended in the year 1995 and the same were/are applicable on the Institutions/Colleges covered under the Act, 1921, which are on grant-in-aid.

19. It is also undisputed rather admitted that when the father of the petitioner expired on 17.05.1986, the School/Institution, in which the petitioner was appointed vide order dated 16.10.2008, was not in grant-in-aid as the same was taken in grant-in-aid on 01.04.1996.

20. It is also admitted fact that the father of the petitioner expired when the petitioner was minor (one and half year old) and on attaining the age of majority, the petitioner applied for appointment on compassionate ground in the year 2008 i.e. after 22 and a half year of death of his father.

21. From Regulations 103-107 under Chapter III of the Act, 1921, it appears that the appointment on compassionate ground can only be made on the recommendation of the Committee as provided under Regulation 105 and in the instant case as appears from the record, the appointment of the petitioner was not made on the recommendation made by the Committee as provided under Regulation 105 of the Act, 1921.

22. A Division Bench of this Court in the judgment dated 09.05.2017 passed in Special Appeal No.264 of 2017 (Abdul Qadir Vs. State of U.P.) observed as under:-

"Accepted position in the present case is that father of petitioner-appellant has died in the year 2012, and at the said point of time, when father of petitioner-appellant has died, there was no provision under which compassionate appointment could have been provided to the dependent of the deceased incumbent who have been serving in Government aided Madarsa. Service conditions at the said point of time was governed by non-statutory rule known as "Uttar Pradesh Ashaskeeya Arbi Tatha Fasi Madarson Ki Manata Niyamawali, 1987. On the date of death of petitioner-appellant's father, there was no provision in existence for offering appointment, is clearly indicative of the fact that the terms and condition of service that has been prevailing on the said date, there has been no provision for providing compassionate

appointment, in case incumbent had died in harness.

Rules in question namely, Uttar Pradesh Non-Governmental Arbic and Persian Madarsa Recognition, Administration and Services Regulation, 2016 has been enforced w.e.f. 22.07.2016 wherein categorical mention has been made that it shall came into force from the date of notification in the gazette. Part-III of aforementioned Regulations deals with teaching and non-teaching employees, and in the said chapter while considering the terms and condition of teaching and non-teaching employees, provision has been incorporated for providing compassionate appointment to one of the dependent on death of an employee during service. One dependent has to apply within a period of five years in the Madarsa. Thus these statutory provisions are clear to the effect that for the first time while introducing the terms and condition of teaching and non-teaching employees, the aforementioned provisions has been introduced for providing compassionate appoint on death of employee in Madarsa during service period and dependent was free to move an application within a period of five years.

Consequently, under the scheme of things provided for, Regulations are clearly prospective in nature and effect and for the first time time provision has been incorporated for providing compassionate appointment on death of incumbent during service period to one of the dependent under the terms and condition of service, in this backdrop, claim that has been made to provide compassionate under the aforementioned regulation, certainty cannot be directed by us inasmuch as, we cannot proceed to enlarge the scope of aforementioned regulation, as on its face value, it is prospective in nature and would not include within its fold all such teaching and non teaching staff under whose condition of service, there has been no provision for providing compassionate appointment. Compassionate appointment has to be considered as per the scheme that has been in vague at the time of death of employee concerned. Apex Court in the case of Canara Bank v. Mahesh Kumar (2015) 7 SCC 412, has further provided that compassionate appointment cannot be made in the absence of Rules and Regulations, and request has to be considered strictly in accordance with the governing scheme, and no discretion is left with any authority to make compassionate appointment dehors the scheme. Here the scheme in question introduced by way of Regulation for providing compassionate appointment w.e.f. 22.07.2016 in no way suggests that benefit of the same would be extended even in reference of those employees, teaching and non teaching, whose death has taken place, prior to enforcement of Regulation.

In view of this, Special Appeal stands dismissed."

23. Insofar as the arguments made by the counsel for the petitioner pertaining to the vested rights accrued in favour of the petitioner is concerned, the law in this connection is well settled in the case of Umesh Kumar Nagpal v. State of Haryana (1994) 4 SCC 138, the Supreme Court explained the basic purpose of providing compassionate appointment to the dependent of a deceased employee, died in harness.

"The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or

the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. ... For these very reasons, the compassionate employment cannot be granted after a lapse of reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

24. The law in this connection is well settled by the Supreme Court in large number of cases. The Supreme Court in the case of Commissioner of Public Instructions v. K.R. Vishwanath (2005) 7 SCC 206 laid down the following principles:--

"...the claim of person concerned for appointment on compassionate ground is based on the premises that he was dependent on the deceased employee. Strictly this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. ...High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments."

25. Similar view has been again taken by the Supreme Court in the case of State of J. & K. v. Sajad Ahmad Mir, (2006) 5 SCC 766 : 2006 (6) AWC 6209 (SC), wherein the Court observed as under:-

"Normally, an employment in Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed from except where compelling circumstances demand, such as, death of the sole breadwinner and likelihood of the family suffering because of the set back. Once it is proved that in spite of death of bread earner, the family survived and substantial period is over, there is no necessity to say "goodbye' to the normal rule of appointment and to show favour to one at the cost of interests of several others ignoring the mandate of Article 14 of the Constitution."

26. Certain principles of law has been laid down by the Supreme Court in the case of V. Shivamurthy v. State of Andhra Pradesh (2008) 13 SCC 730, namely:--

"(a) Compassionate appointment based only on descent is impermissible. Appointments in public service should be

made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no other mode of appointment is permissible, appointments on compassionate grounds are a well recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies.

(b) Two well recognized contingencies which are carved out as exceptions to the general rule are:

(i) appointment on compassionate grounds to meet the sudden crisis occurring in a family on account of the death of the bread-winner while in service.

(ii) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the bread winner.

Another contingency, though less recognized, is where land holders lose their entire land for a public project, the scheme provides for compassionate appointment to members of the families of project affected persons. (Particularly where the law under which the acquisition is made does provide for market value and solatium, as compensation).

(c) Compassionate appointment can neither be claimed, nor be granted, unless the rules governing the service permit such appointments. Such appointments shall be strictly in accordance with the scheme governing such appointments and against existing vacancies.

(d) Compassionate appointments are permissible only in the case of a dependant member of the family of the employee concerned, that is, spouse, son or daughter and not other relatives. Such appointments should be only to posts in the lower category, that is, Classes III and IV posts and the crises cannot be permitted to be converted into a boon by seeking employment in Class I or II posts."

27. Further the Supreme Court in the case of Union of India v. Shashank Goswami (2012) 11 SCC 307 : 2012 (5) AWC 4734 (SC) has held that appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased. Relevant paragraphs of the aforesaid judgment are quoted below:-

"9. There can be no quarrel to the settled legal proposition that the claim for appointment on compassionate grounds is based on the premise that the applicant was dependent on the deceased employee. Strictly, such a claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. Appointment on compassionate ground cannot be claimed as a matter of right.

10. As a rule public service appointment should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis and not to confer a status on the family. Thus, the applicant cannot claim appointment in a particular class/group of post. Appointments on

compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased."

28. Once again the Supreme Court in the case of Chief Commissioner, Central Excise and Customs, Lucknow v. Prabhat Singh (2013) (5) AWC 5062 (SC) held that compassionate appointment is not a gift to all those who seeks court's intervention and the Court may issue directions in the case where appointment on compassionate ground, could deprive a really needy family requiring financial support, and thereby, push into penury a truly indigent, destitute and impoverished family. Relevant portion of the aforesaid judgment is quoted below:--

"We are constrained to record that even compassionate appointments are regulated by norms. Where such norms have been laid down, the same have to be strictly followed...The very object of making provision for appointment on compassionate ground, is to provide succor to a family dependent on a government employee, who has unfortunately died in harness. On such death, the family suddenly finds itself in dire straits, on account of the absence of its sole bread winner. Delay in seeking such a claim, is an anti thesis, for the purpose for which compassionate appointment was conceived. Delay in raising such a claim, is contradictory to the object sought to be achieved... Courts and Tribunals should not fall prey to any sympathy syndrome, so as to issue directions for compassionate appointments, without reference to the prescribed norms. Courts are not supposed to carry Santa Claus's big bag on Christmas eve, to disburse the gift of compassionate appointment, to all those who seek a court's intervention. Courts and Tribunals must understand, that every such act of sympathy, compassion and discretion, wherein directions are issued for appointment on compassionate ground, could deprive a really needy family requiring financial support, and thereby, push into penury a truly indigent, destitute and impoverished family. Discretion is therefore ruled out. So are, misplaced sympathy and compassion."

29. In the case of MGB Gramin Bank v. Chakrawarti Singh reported in (2014) 13 SCC 583 : AIR 2013 SC 3365, the Supreme Court has observed as follows:

"Every appointment to public office must be made by strictly adhering to the mandatory requirements of Articles 14 and 16 of the Constitution. An exception by providing employment on compassionate grounds has been carved out in order to remove the financial constraints on the bereaved family, which has lost its bread-earner. Mere death of a Government employee in harness does not entitle the family to claim compassionate employment. The Competent Authority has to examine the financial condition of the family of the deceased employee and it is only if it is satisfied that without providing employment, the family will not be able to meet the crisis, that a job is to be offered to the eligible member of the family. More so, the person claiming such appointment must possess required eligibility for the post. The consistent view that has been taken by the Court is that compassionate employment cannot be claimed as a matter of right, as it is not a vested right.

The Court should not stretch the provision by liberal interpretation beyond permissible limits on humanitarian grounds."

30. A division Bench of this Court in the case of Vishal Singh v.State of U.P.

reported in 2018 (2) ESC 1036 (All.) (DB) was pleased to hold that the appointment on compassionate ground is given to tide over the immediate financial difficulties faced by the family of the deceased and that a minor cannot claim appointment on compassionate ground unless scheme itself envisages that as and when such minor becomes major, he can be appointed without any time limit.

31. Full Bench of this Court in the case of Shiv Kumar Dubey v. State of U.P., 2014 AWC 3016, formulated the principles which must govern the compassionate appointment in pursuance to the Dying in Harness Rules. In paragraph 29(ii), it was held by Full Bench of this Court that there is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Relevant portion in this regard is quoted below:--

29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

32. In view of the facts as stated, it is clear that a person can not be given appointment on compassionate ground unless the Rules or the scheme provides for such appointment or their exists some vested rights in his favour.

33. In the present case, from the facts as narrated above, it is clear that:-

(i) At the time of death of father of petitioner, there was no Rule or statutory provisions for providing appointment on compassionate ground to the dependent of deceased employee working in unaided school/college covered under the Act, 1921 and as such no vested right accrued in favour of the petitioner on the death of his father to get appointment on compassionate ground.

(ii) In the year 2008, when the petitioner was appointed by the Committee of Management even at that point of time there was no provision or Rule under which the dependent of deceased employee of unaided school/college, covered under the Act, 1921, subsequently taken up in grant-in-aid, could be appointed on compassionate ground.

(iii) Even, subsequent to aforesaid, till date, no provision has been made under the Act, 1921 for providing compassionate appointment to the dependent of deceased employee of unaided school/college or unaided school/college subsequently taken up in grant-in-aid.

(iv) The appointment of the petitioner on compassionate ground is in violation of Regulation 105 under Chapter

III of the Act, 1921, as without the recommendation of Committee provided under Regulation 105, the Committee of Management of the college appointed the petitioner on compassionate ground on the post of Assistant Teacher.

(v) The petitioner was appointed on compassionate ground after 22 and a half year of death of his father. Highly belated appointment, against the spirit of providing compassionate appointment.

34. Taking into consideration the facts of the case and aforesaid settled legal preposition on the issue of providing compassionate appointment, according to which compassionate appointment can be given strictly as per the scheme/rule applicable at the time of death of the employee and should not be provided at highly belated stage, as also the Regulations 103-107 of Chapter III of the Act, 1921 this Court is of the view that the ground taken in the order impugned to the effect that the College was not in grant-in-aid when the father of the petitioner expired and accordingly, no right was accrued in his favour for seeking appointment on compassionate ground under the aforesaid Regulations, is justified.

35. In the aforesaid factual background and taking into consideration the settled legal position, narrated hereinabove with regard to compassionate appointment, this Court is of the view that the order passed by the District Inspector of Schools, Unnao dated 29.05.2009 is not liable to be interfered with.

36. In regard to the submissions made by the learned counsel for the petitioner that the petitioner was appointed vide order dated 16.10.2008 and he is still continuing in service on the post of Assistant Teacher in the College in question and the appointment of the petitioner, at this stage, is not liable to the interfered with and the direction be issued to the State/Respondents to pay salary to the petitioner w.e.f. 01.11.2008, this Court considered the judgment placed by the learned counsel for the petitioner in support of his case, referred hereinabove, and on due consideration of the same and the judgment of the Apex Court in the case of Secretary, *State of Karnataka and others v. Umadevi (3) and others*, (2006) 4 SCC 1 : 2006 SCC (L&S) 753, wherein the Apex Court observed that any appointment made in violation of the Rules as also in violation of Article 14 and 16 of the Constitution of India would be nullity, I am of the view that the petitioner is not entitled to any indulgence from this Court on the ground that he is continuing on the post since 01.11.2008. The appointment made in violation of mandatory provisions of Statute/Rule would be illegal and thus, void. Illegality cannot be rectified. Illegality cannot be regularized, only an irregularity can be.

37. Needless to say that it is well settled that when there is conflict between law and equity, it is law which has to prevail. It is latin maxim "dura lex sed lex" is to be taken note of, which means 'that law is harsh but it is law. Equity can only supplement the law, but it cannot supplant or override it.

38. Further, it is also settled principle of law that Court should not exercise its jurisdiction only on sympathy.

39. Considering the entire aspects of the case including the reasoning recorded by this Court, hereinabove, this Court finds that the writ petition lacks merit.

40. It is accordingly ***dismissed*** with no order as to costs.

(2020)03-05ILR A796
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2020

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 7317 of 2020

Ram Adhar Pandey ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Anil Kumar Pandey

Counsel for the Respondents:
A.S.G.

(A) Civil Law-Constitution of India - Article 226(2) - even if none of the opposite parties belong to the state of U.P. but the cause of action has arisen within the jurisdiction of this Court at Lucknow

(B) Limitation and cause of action - it shall be treated as recurring in case of proper pay to an employee

Writ Petition disposed of. .(E-10)

List of cases cited:

1. Nawal Kishore Sharma Vs UOI & ors (2014) 9 SCC 329 *(followed)*

2. M.R. Gupta Vs. UOI & ors (1995) 5 SCC 628 I *(followed)*

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Anil Kumar Pandey, learned counsel for the petitioner and Sri S.B. Pandey, learned Assistant Solicitor General of India and the Senior Advocate assisted by Sri Varun Pandey, learned counsel for the opposite parties.

2. By means of this writ petition, the petitioner has prayed that the opposite parties be directed to revise the pension of the petitioner according to the recommendations of 6th Pay Commission and 7th Pay Commission and also pay the arrears of revised pension and amount of GIS, GPF and difference of arrears of salary and other benefits along with admissible interest.

3. Learned counsel for the petitioner has produced before the Court the copy of one letter dated 20.02.2020 preferred by the Deputy Inspector General, Group Centre, Central Reserve Police Force (in short C.R.P.F.), Mokama Ghat, Patna, Bihar addressing to the petitioner apprising him that his pay has not been revised as per the 6th Pay Commission and 7th Pay Commission, therefore, five documents have been indicated in the said letter with the direction to the petitioner to provide those documents to the department for necessary action. The same is taken on record. The copy of letter dated 20.02.2020 has also been provided to Sri S.B.Pandey, learned Assistant Solicitor General of India.

4. Sri S.B. Pandey, learned Assistant Solicitor General of India has raised objection regarding maintainability of the writ petition by submitting that none of the opposite parties are belonging to the present State i.e. the State of U.P., more particularly, the jurisdiction/area of this Court, therefore, this writ petition may be dismissed. He has further raised objection to the extent that the petitioner is claiming the aforesaid benefits after about more than

40 years, therefore, such relief may not be granted to him.

5. Replying to the aforesaid contention of Sri S.B. Pandey, learned counsel for the petitioner has drawn attention of this Court towards the decision of Hon'ble Supreme Court in re: ***Nawal Kishore Sharma vs. Union of India and others*** reported in ***(2014) 9 SCC 329*** by submitting that in an identical facts and circumstances the Hon'ble Supreme Court has directed that in view of the peculiar facts and circumstances if the recurring cause of action arises within the jurisdiction of the Court concerned, the said writ petition may be entertained. The relevant para-17 of the aforesaid judgment is being reproduced here-in-below:-

"17. We have perused the facts pleaded in the writ petition and the documents relied upon by the appellant. Indisputably, the appellant reported sickness on account of various ailments including difficulty in breathing. He was referred to hospital. Consequently, he was signed off for further medical treatment. Finally, the respondent permanently declared the appellant unfit for sea service due to dilated cardiomyopathy (heart muscles disease). As a result, the Shipping Department of the Government of India issued an order on 12.4.2011 cancelling the registration of the appellant as a seaman. A copy of the letter was sent to the appellant at his native place in Bihar where he was staying after he was found medically unfit. It further appears that the appellant sent a representation from his home in the State of Bihar to the respondent claiming disability compensation. The said representation was replied by the respondent, which was addressed to him on his home address in Gaya, Bihar rejecting his claim for disability compensation. It is further evident that when the appellant was signed off and declared medically unfit, he returned back to his home in the District of Gaya, Bihar and, thereafter, he made all claims and filed representation from his home address at Gaya and those letters and representations were entertained by the respondents and replied and a decision on those representations were communicated to him on his home address in Bihar. Admittedly, appellant was suffering from serious heart muscles disease (Dilated Cardiomyopathy) and breathing problem which forced him to stay in native place, wherefrom he had been making all correspondence with regard to his disability compensation. Prima facie, therefore, considering all the facts together, a part or fraction of cause of action arose within the jurisdiction of the Patna High Court where he received a letter of refusal disentitling him from disability compensation."

6. Replying the second objection regarding the delay in approaching the Court for claiming the dues, learned counsel for the petitioner has drawn attention of this Court towards another judgment of Hon'ble Supreme Court rendered in re: ***M.R. Gupta vs. Union of India and others reported in (1995) 5 SCC 628***, wherein the Hon'ble Supreme Court has held that if the grievance of an employee is relating to the proper pay fixation etc. it shall be treated recurring cause of action and limitation shall not be treated as barred.

7. In the present case, the benefit of 6th Pay Commission accrued in the year 2006 and of 7th Pay Commission in the year 2016. The letter to that effect has been issued by the opposite party No.6 to the

petitioner on 14.06.2017 seeking information. The said letter dated 14.06.2017 has been annexed as Annexure No.8 to the writ petition.

8. Further, the letter dated 20.02.2020, which has been brought into the notice of this Court by learned counsel for the petitioner, clearly reveals that the aforesaid grievance of the petitioner is pending consideration, for that, some documents have been asked and as per learned counsel for the petitioner those documents have already been provided to the Competent Authority.

9. It has been noted that all those correspondences have been made with the petitioner on his address at Sultanpur (U.P.). Besides, the petitioner is aged about 80 years and in the old age he has been suffering couple of diseases.

10. Learned counsel for the petitioner has further submitted that the petitioner has preferred couple of representations to the Competent Authorities but no proper decision has been taken. Therefore, the petitioner may be permitted to prefer a fresh representation to the Authority Competent and the direction may be issued to decide the same within time frame.

11. Be that as it may, in view of the decision of Hon'ble Supreme Court in re: ***Nawal Kishore Sharma (supra)*** the cause of action in terms of Article 226 (2) of the Constitution of India has arisen within the jurisdiction of this Court at Lucknow and in view of the decision of Hon'ble Supreme Court in re: ***M.R. Gupta (supra),*** the cause of action for getting the benefits of 6th Pay Commission and 7th Pay Commission is still existing. Therefore, it is a recurring cause of action, hence, the second ground may not sustain in the eyes of law.

12. Therefore, in view of the above, the petitioner is permitted to prefer a fresh representation to the opposite party No.6 i.e. Deputy Inspector General, Group Centre, Central Reserve Police Force, Mokama Ghat, Patna, Bihar taking all pleas and grounds which are available with him enclosing therewith the copies of his earlier representations and other relevant documents which are necessary for disposal of his representation within a period of one month from today, and if, such representation is preferred by the petitioner within the aforesaid stipulated time, the Authority Competent shall consider and decide the same strictly in accordance with law by speaking and reasoned order with expedition, preferably, within a period of three months from the date of presentation of a certified copy of this order along with representation and the decision thereof be communicated to the petitioner forthwith.

13. In view of the aforesaid terms, the writ petition is ***disposed of finally.***

(2020)03-05ILR A798
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.02.2020

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Service Single No. 8038 of 2011

Sunil Kumar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ajay Pratap Singh

Counsel for the Respondents:
C.S.C., Indra Pratap Singh, Krishna Madhav Shukla

(A) Interpretation - Ordinance dated 26.09.1991 and 28.06.1993 - 'And' - is a grammatical conjunction - in exceptional circumstances only it may be capable of being read as "or" to manifest intention of legislature, if the contest so demands.

Writ Petition Rejected. (E-10)

List of cases cited:

1. S.Krishnan Vs. St. of Mad. AIR 1951 SC 301: 1951 SCJ 453: 1951 SCR 621 *(followed)*

2. Vidyacharan Shukla Vs. Khubchand Baghel AIR 1964 SC 1099: (1964) 2 SCA 505: (1964) 6 SCR 129 *(followed)*

3. Ishwar Singh Bindra Vs. St. of U.P. AIR 1968 SC 1450: 1968 Cr.LJ 19: (1969) 1 SCR 219 *(followed)*

4. St. of T.N. Vs. R. Krishnamurthy AIR 1980 SC 538 *(followed)*

5. Fakir Mohd. Vs. Sita Ram AIR 2002 SC 433: (2002) 1 SCC 741: JT 2001 (10) SC 530 *(followed)*

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Ajay Pratap Singh, learned Counsel for the petitioner, Sri Rishabh Tripathi and Sri K.M.Shukla, learned Counsel for the respondents.

2. The present petition has been filed, for the following main reliefs:-

*"I. Issue a writ, order or direction in the nature of **CERTIORARI** thereby quashing the impugned order dated 4.7.2011 passed by the Director of Education (Secondary), U.P. , Lucknow (opposite party No. 2) contained as Annexure No. 1 to the writ petition.*

*II. Issue a writ, order or direction in the nature of **MANDAMUS** commanding the Opposite Parties to provide the financial approval to the petitioner on the post of Assistant Teacher (Modern Subject) in Ram Deshik Sanskrit Uchchtar Madhyamik Vidyalya, Ankaripur, District Faizabad as admittedly the opposite party NO. 6 and 7 are juniors to the petitioner and they have been accorded financial approval."*

3. The brief facts of the case as stated in the writ petition, are that the petitioner was appointed on the post of Assistant Teacher (Modern Subject) on 1.7.2005 by the Manager, Committee of Management by following the due process in Ram Deshik Sanskrit Uchchtar Madhyamik Vidyalya Rampur, Ankaripur, District Faizabad (now Ayodhya) (in short "Institution"). The petitioner joined his duties on the post of Assistant Teacher (Modern Subject) on 4.7.2005. In the year 2008, with regard to taking the Institution in grant-in-aid, the name of the Teacher as well as Principal was submitted before the authorities concerned in which the name of the opposite party No. 6 and 7 does not find place. On 12.08.2010, the State Government issued a Government Order by which the institution of the petitioner was taken into grant-in-aid list. When the manager came to know regarding the grant-in-aid of the Institution, he immediately changed the list of teachers by mixing the name of his son and daughter-in-law viz Alok Kumar Tiwari (Opposite Party No. 7) and Mithilesh Kumar (opposite party no. 6). Thereafter, the District Inspector of Schools, Faizabad, sent a letter to the opposite party no. 2 on 29.03.2011 with the observation that two different lists have been submitted in respect of teaching staff and requested the respondent no. 2 to do the needful in the matter. From the records

of District Inspector of Schools, Faizabad it appears that appointment of opposite party nos. 6 and 7 were of 01.07.2009 and 02.07.2009 respectively and petitioner has been working since 04.07.2005. The petitioner is still working on the post of Assistant Teacher (Modern Subject) since the date of joining. The petitioner is fully eligible and qualified for the appointment on the post of Assistant Teacher (Modern Subject) and being so entitled to salary from State.

4. Opposing the writ petition, the respondent nos. 4, 6 and 7 have filed counter affidavit and supplementary counter affidavit filed by the respondent nos. 6 and 7 is also on record.

5. In the affidavit filed by the opposite partiy nos. 4, 6 and 7 it is stated that Ram Deshik Sanskrit Uchchtar Madhyamik Vidyalya, Ramapur, Faizabad, where the petitioner was working, is affiliated to Sampurna Nand Sanskrit University, Varanasi(in short "University") and as per the Government Order dated 28.06.1993, the qualification for the post of Assistant Teacher (Modern/Adhunik) is Post Graduate with Second Division, whereas the petitioner is Post Graduate with Third Division and keeping in view the same the financial approval with regard to appointment of petitioner was not given by the respondent no. 2.

6. Pressing the writ petition for the reliefs sought the learned Counsel for the petitioner submitted that the petitioner was appointed in the recognized Institution affiliated to Sampurna Nand Sanskrit University, Varanasi, imparting education upto the Uttar Madhyma, on the post of Assistant Teacher and qualification provided for the posts of Assistant Teacher of Modern Subjects in Ordinance of University dated 26.06.1993 is only Post Graduate and not Post Graduate with Second Division and as such the petitioner is entitled to financial approval as also the salary from State Exchequer.

7. Per contra, learned Counsel for the State Sri Rishabh Tripathi as also the learned Counsel for the respondent nos. 6 and 7 Sri K.M.Shukla, submitted that in the instant case, as per Ordinance dated 26.06.1993 the minimum qualification for the post of Assistant Teachers (Modern Subjects/Adhunik) is Post Graduate with Second Division whereas the petitioner, admittedly is Post Graduate with Third Second as such he does not fulfill the minimum requisite qualification consequently he is not entitled to salary for State Exchequer.

8. On the basis of pleadings on record and submission of learned Counsel for the parties that the questioner(s) for consideration are that (i) Whether petitioner is eligible and qualifed for the post of Assistant Teacher (Modern Subject/Adhunik) being Post Graduate with Third Division and (ii) whether the requisite qualification for the post of Assistant Teacher (Modern Subject/Adhunik).

9. Heard learned Counsel for the parties and perused the records.

10. For deciding the questions involved in the instant writ petition, it would be appropriate to take notes of the relevant portion of Ordinance dated 28.06.1993 and earlier Ordinance dated 26.09.1991 of the University prescribing minimum qualification for the post of Assistant Teacher (Modern

Subjects/Adhunik) in the recognized Institution imparting education upto Uttar Madhyma affiliated to University.

11. Relevant portion of Ordinance dated 26.09.1991 reads as under:-

"4–उत्तरमध्यमा स्तर तक मान्यताप्राप्त विद्यालय के अध्यापकों की न्यूनतम अर्हताएं निम्नलिखित होंगीः–

(क)सम्बद्ध विषय में कम से कम द्वितीय श्रेणी में स्नातकोत्तर उपाधि।

(ख) प्रशिक्षण और परम्परागत उपाधि को वरीयता।"

12. Relevant portion of Ordinance dated 28.06.1993 reads as under:-

"उत्तर मध्यमा स्तर तक मान्यता प्राप्त विद्यालयों के अध्यापकों की न्यूनतम अर्हताएँ निम्नलिखित होगी–

क) सम्बद्ध विषय में कम से कम द्वितीय श्रेणी में ष्कष् वर्गीय विषय में आचार्य उपाधि और आधुनिक विषयों के अध्यापकों के पदों के लिए स्नातकोत्तर उपाधि।"

13. To answer the questioner(s) aforesaid, this Court of the view that English version of Ordinance dated 28.06.1993 is also required to be considered but the same has not been produced by any of the party and accordingly the free hand translation of the same reads as under:-

"Minimum Second Class in related subject for "A" category subjects Acharya Degree and for the posts of Assistant Teachers (Modern Subjects/ Adhunik Vishyon) Post Graduate Degree."

14. From the above quoted provision, under consideration, it appears that word "And/और" has been used therein between two category of Assistant Teachers. Now the question is that what would be effect of word "And" in the provision.

15. "And" is a grammatical conjunction used to indicate that one or more classes/cases it connects. Further, it connects clauses or sentences and is generally used in cumulative sense.

16. The word "and" is generally conjunctive and in only exceptional circumstances, the word "and" may be capable of being read as "or", to manifest intention of legislature if the context so demands. In normal course the term "and" has a cumulative sense, requiring the fulfilment of all the conditions that are joined together. *(Sec: S.Krishnan v. State of Madras, AIR 1951 SC 301: 1951 SCJ 453: 1951 SCR 621; Vidyacharan Shukla v. Khubchand Baghel, AIR 1964 SC 1099: (1964) 2 SCA 505:(1964) 6 SCR 129; Ishwar Singh Bindra v. State of Uttar Pradesh, AIR 1968 SC 1450: 1968 Cr.LJ 19 (1969) 1 SCR 219; State of Tamil Nadu v. R. Krishnamurthy, AIR 1980 SC 538; and Fakir Mohd. v. Sita Ram, AIR 2002 SC 433: (2002) 1 SCC 741: JT 2001 (10) SC 530.*

17. Considering the aforesaid including the earlier Ordinance dated 26.09.1991 and the settled legal preposition with regard to use of word "And", I am of the view that the effect of word "And/vkSj" used in the relevant part of Ordinance dated 28.06.1993 is that the expression "Minimum Second Class" is required for appointment of Assistant Teacher on post(s) related to, "A" Category Subjects as also for "Modern Subjects".

18. Thus, the answer to question no. 2 is that Post Graduate Degree with minimum Second Class is required for

appointment on the post of Assistant Teacher (Modern Subject/ Adhunik).

19. In view of above, the answer to the question no. 1, is that the petitioner is not qualified for the post of Assistant Teacher (Modern Subject/Adhunik).

20. In view of the aforesaid, the petitioner is not entitled to the salary from the State Exchequer.

21. Thus, the writ petition for the relief sought is misconceived and hence **dismissed** accordingly.

22. No order as to to costs.

(2020)03-05ILR A802
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.05.2020

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 9184 of 2018
connected with
Service Single No. 883 of 2018 & Ors.

Lakshman Singh & Ors ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Gaurav Mehrotra, Anamita Srivastava, Santosh Kumar Tripathi, Shreya Prakash

Counsel for the Respondents:
C.S.C.

(A) Civil Law- Appointment - court would have the right to regularize an appointment made only after following the due procedure, even though, a non fundamental element of that process or procedure has not been followed - this right would not extend to direct that an appointment made in clear violation of the constitutional scheme and statutory rules can be treated to be permanent
Writ Petition Disposed of. (E-10)

List of cases cited:

1. St. of U.P. & anr. Vs. Dalla Ram & ors. Writ Petition No. 1/SB/2013

2. Secretary, St. of Karn. & ors. Vs. Umadevi and ors (2006) 4 SCC 1

3. National Fertilizers Ltd. & ors. Vs. Somvir Singh (2006) 5 SCC 493

4. St. of Orissa & ors. Vs. Mamata Mohanty (2011) 3 SCC 436

5. St. of Hary. Vs. Piara Singh & ors. (1992) 3 SCR 826

6. Dr. M.S. Mudhol and ors. Vs. S.D. Halegkar & ors. (1993) 3 SCC 591

7. Rekha Chaturvedi (Smt.) Vs. State of Rajasthan & ors. 1993 Supp (3) SCC 168

8. St. of U.P. & anr. Vs. Anand Kumar & ors. (2018) 13 SCC 560

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Since similar question of facts and law are involved in the bunch of writ petitions, therefore, they are being decided by this common order.

2. By means of bunch of writ petitions the petitioners have challenged the order passed by learned Advocate General vide which appointment of the petitioners have been cancelled and their services have been terminated with immediate effect.

3. In Writ Petition Nos.883 (SS) of 2019, 3047 (SS) of 2018, 3402 (SS) of

2018, 3880 (SS) of 2018 & 4634 (SS) of 2018, the petitioners have challenged order dated 22.12.2017 by means of which appointment order of the petitioners has been cancelled and their services have been terminated with immediate effect.

4. The background facts in which Writ Petition No.9184 (SS) of 2018 has been filed are briefly stated as under:-

(i) Petitioners are Class - IV employees and were working on the post of Peon (Anusewak) in the office of Chief Standing Counsel of High Court of Judicature at Allahabad as well as Lucknow. While Petitioners No.1 to 4 were working on the post of Peon (Anusewak) in the office of Chief Standing Counsel at Lucknow and Petitioners No. 5 & 6 were working as Peon (Anusewak) in the office of Chief Standing Counsel at Allahabad. Petitioners No.1, 3 & 5 belong to General Category, Petitioners Nos. 2 & 4 belong to Other Backward Category and Petitioner No.6 belongs to Scheduled Caste Category.

(ii) In year 2013, in the office of Respondent No.2 and State Law Officers (Establishment), several posts in Class - III category namely Stenographers, Assistant Review Officers and Computer Assistants as well as posts of Class - IV employees were lying vacant. Those posts were duly sanctioned in accordance with the procedure prescribed in the statute. Vide order/letter dated 18.06.2013 issued by Special Secretary (Law), Government of U.P. to Chief Standing Counsel of this Court at Allahabad and Lucknow, it was requested to make available the proposal to the State Government for appointment of Stenographers and other staffs in the office of Chief Standing Counsel in compliance of judgment and order dated 09.04.2013 passed in Writ Petition No. 1 (S/B) of 2013 (State of U.P. & Anr. Vs. Dallaram & Anr.). In pursuance of the said letter, the decision to fill up the aforesaid vacancies was taken by the then learned Advocate General.

(iii) In another order dated 25.11.2013 passed in Writ Petition No.7155 (MB) of 2008 (C/M Dhirja Devi Ram Adhar Kanya Inter Colleve V. State of U.P. & Ors.), the Division Bench of this Court passed the following orders:-

"Earlier, this Court had directed to send the record of listed cases to different counsel according to allocation of work.

Learned Standing Counsel pointed out that the records of the cases listed are not being sent by the CSC Office to them.

Today, the record of this case has not been sent by the CSC office, due to which the learned Standing Counsel is unable to argue the case.

Learned counsel for the petitioner submits that since last two dates, the record of this case is not made available with the learned Standing Counsel. Hence, arguments could not be held.

There appears mismanagement of the CSC office.

List/put up on 28.11.2013. On the said date, Principal Secretary (Law) shall appear in person before this Court to show cause as to why an adverse entry may not be entered in his character roll for failing to administer the office of Chief Standing Counsel and also for failing of non compliance of earlier direction issued by this Court which also amounts to a contempt. He shall also a show cause as to why a contempt proceeding may not be initiated against him for non complying with the order passed by this Court in not providing requisite infrastructure and assistance to this Court.

Principal Secretary (Law) be informed forthwith by learned Standing Counsel as well as Register of this Court for compliance.

Learned Standing Counsel shall also produce the copy of order passed earlier by the Division Bench of this Court by which certain directions were issued to the authority concerned on the date fixed.

List on 27.11.2013."

(iv) Pursuant to the aforesaid order(s), the Division Bench expressed annoyance against the State Government regarding non-providing of requisite infrastructure in the Chief Standing Counsel office. Thereafter, a decision was taken by respondent no.2/Advocate General, Uttar Pradesh to fill up the vacant posts in the Chief Standing Counsel office and for the said purpose, Notice No.737(3) dated 10.12.2013 was issued by Officer on Special Duty (O.S.D) in the office of respondent no.2 inviting applications from the eligible candidates for filling up vacancies on those posts on ad-hoc basis. The said notice was duly circulated and the same was also pasted on the notice boards in the office of Chief Standing Counsel of this Court at Allahabad and Lucknow.

(v) As per the aforesaid notice, last date for submitting the applications was 30.04.2014. The petitioners came to know about the aforesaid vacancy in the office of respondent no.2 and State Law Officers (Establishment). They applied for the said posts as they were eligible.

(vi) A three members selection committee was constituted for appointment on Class - IV posts of Peon (Anusewak) headed by the then Government Advocate at Lucknow. The other members were the then Chief Standing Counsel at Lucknow and the Standing Counsel at Lucknow. An interview took place on 18.06.2014 for the posts of Peon (Anusewak) and the petitioners succeeded in the said interview. After completing the interview, a select list was prepared and the selection committee sent its report/recommendation on 19.06.2014 to respondent no.2 for appointment of selected candidates.

(vii) On the basis of the aforesaid select list, vide office order dated 20.06.2014, a composite appointment letter on the post of Peon (Anusewak) was issued to the petitioners.

(viii) In furtherance of the aforesaid appointment order/letter, petitioners no.1 to 4 served their joining on the same day i.e. 20.06.2014 at the office of Chief Standing Counsel at Lucknow, petitioner no.5 served his joining on 01.07.2014 and petitioner no.6 served his joining on 20.06.2014 at the office of Chief Standing Counsel at Lucknow. Since then they were performing their duties till issuance of the impugned order dated 22.03.2018.

5. In Writ Petitions No.4520 (SS) of 2017 and Writ Petition No.5198 (SS) of 2017, the petitioners have prayed for a writ in the nature of mandamus directing the respondents to release the petitioner's salary as well as pay arrears of salary w.e.f. July, 2014.

6. The Government of U.P. in pursuance of provisions of Clause (3) of Article 348 of Constitution of India notified the U.P. Advocate General and Law Officers Establishment Service rules, 2009 (hereinafter referred as "2009 Rules') on 11.11.2009. On 15.12.2009, the 2009 Rules was amended making amendments in Rule 25(2) and in appendix. The second amendment was made in rules 15 & 16 of 2009 Rules on 19.01.2010. By way of third amendment in 2009 Rules, Rule 31 was inserted on 10.02.2010.

7. In the year 2014, a complaint was made by an Additional Advocate General at Allahabad questioning the appointments of

Assistant Review Officers. On the said complaint, the Chief Secretary, Government of U.P. wrote a letter dated 26.06.2014 to Principal Secretary (Law), Government of U.P. instructing therein that there is ban on appointments, hence appointments of Assistant Review Officers is against the appointment policy of the State. The said letter was modified vide order dated 15.07.2014 by the Chief Secretary, Government of U.P. It is also alleged in the instant proceedings that the services of the employees which were appointed on ad-hoc basis were regularised vide order dated 28.07.2014. An inquiry was instituted vide order dated 11.08.2014 issued by Special Secretary, Department of Law, Government of U.P. to inquire about the legality and validity of order dated 28.07.2014.

8. On 13.04.2015, the inquiry report was submitted by Government Advocate, Lucknow stating therein that appointments made by respondent no.2 were proper and valid, and were in accordance with law. It was also stated in the said inquiry report that order of regularisation of the employees of Class - III and Class - IV posts issued by respondent no.2 was also valid and in accordance with law.

9. Further, another inquiry report dated 23.05.2016 was submitted by Additional Advocate General, relevant portion of which is quoted hereinbelow for ready reference:-

"..... After looking into all the documents on record and giving a thoughtful consideration, do not find any discrepancy in either the selection process or in respect of any laxity in the educational qualifications or eligibility criterion and while making the appointments due care and caution was taken by both the Selection Committee and by the then Advocate General, U.P.

I am of the opinion that since no regular appointment had been made since the year 2010 and a large number of vacancies were available in the Office of the Advocate General both at Lucknow and Allahabad and looking to the interest of work, the then Advocate General had taken a decision to make appointment on different posts of Class III and Class IV category.

At this juncture, I would also like to mention that a bench comprising of Hon'ble Mr. Justice D.P. Singh and Hon'ble Mr. Justice Arvind Kumar Tripathi (II) in the case of State of U.P. And another Versus Dalla Ram and another (Writ Petition No.1/SB/2013), had strongly recommended to make appointments in the office of Advocate General, U.P., so that it functions in a proper and better manner and that being the necessity and need of the hour, the Advocate General thought it proper to make adhoc appointments at that point of time. It will also be not out of place if it is mentioned here that all the incumbents whose adhoc appointments were made in the year 2014 have been working since then but are not getting their salary and emoluments which is not in accordance with Constitutional requirements.

Hence, I conclude by saying that since appointments have been done in accordance with law and due to the exigencies of work interest and also in the light of the directions given by the Hon'ble High Court in the case of State of U.P. And another Versus Dalla Ram and another (Writ Petition No.1/SB/2013) and also because the incumbents on the post in question have been working since 2014, the appointments made may be treated as legal and salary may be paid to the persons who are still working."

10. Supplementary report/reply dated 12.09.2016 was also submitted, relevant portion of which is quoted hereinbelow:-

"..... In view of the judgment and order dated 25.11.2013 passed by the Hon'ble Court and looking into the exigencies of work selection and appointment was carried out and while making the aforesaid selection and appointment, due process was adopted as to why the proposal was not send to the government for relaxation in terms of the government order dated 15.03.2012 was not taken is not within my knowledge. Moreover, I have been asked to submit a report in this regard vide order dated 26.10.2015 specially provide that I should give an enquiry report in respect of the appointment made of the Ex-Advocate General Sri Vinay Chandra Mishra, in the office of Advocate General U.P./State Law Officers on the post of 6 Assistant Review Officers, 7 Stenographers and 6 Class IV employees.

Dear Sir, since the queries now raised are not a part of the original reference order on which I had submitted by Enquiry report, these queries are of no relevance.

(ii) That the order passed in the case of State of U.P. and others Vs. Dalla Ram and others related to present issue but since the Hon'ble Court in taken to the office that there was shortage of staff in the office of Advocate General, U.P./State Law Officers and he should issue certain directions and the Advocate General has acted in the light of the aforesaid order dated 25.11.2013 passed by the Hon'ble High Court and no Special Appeal has been preferred against the aforesaid judgment, hence the judgment and order passed by the Hon'ble High Court is of much relevance and needs to be implemented.

(iii) Third query as to why the advertisement was not issued for selection/appointment again cannot be clarified at my end as I was never a part of the selection committee, as it is not a part of the reference order dated 26.10.2015 by which I was appointed as the inquiry officer to enquire into the appointment made by the then Advocate General, U.P. On the post of Assistant Review Officer, Stenographers and Class IV employees. However, it may be clarified that the selection process undertaken at the end of the then Advocate General O.P. Is not taking any as I had already stated in my earlier enquiry report dated 23.05.2016."

11. Vide order dated 22.12.2017, respondent no.2 terminated the services of the petitioners. Vide order dated 03.02.2018, respondent no.2 modified the said termination order dated 22.12.2017 of the petitioners. Finally, order dated 22.03.2018 was passed terminating the services of the petitioners on the basis that appointments of the petitioners were contrary to the provisions of 2009 Rules and their services were regularised in contravention of the provisions of the said rules.

12. Mr. Gaurav Mehrotra, learned counsel appearing for the petitioners in Writ Petition No.9184 (SS) of 2018 has submitted that the appointing authority i.e. Advocate General was fully justified in making appointment on Class - III and Class - IV posts by merely resorting to the procedure prescribed in Sub-Rule 2 of Rule 14 of 2009 Rules. It is submitted that the situation occurred due to the decision and observation made by Division Bench vide order dated 09.04.2013 (supra) vide which the Division Bench expressed their concern on the functioning of the office of Advocate General of the State and submitted that due to non-availability of the sufficient staff, the Advocate General as well as Chief Standing Counsel(s) are not able to get the

paper-book prepared, therefore, they were not able to assist the Court properly.

13. It is further submitted that in view of the observations, as mentioned above, the Advocate General appointed the petitioners on their respective posts after following the procedure prescribed in 2009 Rules. It is also submitted that a selection committee was constituted for selection of the petitioners on their respective posts. Examination was conducted and the committee recommended the names of the eligible candidates for appointment as they were found eligible. On the said recommendation, select list was prepared and as per the said list, the petitioners were appointed on their respective posts.

14. The learned counsel for the petitioners has submitted that when the complaint regarding appointment of the petitioners were received, an inquiry committee was constituted and inquiry was conducted, and a report was submitted by the inquiry officer on 13.04.2015. In the said report it has been mentioned that statements of all employees were recorded by the enquiry officer. Ultimately, the euquiry officer recorded that he also had a telephonic conversation with the then Advocate General, during whose tenure the appointments in question were made. The then Advocate General gave his explanation that ad-hoc appointments were made in exigency of service on account of directions issued by this Hon'ble Court as also keeping in view the extreme shortage of Class - III and Class - IV employees in the office of Advocate General and State Law Officers. The appointments were made after getting the notice pasted on the notice board and after constituting selection committee for selection, on whose recommendation the selections were made. Ultimately, the enquiry officer opined that *stricto sensu* would apply only in regular appointments and not in ad-hoc appointments. The enquiry officer further opined that the Hon'ble Court had issued direction to the State Government to sanction appropriate posts of Class - III and Class - IV employees which were never sanctioned, thus in view of the shortage of employees, excessive work load and directions of this Hon'ble Court, as an emergent situation, the then Advocate General made appointments on ad-hoc basis. Even, Chief Secretary modified his earlier letter on 15.07.2014 making it clear that the ad-hoc appointments made by the then Advocate General were in accordance with rules.

15. The learned counsel has further submitted that the Advocate General vide its Letter No.56 PS AG UP-15 dated 14.04.2015 categorically opined that *"from the records it is clear that all the persons who were appointed possessed requisite qualifications and they have been discharging their duties for about one year and as far as their performance is good, they may be allowed to continue till regular selection is made in accordance with law"*.

16. Thereafter, second inquiry was directed by the State Government regarding the appointment of the petitioners which was conducted by Additional Advocate General, Government of U.P., Lucknow. The second inquiry report dated 23.05.2016 was submitted by the inquiry officer i.e. Additional Advocate General. The inquiry officer during the course of inquiry went through the records in great detail and found that several posts including the posts of Class - IV employee duly sanctioned, were vacant in the office of Advocate General and State Law Offices, thus a

decision was taken by the then Advocate General keeping in mind the interest of the institution and the aforesaid posts were filled on ad-hoc basis for which notice was circulated on 10.12.2013. Large number of persons applied for the same. It was also mentioned in the said inquiry report that the selection committee recommended the names of the petitioners, on being found eligible, for appointment on their respective posts.

17. It is specifically mentioned in the second inquiry report that on the basis of the documents, the inquiry officer found that there was no discrepancy either in the selection process or laxity in educational qualifications or eligibility criteria, thus he concluded that appointments had been done in accordance with law and in exigencies of work interest and also in light of directions of this Court.

18. It is further submitted that the petitioners, who were appointed on ad-hoc basis, were appointed on their respective posts due to exigency of service by the appointing authority exercising its discretion in view of the emergent situation which had emerged on account of directions issued by this Hon'ble Court vide orders dated 09.04.2013 and 25.11.2013 as also on account of acute shortage of staff in the office of Advocate General and State Law Officers. Though the notice could not be advertised in the news paper and employment exchange, but the notice was duly circulated by pasting the same on the notice board as prescribed in Rule 14(ii) of 2009 Rules. In such circumstances, appointment of the petitioners on ad-hoc basis cannot be faulted with or is not contrary to the provisions.

19. Learned counsel has fairly submitted that the petitioners had been working on ad-hoc basis on their respective posts for last several years after facing a proper selection process as per rules. There is also no allegation that the petitioners are not qualified or eligible candidates for their respective posts. The only allegation is that the selection was made in contravention of certain provisions of 2009 Rules.

20. It is also submitted that the procedure prescribed for selection was completely followed with and from the date of appointment till issuance of the impugned termination order, the petitioners continuously discharged their duties even thereafter there is deeming legal fiction of continuance of service of the petitioners on their respective posts in view of interim order dated 30.03.2018 passed by this Court in Writ Petition No.9184 (SS) of 2018.

21. Learned counsel for the petitioners has submitted that it is not the case of the respondents that the petitioners have committed any kind of forgery or misrepresentation for procuring the job or that the petitioners do not possess the requisite qualification for Class - III and Class - IV posts. On the contrary, the appointing authority after going through the records has explicitly held that the petitioners possess the requisite qualifications, therefore, the petitioners undoubtedly deserve to be continued on their respective posts at least till regular selections are made in accordance with 2009 Rules.

22. Learned counsel for the petitioners in their respective other writ petitions have adopted the arguments advanced by Shri Gaurav Mehrotra, learned counsel appearing for Writ Petition No.9184 (SS) of 2018.

23. *Per contra*, Mr. H.P. Srivastava, learned Additional Chief Standing Counsel appearing for opposite parties no.2 to 4 has

vehemently opposed the submissions advanced by learned counsel for the petitioners and submitted that the appointment was made on ad-hoc basis and the same is nothing but a fortuitous appointment, which does not create any right to the incumbents appointed on ad-hoc basis. It is submitted that they do not have any right to continue in service and their services can be terminated at any point of time without assigning any reason. The procedure for direct recruitment for the post of Peon has been laid down in Rule 16 of 2009 Rules. It is submitted that 2009 Rules was amended in the year 2010. The same is known as "Uttar Pradesh Advocate General and Law Officers Establishment (2nd Amendment) Rules, 2010."

24. It is submitted that Rule 14 of 2009 Rules envisages two things; firstly, determination of the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies to be reserved for candidates belonging to SC/ST and OBC category. Secondly, wide publication of the vacancies through advertisement in daily newspaper having wide circulation and through other means. The procedure relating to a fair and ethical appointment as well as the rules laying down the procedure to be followed in making an appointment to a public post were all given a go bye and in disdainful manner contrary to the applicable rules, appointment of the petitioners and other similarly situated incumbents were made in an arbitrary and whimsical manner.

25. Learned counsel for opposite parties no.2 to 4 has pointed out illegalities in appointment of the petitioners i.e., without determination of number of vacancies to be filled during the course of the year of recruitment and without determining the number of vacancies reserved for candidates belonging to SC/ST and OBC category, which is contrary to Rule 14 of 2009 Rules. It is further submitted that the appointment was made without notifying the vacancies to be filled by direct recruitment by issuing advertisement in daily newspapers having wide circulation and also such appointments were made without adhering to a fair, transparent and non-exploitive process of selection.

26. Learned counsel for opposite parties no.2 to 4 has invited attention towards Para - 12 of counter affidavit dated 24.04.2018 and submitted that on a complaint, a show-cause notice dated 27.10.2017 was issued by opposite party no.2 calling upon the petitioners to show-cause as to why in the absence of a fair, transparent and non-exploitive process of their appointments, their appointments be not cancelled and their services be not terminated. By way of aforesaid show-cause notice, a reply was called from the petitioners and other similarly situated incumbents to furnish the evidence on the points which are mentioned in Para - 12 of the counter affidavit. It is further submitted that the petitioners failed to provide even a single document leading to the conclusion that no publication was issued inviting applications for filling up the vacancies through direct recruitment and making vacancies known to public at large in consonance with Articles 14 & 16 of the Constitution of India.

27. It is also established that no interview letters were issued to the petitioners, no final list of meritorious candidates was prepared, examination was not conducted and also no candidates from the open market participated in the

selection process, as no advertisement was published in the newspaper and no effort had been made to circulate the vacancies in the public at large.

28. Learned counsel for opposite parties no.2 to 4 has submitted that some documents, which are annexed in the writ petition, are fabricated and also not available on the records of the opposite parties. It is also submitted that some documents were forged by the petitioners. Learned counsel for opposite parties no.2 to 4 has invited attention towards Para - 24 of the counter affidavit and submitted that fraudulent purported notice has been issued under signature of one Poonam Kaushik, who had no authority to issue any such notice as not being a Gazetted Officer.

29. The file of the petitioners for regularisation was never put up before the then learned Advocate General by the Establishment Section of the Advocate General Office, Allahabad nor order dated 28.07.2014 has been issued or passed through the Establishment Section of the Advocate General Office, Allahabad. The dispatch register at Advocate General Office at Allahabad also does not record any entry relating to issuance of the purported fabricated order of regularisation dated 28.07.2014.

30. The learned counsel for opposite parties no.2 to 4 has submitted that it is a settled legal proposition that no person can be appointed even on a temporary or ad-hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on notice board etc., that will not meet the requirement of Articles 14 & 16 of the Constitution of India. Such a course violates the mandates of Articles 14 & 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment, mandatory compliance of the said constitutional requirement is to be fulfilled. It is further submitted that equality clause enshrined in Article 16 of the Constitution of India requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merits.

31. It is submitted that in the instant case it is crystal clear that no procedure has been adopted in the appointment of the petitioners and similarly situated other incumbents and their appointment is sheer violation of the provisions of the applicable statutes. In such circumstances, the entire appointment is illegal, contrary to the provision and deserves to be set aside.

32. The learned counsel has futher submitted that the learned Advocate General vide orders dated 22.12.2017 and 22.03.2018 have already terminated/cancelled the appointment of 27 employees after affording due opportunity of hearing. It is submitted that appointment of all the 27 employees, who have been terminated, was found illegal, against the procedure prescribed in the Rules and their regularisation of ad-hoc services was also found illegal, therefore, there is no illegality or any arbitrariness in the said termination order. The instant writ petitions filed by the petitioners/employees have no merit and therefore, the same may be dismissed with cost.

33. The parties exchanged affidavits in their respective writ petitions, which are available on record.

34. I have heard learned counsel for the parties and perused the materials available on record in all the above-mentioned writ petitions.

35. In the instant proceedings, the following issues for consideration are involved:-

"(I) whether the appointment of the petitioners is in violation of Rule 14(i) and 14(iii) of U.P. Advocate General and Law Officers Establishment Service rules, 2009 by not issuing/publishing advertisement in the daily newspapers and by not notifying vacancies in the Employment Exchange?

(II) whether the impguned order dated 22.03.2018 terminating the petitioners from the services has been issued mechanically, arbitrary and without following the procedure contained in the concerned service rules 2009 as well as violative of principle of natural justice?

(III) whether the petitioners who have alreeady put in long service on their respective posts from the date of their appointment till issuance of impugned order dated 22.03.2018 and even thereafter, in view of the deeming legal fiction of continuance in view of the interim order dated 30.03.2018 staying the operation and implementation of the impguned orders of termination, deserve to continue on their respective posts at least till the regular selection?"

36. The relevant provisions of 2009 Rules are reproduced here-under:-

PART-IV- QUALIFICATIONS

8. A candidate for recruitment to the various posts in the service must possess the following qualifications:

(i) Routine Grade Clerk Must have passed the Intermediate examination of the Board of High School and Intermediate Education, Uttar Pradesh or a qualification recognised by the Government as equivalent thereto and must possess minimum speed of 30 words per minute in English Typing or 25 words per minute in Hindi Typing. Preference will be given for the working knowledge of computer application.

(ii) Sahayak Samiksha Adhikari/Sahayak Samiksha Adhikari (Record)Must possess Bachelor's degree of a University established by law in India or a qualification recognised by the Government as equivalent thereto and minimum speed of 30 words per minute in English typing or 25 words per minute in Hindi Typing. Good knowledge of Computer Application is essential.

(iii) Stenographer Must possess Bachelor's degree of a University established by law in India or a qualification recognised by the Government as equivalent thereto und minimum speed of 100 words per minute in English shorthand and 30 words per minute in English typing or 80 words per minute in Hindi shorthand and 25 words per minute

in Hindi typing. Good knowledge of Computer Application is essential.

(iv) Cataloguer Bachelor's degree in Law and Diploma in Library Science from a University established by law in India. Good knowledge of Computer Application is essential.

(v) Routine Grade Clerk (Accounts) B.Com with Accountancy as a subject. Good knowledge of Computer is essential.

(vi) Computer Operator Grade A Must possess Bachelor's degree of a University established by law in India or a qualification recognised by the Government as equivalent thereto and diploma in Computer Science from a recognised Institution/"O" level Certificate from D.O.E.A.C.C. Three years experience in the field of Computer Application is essential.

(vii) Assistant Computer \ Operator Must possess Bachelor's Degree of a University established by law in India or a qualification recognised by the Government equivalent thereto and diploma in Computer Science from a recognised Institution/'0" level Certificate from D.O.E.A.C.C. Two years experience in the field of Computer Application is essential.

(viii) Peon (Anusewak/Chowkidar/ Bundle Lifter/Farrash) Must have passed class VIII examination.

(ix) Sweeper Must have passed Class V examination.

(x) Mali Must have passed class VIII examination with experience of five years as Mali.

(xi) Electrician Must possess certificate from a recognised Industrial Training Institute in Electrical Trade.

(xii) Photostat Operator Must have passed class VIII examination and must possess experience of five years in operating photostat machine.

PART-V-PROCEDURE FOR RECRUITMENT

14. Determination of vacancies.- *The appointing authority shall determine the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and other categories under Rule 6. The vacancies to be filled by direct recruitment shall be notified in the following manner:--*

(i) by issuing advertisement in daily newspaper having wide circulation;

(ii) by pasting the notice on the notice board of the office or by advertising through Radio/Television and other employment newspapers; and

(iii) by notifying vacancies to the Employment Exchange.

15. Procedure for direct recruitment for the posts of Routine Grade Clerk, Sahayak Samiksha Adhikari/Sahayak Samiksha Adhikari (Record), Stenographer, Cataloguer, Routine Grade Clerk (Accounts), Computer Operator Grade 'A' and Assistant Computer Operator.--

Direct recruitment to the posts of Routine Grade Clerk, Sahayak Samiksha Adhikari/Sahayak Samiksha Adhikari (Record), Stenographer, Cataloguer, Routine Grade Clerk (Accounts), Computer Operator Grade 'A' and Assistant Computer Operator in the service shall be made in accordance with the provisions of the Uttar Pradesh Procedure for Direct Recruitment for Group 'C' Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 2002, as amended from time to time.

16. Procedure for direct recruitment for the posts of Peon (Anusewak), Chowkidar, Bundle Lifter, Farrash, Sweeper, Mali, Electrician and Photostat Operator.--

Direct recruitment to the posts of Peon (Anusewak), Chowkidar, Bundle Lifter, Farrash, Sweeper, Mali, Electrician and Photostat Operator in the service shall be made in accordance with the provisions of the Group 'D' Employees Services Rules, 1985, as amended from time to time.

17. Procedure for recruitment by promotion to the posts other than the posts of Routine Grade Clerk, Zamadar and Daftari.--

(1) Recruitment by promotion shall be made on the basis of the criterion laid down in the Uttar Pradesh Government Servants Criterion for Recruitment by Promotion Rules, 1994, as amended from time to time, through the Selection Committee constituted in accordance with the provisions of the Uttar Pradesh Constitution of Department Promotion Committee for Posts Outside the Purview of the Service Commission Rules, 1992, as amended from time to time.

***NOTE-** Nomination of officers for giving representation to the Scheduled Castes, Scheduled Tribes and other backward classes of citizens in the Selection Committee shall be made in accordance with the order made under Section 7 of the Act as amended from time to time.*

(2) The appointing authority shall prepare eligibility lists of the candidates in accordance with the Uttar Pradesh Promotion by Selection (On Posts Outside the Purview of the Public Service Commission) Eligibility List Rules, 1986, as amended from time to time, and place the same before the Selection Committee along with their Character rolls and such other records, pertaining to them, as may be considered proper :

Provided that where there are two or more feeding cadres :--

(a) bearing different pay scales the candidates belonging to the cadre bearing higher pay scale shall be placed higher in the eligibility list.

(b) bearing same pay scale the names of the candidates shall be arranged in the eligibility list in order of their date of substantive appointment in their respective cadres. But if the dates of substantive appointment of two or more candidates is the same, then in such situation the candidate who is older in age shall be placed higher in the eligibility list.

(3) The Selection Committee shall consider the cases of candidates on the basis of records, referred to in sub-rule (2), and, if it considers necessary, it may interview the candidates also.

(4) The Selection Committee shall prepare a list of selected candidates in order of seniority as it stood the cadre from which they are to be promoted and forward the same to the appointing authority.

18. Procedure for recruitment by promotion to the post of Junior Grade Clerk.--

by promotion to the post of Routine Grade Clerk shall be made in

accordance with the provisions of the Uttar Pradesh Subordinate Offices Ministerial Group 'C' Posts of the Lowest Grade (Recruitment by Promotion) Rules, 2001, as amended from time to time.

19. Procedure for recruitment by promotion to the post of Zamadar and Daftari.--

(1) Recruitment by promotion to the posts of Zamadar and Daftari in the service shall be made on the basis of seniority subject to the rejection of unfit through a Selection Committee to be constituted by the appointing authority.

NOTE- *Nomination of officers for giving representation to the Scheduled Castes, Scheduled Tribes and other backward classes of citizens in the Selection Committee shall be made in accordance with the order made under Section 7 of the Act as amended from time to time.*

(2) The appointing authority shall prepare eligibility lists of the candidates in accordance with the Uttar Pradesh Promotion by Selection (On Posts Outside the Purview of the Public Service Commission) Eligibility List Rules, 1986, as amended from time to time, and place the same before the Selection Committee along with their character rolls and such other records, pertaining to them, as may be considered proper:

Provided that where there are two or more feeding cadres:--

(a) bearing different pay scales the candidates belonging to the cadre bearing higher pay scale shall be placed higher in the eligibility list.

(b) bearing same pay scale the name of the candidates shall be arranged in the eligibility list in order of their date of substantive appointment in their respective cadres. But if the date of substantive appointment of two or more candidates is the same, then in such situation the candidate who is older in age shall be placed higher in the eligibility list.

(3) The Selection Committee shall consider the cases of candidates on the basis of records, referred to in sub-rule (2), and, if it considers necessary, it may interview the candidates also.

(4) The Selection Committee shall prepare a list of selected candidates in order of seniority as it stood the cadre from which they are to be promoted and forward the same to the appointing authority.

20. Combined select list.--

If in any year of recruitment appointments are made both by direct recruitment and by promotion, a combined select list shall be prepared by taking the names of the candidates from the relevant lists, in such manner that the prescribed percentage is maintained, the first name in the list being of the person appointed by promotion."

37. A perusal of the aforesaid provisions would show that for appointment or recruitment on any post in the office of the Advocate General at Allahabad & Lucknow, a proper advertisement of the said post(s) would first have to be made in the news paper for wide circulation.

38. During the course of argument of instant case (Writ Petition No.9184 (SS) of 2018), learned counsel for the petitioners has submitted that services of the petitioners and other similarly situated incumbents were never regularised by the State and they were working only on ad-hoc basis. However, learned counsel appearing for the State contradicted the submissions and categorically submitted that ad-hoc services of the petitioners and other similarly situated incumbents have

already been regularised without following the procedure prescribed in law. In this juncture, this Court has passed the following order(s) on 08.01.2020:-

"During the course of argument, learned counsel for the petitioners has submitted that petitioenrs have been appointed on ad hoc basis but they have not been regularized by the State.

Learned Counsel appearing for the State has contradicted the aforesaid statements made by learned Counsel for petitioners.

In view of above, learned Counsel for petitioners is directed to file an affidavit bringing on record the statements as stated above.

List this case on 22.01.2020.

Interim order, if any, shall continue till the next date of listing."

39. In pursuance to the aforesaid order dated 08.01.2020, an affidavit has been filed on behalf of the petitioners on 16.01.2020 wherein relevant contentions were given, which are as follows:-

"6. That the Petitioners came across an order dated 28.07.2014 issued a Letter No.121 PSAGOP-R-14 whereby, all the Class IV and Class III employees working on daily wages basis or on ad-hoc basis in the learned Advocate General establishment were ordered to be regularized. The aforesaid order dated 28.07.2014 has been referred by the Petitioners in the Paragraph No.19 of the Writ Petition and copy of the same has been annexed Annexure-15 to the Writ Petition.

7. That the Respondent Nos.2 to 4 by means of the Counter Affidavit dated 23.04.2018 in its paragraph 44 have denied the existence of aforesaid regularization order dated 28.07.2014.

10. That the Petitioners who are merely Class IV employees initially remained under the impression that vide order dated 28.07.2014 their services stood regularized however subsequently by means of the Counter Affidavit, the Respondents have denied the very existence of the order dated 28.07.2014 of purported regularization, as such the Petitioners have realized that the services of Petitioners have not been regularized and the Petitioners still continue to be ad hoc employees.

11. That thus the Petitioners in view of the aforesaid facts are presently, on the post of the Peons (Anusevak) on ad hoc presently, basis in the office of the Advocate General Establishment."

40. The contention of learned counsel appearing for the petitioners is that appointment of the petitioners were made to meet out the exigency of work as there was shortage of incumbents in the office of Advocate General. Keeping the aforesaid submission in view, vide order dated 22.01.2020, the opposite parties were directed to file an affidavit bringing on record the number of employees who are working in the Advocate General's Office at Allahabad and Lucknow as also the details of the employees whose termination orders are under challenge before this Court. In pursuance of the said order, learned Additional Chief Standing Counsel appearing for opposite parties no.2 to 4 has filed affidavit dated 27.01.2020 wherein details were provided as per the directions of this Court. The relevant information contained in the affidavit are as follows:-

"4. That in compliance of the aforesaid order dated 22.01.2020, the deponent is submitting herewith the list of sanctioned of Class III posts number of employees workign, against the sanctioned post and number of vacancies as under:-

Sl. No.	*Posts*	*Sanctioned Posts*	*Filled Posts*	*Vacant Posts*
1.	*Review Officer*	*72*	*52*	*20*
2.	*Additional Private Secretary*	*53*	*24*	*29*
3.	*Review Officer Account*	*2*	*2*	*0*
4.	*Deputy Librarian*	*1*	*1*	*0*
5.	*Assistant Review Officer Accounts*	*17*	*17*	*0*
6.	*Research Assistant*	*2*	*2*	*0*
7.	*Catloger*	*2*	*2*	*0*
8.	*Assistant Review Officer*	*100*	*76*	*24*
9.	*Computer Operator Grade-B*	*6*	*6*	*0*
10.	*Computer Operator Grade-A*	*8*	*8*	*0*
11.	*Asstt. Computer Operator*	*1*	*1*	*0*
12.	*Computer Assistant*	*103*	*97*	*6*

5. That it is pertinent to point out to this Hon'ble Court that apart from Class-III employees working against the sanctioned posts in the office of Advocate General, at present 28 Additional employees are working. Out of the 28 such Class-III employees, 21 Class-Ill employees are working in the Allahabad Office of Advocate General in compliance of the order passed in Writ-A No. 14876 of 2005: Ashok Kumar & others Vs. State of U.P and others and Writ-A No. 4146 of 2008: Usha Pandey and others Vs. State of U.P. and others as well as Contemn Petition No. 935 of 2009: Usha Pandey and Others Vs S.M.A. Abdi, Principal Secretary, Legal Remembrancer Govt. of U.P.: and they are being paid same salary as regular Class-III Employees. Apart from this 07 class employees working in the Lucknow Office of Advocate General are getting regular salary in compliance of the orders passed by this Hon'ble Court in Lucknow Bench in Writ Petition 5300 (SS) of 2009: Anil Kumar Sharma Vs. State of U.P. and others., Writ Petition No. 5240 (S/S) 2009: Anil Rastogi Vs. State of U.P. and others: Writ Petition No. 5513 (S/S) of 2009: Sanjay Verma Vs. State of U.P. and others and Writ Petition No. 5421 (S/S) of 2009 Smt. Narvada Dwivedi Vs. State of U.P. and others.

6. That the deponent is also submitting the list of sanctioned of Class IV posts number of employees working, against the sanctioned post and number of vacancies as under:

Sl. No.	*Posts*	*Sanctioned Posts*	*Filled Posts*	*Vacant Posts*
1.	*Photo-Stat Operator*	*3*	*2*	*1*
2.	*Daftari*	*9*	*7*	*2*
3.	*Bundle Lifter*	*4*	*4*	*0*
4.	*Peon*	*180*	*168*	*12*
5.	*Farrash*	*2*	*2*	*0*
6.	*Chaukidar*	*3*	*3*	*0*
7.	*Electrical Mistri*	*1*	*1*	*0*
8.	*Safar Karmchari*	*5*	*4*	*1*

41. A Division Bench of this Court in the case of *State of U.P. & Anr. Vs. Dalla Ram and Ors. (Writ Petition No.1/SB/2013)*

has issued following order (relevant portion) on 09.04.2013 :-

".....

10. After hearing learned Chief Standing counsel Shri I.P.Singh at length and other counsel, we issue following directions for compliance by Principal Secretary, Law as well as the office of learned chief standing counsel:-

(1). The cases should be allotted to different State counsel immediately after receipt of cause list i.e. a day before. It shall be ensured that paper book is handed over or sent to the residence of different standing counsels by evening or night so that they may prepare the case and assist the court.

(2). All those cases where records are summoned or court requires appearance of Government officer, such government officers should meet the State Counsel along with records a day before so that State counsel may be ready with brief while assisting the court.

(3). Appointments may be made to provide photostat copy of the judgments by the learned Standing counsel to the courts during the course of hearing.

(4). Sufficient number of stenographers and other staff must be provided to the office of Chief Standing counsel to draft counter affidavit or affidavits in terms of instruction given by the courts or otherwise within the time frame provided for the purpose by the courts.

We are strange to note that there is no sufficient number of stenographer in the office of learned Chief Standing Counsel. Shri I.P.Singh learned Chief Standing counsel submits that outsourcing has been done and some appointment has been done on contract basis. It seems to be not proper. Government should create regular vacancies so that stenographer or clerks appointed in the office of learned chief standing counsel may not be disengaged and the office may be benefited by their experience. Functioning of office of learned chief standing counsel and courts are entirely different than the government department. Experience gained by the class 2,3 and class 4 employees while working in the office is an asset and office of learned chief standing counsel or the courts cannot be deprived from it. Government must create immediately requisite number of post of stenographers and other class III class IV post for the office of learned chief standing counsel/government advocate and immediately be filled up in accordance with rules by holding regular selection.

(5). The learned Chief Standing counsel/Government Advocate shall ensure that records are sent to court a day before by evening or at least by 10.00 0'clock in the morning and it must be checked by the persons who are assigned duty for the purpose.

(6). Necessary arrangements may be made in the Library to provide photostat copy of the journals and books to the learned Standing counsels/Government Advocates and in case, already not subscribed, sufficient number of journals be subscribed and library should be managed by the competent qualified persons.

Let the aforesaid direction be complied with expeditiously, say within a period of four months from the date of receipt of a certified copy of this order.

Principal Secretary, Law shall file his personal affidavit after due compliance the order.

11. We have issued aforesaid directions since, repeated orders have been passed by this court since last three or four years even more but respondent (State)

have been failed to achieve its object and still substantial number of State Counsels are ill prepared or records are not sent to this court or counter affidavit is not filed within the time frame provided by the court.

12. On account of absence of assistance up to mark from the State counsels as well as non-filing of affidavit within time provided by the courts the backlog is increasing day by day. Inaction on the part of office of standing counsel on account of insufficient infrastructure obstruct the administration of justice. Court cannot function unless state counsels cooperate and provide assistance up to mark armed with case laws and paper book. Necessary infrastructure is necessary to tone up the administration of the office of Chief Standing Counsel so that requisite assistance may be provided to the court by the government counsels who are also officers of the court.

With the aforesaid direction, we disposed of writ petition finally. Registry shall list the case after four month for perusal of compliance report."

42. The aforesaid directions were issued by the Division Bench for ensuring proper functioning of the office of learned Chief Standing Counsel. In another writ petition bearing No.7155 (MB) of 2008 (supra), the Division Bench of this Court expressed their anguish about functioning of the Advocate General's Office.

43. In view of the aforesaid directions issued by the Division Bench(s), the appointing authority took a decision to make appointment on ad-hoc basis for Class - IV posts of Peon by resorting to the procedure prescribed in Rule 14(ii) of 2009 Rules i.e. by pasting the notice on notice board. The applications were invited and the selection was made from amongst the eligible candidates who had applied for the same. A three member committee was constituted for selection on Class - IV posts for which an interview was taken place on 18.06.2014 and thereafter a select list was prepared on 19.06.2014. On 20.06.2014, the appointing authority issued a composite appointment letter for peon.

44. Against other vacant posts, several appointments were made on ad-hoc basis by the authority concerned for proper functioning of the office of Advocate General at Allahabad and Lucknow.

45. After perusal of the entire documents and after hearing the submissions, there is no doubt that the said appointments were made in terms of order dated 09.04.2013 (supra) passed by a Division Bench of this Court. It is also clear that in those appointments, the statutory provisions were not followed due to exigencies of work in the office of Advocate General.

46. It is established by several judgments of the Hon'ble Supreme Court that a court can condone an irregularity in the appointment procedure only if the irregularity does not go to the root of the matter. For sanctioned posts having vacancies, such posts have to be filled by regular recruitment process of prescribed procedure otherwise, the constitutional mandate flowing from Articles 14, 16, 309, 315, 320 etc is violated.

47. In the case of ***Secretary, State of Karnataka and Others v. Umadevi and Others - (2006) 4 SCC 1,*** the Hon'ble Supreme Court has held as follows:-

"2. Public employment in a sovereign socialist secular democratic

republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated as equals. Thus, any public employment has to be in terms of the constitutional scheme."

48. In Uma Devi's case (supra), the Hon'ble Supreme court has further held that sometimes this process is not adhered to and the constitutional scheme of public employment is bypassed. The employer or the departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure as per the rules adopted and to permit these irregular appointees to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor, approaching the Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over. It is time, that the courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established.

49. It is further held that by the Hon'ble Supreme Court in Umadevi's case (supra) that this Court has also on occasions issued directions which could not be said to be consistent with the constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualisation of justice. The question arises, equity to whom? Equity for the handful of people who have approached the court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the constitutional scheme, certainly tend to water down the constitutional requirements.

50. I have already indicated the constitutional scheme of public

employment, and the executive, or for that matter the court, in appropriate cases, would have only the right to regularise an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. This right of the executive and that of the court would not extend to the executive or the court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.

51. The Hon'ble Supreme Court in the case of ***National Fertilisers Limited & Ors. vs. Somvir Singh - (2006) 5 SCC 493*** by referring to the ratio of Umadevi's case (supra) has held that persons who have been appointed for termporary purpose or temporary employees in posts, such person cannot claim regularisation.

52. The Hon'ble Supreme Court in a way laid down the same ratio in the case of ***State of Orissa and Ors. vs. Mamata Mohanty - (2011) 3 SCC 436*** and held that candiddates who are not duly qualified if are appointed, the same would cause grave and irreparable injury to other unqualified candidates who would have otherwise applied, and therefore in such a case when unqualified persons seek regularization, that would be violative of the ratio in the case of Umadevi (supra) as also Articles 14 and 16 of the Constitution of India. The relevant observations of the Supreme Court in the case of Mamta Mohanty (supra) are made in para 36 of the judgment, and para 35 also is relevant because the same makes the legal position very clear that the object of issuing advertisement is to ensure open competition by calling of all the eligible candidates. These paras 35 and 36 read as under:-

"35. At one time this Court had been of the view that calling the names from employment exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, it came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from employment exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in radio and television as merely calling the names from the employment exchange does not meet the requirement of the said article of the Constitution. (Vide Delhi Development Horticulture Employees' Union v. Delhi Admn. [(1992) 4 SCC 99 : 1992 SCC (L&S) 805 : (1992) 21 ATC 386 : AIR 1992 SC 789] , State of Haryana v. Piara Singh [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403 : AIR 1992 SC 2130] , Excise Supdt. v. K.B.N. Visweshwara Rao [(1996) 6 SCC 216 : 1996 SCC (L&S) 1420] , Arun Tewari v. Zila Mansavi Shikshak Sangh [(1998) 2 SCC 332 : 1998 SCC (L&S) 541 : AIR 1998 SC 331] , Binod Kumar Gupta v. Ram Ashray Mahoto [(2005) 4 SCC 209 : 2005 SCC (L&S) 501 : AIR 2005 SC 2103] , National Fertilizers Ltd. v. Somvir Singh [(2006) 5 SCC 493 : 2006 SCC (L&S) 1152 : AIR 2006 SC 2319] , Telecom District Manager v.

Keshab Deb [(2008) 8 SCC 402 : (2008) 2 SCC (L&S) 709] , State of Bihar v. Upendra Narayan Singh [(2009) 5 SCC 65 : (2009) 1 SCC (L&S) 1019] and State of M.P. v. Mohd. Abrahim [(2009) 15 SCC 214 : (2010) 1 SCC (L&S) 508] .)"

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

53. In the case of ***State of Haryana v. Piara Singh & Ors. - (1992) 3 SCR 826,*** the Hon'ble Supreme court has held that appointment to the public posts should ordinarily be made by regular recruitment through the prescribed agency and that even where ad-hoc or temporary employment is necessitated on account of the exigencies of administration, the candidate should be drawn from the employment exchange and that if no candidate is available or sponsored with the employment exchange, some method consistent with the requirements of Article 14 of the Constitution should be followed by publishing notice in appropriate manner for calling for applications and all those who apply in response thereto should be considered fairly, proceeded to observe that if an ad-hoc or temporary employee is continued for a fairly long spell, the authorities are duty bound to consider his case for regularization subject to his fulfilling the conditions of eligibility and the requirement of satisfactory service.

54. After perusing all the material and documents available on record, I am convinced that the appointment of the petitioners and other similarly situated incumbents on ad-hoc basis were violative of statutory provisions. The notices/vacancies were never advertised in daily news paper and employement exchange, as a requirement of statutory provisions of Rules applicable, therefore, appointment of the petitioners on ad-hoc basis is contrary to the Rules and therefore, found faulted.

55. However, there is no allegation that the petitioners committed any forgery or misrepresentation for procuring the job in the office of Advocate General. It is also not the case of the respondents that the petitioners did not possess the minimum requisite qualification as prescribed by the Rules or that the petitioners were not eligible to be appointed against their respective posts. Thus, it is evident that the petitioners and other similarly situated incumbents were appointed on their respective posts by the appointing authority i.e. learned Advocate General by exercising his discretion due to exigency of service, on account of acute shortage of staffs including on Class - IV posts in the office of Advocate General and State Law Officers and in view of the emergent situation which had emerged on account of

directions issued by Division Bench of this Court vide order dated 09.04.2013 & 25.11.2013 (supra).

56. In the case of ***Dr. M.S. Mudhol and Anr. v. S.D. Halegkar and Ors. - (1993) 3 SCC 591,*** though the incumbents did not possess the minimum requisite qualification, the Hon'ble Supreme Court declied to interfere with the appointment of such incumbent and held as follows in Paras - 2, 6, 7 & 9:-

2. Admittedly, the 1st respondent who did not belong to the same school had M.A. degree in Political Science with third class with 41.1% aggregate marks, although he had his M.Ed. in second class. Respondent 1, according to the petitioners, however, did not also have the required experience of 10 years' teaching, since he was working as an Inspector of Schools prior to his selection as the Principal. The schools which he was inspecting had also classes only up to the 8th standard. Thus, except the degree of M.Ed. which he possessed, he did not have the other two statutory essential qualifications at the time of his appointment as the Principal. According to the petitioners, who are the members of the teaching staff of the same school but not aspirants for the post of Principal, the fact that the 1st respondent lacked the two essential qualifications came to their light for the first time in 1990 and, therefore, they moved the High Court by a writ of quo warranto against the 1st respondent. The High Court, however, dismissed the petition on the ground of laches and also on the ground that the petitioners had not asserted in the writ petition that the advertisement inviting the applications for the post of the Principal was published before the 1st respondent was selected as the Principal.

6. Since we find that it was the default on the part of the 2nd respondent, Director of Education in illegally approving the appointment of the first respondent in 1981 although he did not have the requisite academic qualifications as a result of which the 1st respondent has continued to hold the said post for the last 12 years now, it would be inadvisable to disturb him from the said post at this late stage particularly when he was not at fault when his selection was made. There is nothing on record to show that he had at that time projected his qualifications other than what he possessed. If, therefore, in spite of placing all his cards before the selection committee, the selection committee for some reason or the other had thought it fit to choose him for the post and the 2nd respondent had chosen to acquiesce in the appointment, it would be inequitous to make him suffer for the same now. Illegality, if any, was committed by the selection committee and the 2nd respondent. They are alone to be blamed for the same.

7. Whatever may be the reasons which were responsible for the non-discovery of the want of qualifications of the 1st respondent for a long time, the fact remains that the court was moved in the matter after a long lapse of about 9 years. The post of the Principal in a private school though aided, is not of such sensitive public importance that the court should find itself impelled to interfere with the appointment by a writ of quo warranto even assuming that such a writ is maintainable. This is particularly so when the incumbent has been discharging his functions continuously for over a long period of 9 years when the court was moved and today about 13 years have elapsed. The infraction of the statutory rule regarding the qualifications of the

incumbent pointed out in the present case is also not that grave taking into consideration all other relevant facts. In the circumstances, we deem it unnecessary to go into the question as to whether a writ of quo warranto would lie in the present case or not, and further whether mere laches would disentitle the petitioners to such a writ.

9. In the circumstances, we decline to interfere with the appointment of the 1st respondent and dismiss the petition. There will be no order as to costs.

57. Similar view has been expressed by the Hon'ble Supreme Court in the case of ***Rekha Chaturvedi (Smt.) v. University of Rajasthan and Ors. - 1993 Supp (3) SCC 168***. Relevant portion of Para - 11 of the said case is reproduced hereunder:-

11. However, for the reasons which follow, we are not inclined to set aside the selections in spite of the said illegality. The selected candidates have been working in the respective posts since February 1985. We are now in January 1993. Almost eight years have elapsed.....

58. In *Mamata Mohanty's case (supra),* the following has been held by the Hon'ble Supreme Court in Para - 70:-

70. In the facts and circumstances of the case, we feel that terminating the services of those who had been appointed illegally and/or withdrawing the benefits of grant-in-aid scheme of those who had not completed the deficiency in eligibility/educational qualification or withdrawing the benefit thereof from those who had been granted from the date prior to completing the deficiency, may not be desirable as a long period has elapsed. So far as the grant of UGC pay scale is concerned, it cannot be granted prior to the date of acquisition of higher qualification. In view of the above, the impugned judgment/order cannot be sustained in the eye of the law.

59. In the case of ***State of U.P. and Anr. vs. Anand Kumar and Ors. - (2018) 13 SCC 560,*** the following has been held by Hon'ble Supreme Court in Paras - 28, 29, 30, 31, 32 & 33:-

28. We are in agreement with the above findings. In view of clear mandate of law statutorily requiring minimum qualification for appointment of teachers to be appointed after the date of the Notification dated 23-8-2010, there is no doubt that no appointment was permissible without such qualifications. Appointments in the present case are clearly after the said date. Relaxation provision could be invoked for a limited period or in respect of persons already appointed in terms of applicable rules relating to qualifications. The Shiksha Mitras in the present case do not fall in the category of pre 23-8-2010 Notification whose appointment could be regularised.

29. Further difficulty which stares one in the face is the law laid down by this Court on regularisation of contractually appointed persons in public employment. Appointment of Shiksha Mitras was not only contractual, it was not as per qualification prescribed for a teacher nor on designation of teacher nor in pay scale of teachers. Thus, they could not be regularised as teachers. Regularisation could only be of mere irregularity. The exceptions carved out by this Court do not apply to the case of the present nature.

30. In view of our conclusion that the Shiksha Mitras were never appointed as teachers as per applicable qualifications

and are not covered by relaxation order under Section 23(2) of the RTE Act, they could not be appointed as teachers in breach of Section 23(1) of the said Act. The State is not competent to relax the qualifications.

31. Since, we have given full hearing to all Shiksha Mitras through their respective counsel, it is not necessary to consider the argument of breach of procedure under Order 1 Rule 8 CPC.

32. On the one hand, we have the claim of 1.78 lakh persons to be regularised in violation of law, on the other hand is the duty to uphold the rule of law and also to have regard to the right of children in the age of 6 to 14 years to receive quality education from duly qualified teachers. Thus, even if for a stop-gap arrangement teaching may be by unqualified teachers, qualified teachers have to be ultimately appointed. It may be permissible to give some weightage to the experience of Shiksha Mitras or some age relaxation may be possible, mandatory qualifications cannot be dispensed with. Regularisation of Shiksha Mitras as teachers was not permissible. In view of this legal position, our answers are obvious. We do not find any error in the view [Anand Kumar Yadav v. Union of India, 2015 SCC OnLine All 3997 : ILR 2015 All 1108 : (2015) 8 ADJ 338] taken by the High Court.

33. Question now is whether in the absence of any right in favour of Shiksha Mitras, they are entitled to any other relief or preference. In the peculiar fact situation, they ought to be given opportunity to be considered for recruitment if they have acquired or they now acquire the requisite qualification in terms of advertisements for recruitment for next two consecutive recruitments. They may also be given suitable age relaxation and some weightage for their experience as may be decided by the authority concerned. Till they avail of this opportunity, the State is at liberty to continue them as Shiksha Mitras on same terms on which they were working prior to their absorption, if the State so decides.

60. In view of the aforesaid discussion and after going through all the material available on record as well as relevant rules and law, answer to the issues framed in Para-35 of this order are as follows:

(I) The ad-hoc appointments of the petitioners and other similarly situated incumbents were made in terms of order passed by Division Bench(s) of this Court, however without following the relevant statutory provisions due to exigency of work in the office of Advocate General. Therefore, the services of the petitioners and other similiarly situated incumbents are dehors the rules and without following the procedure prescribed. In such circumstances, the said order of appointment as well as the order of regularisation be treated as *void ab initio.*

(II) The impugned order dated 22.03.2018 terminating the services of the petitioners has been passed after following the procedure prescribed in the 2009 Rules as well as the law established.

(III) Considering the extreme shortage of Class - III and Class - IV employees in the office of Advocate General and in order to meet the requirement, it would be appropriate if the order of appointment of the petitioners and other similarly situated incumbents on ad-hoc basis remain in operation till regular selection is made.

61. In the peculiar fact situation, as stated above, it is directed that regular selection be made as per the relevant statute at the earliest and the petitioners and other similarly situated incumbents ought to be given opportunity to be considered for

recruitment if they possess the requisite qualification in terms of advertisement as well as the statute. They may also be given suitable age relaxation and some wightage for their experience as may be decided by the authority concerned.

It is further directed that till regular selection is made, the State is at liberty to continue the petitioners and other similarly situated incumbents on their respective posts on same terms on which they were working.

It is also directed that the petitioners and other similarly situated incumbents be paid arrears of salary, if any, for the period they had worked, and in future be paid regularly.

62. With the aforesaid observations/directions, all the above-mentioned writ petitions are ***disposed of.***

(2020)03-05ILR A825
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2020

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 25168 of 2019

Pradeep Kumar Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Hemendra Pratap

Counsel for the Respondents:
C.S.C.

(A) Service Law - Rule 6 of U.P. Government Servant (Discipline & Appeal) Rules, 1999 - appointing authority should be the disciplinary authority - only disciplinary authority may impose penalty

As per Rule 6 the notices can be issued either by the appointing authority or the head of the department in case of minor punishments. In present case, the appointing authority is the State Government while the head of the department would be the Engineer-in-Chief. The notices were passed by neither of the parties. However, the Executive Engineer, an incompetent authority in view of the abovementioned Rule, has issued the notices.

(B) Years of Service - pensionery benefits - service rendered by an employee on substantive post on ad-hoc basis including the years of service rendered later on after regularization would be counted for pensionery benefit

(C) Natural Justice - any order giving rise to civil consequences may not be passed without giving opportunity of hearing to the parties

(D) Interest - can be awarded as a compensation by the Courts where the pensionery benefits have been utilized by the department having no right to lien after the retirement of an employee - withhold the pension amount without any cogent reason

The purpose of awarding interest is that the interest would be the compensation which is allowed in the law for the use of money belonging to another or for delay in paying the said money after it has become double. (para 33)

Writ Petition Allowed. .(E-10)

List of cases cited:

1. Krishna Kant Pandey Vs. State Public Services Tribunal, U.P. Lucknow & ors. 2018 (36) LCD 109 *(followed)*

2. Amarkant Rai Vs. St. of Bihar & ors (2015) 8 SCC 265 *(followed)*

3. Union of India & ors. Vs. B V. Gopinath 2014 (1) LBESR 75 (SC) *(followed)*

4. Abhishek Prabhakar Awasthi Vs. The New India Assurance Company Limited & ors. 2014 (32) LCD 405 *(followed)*

5. S.K. Dua Vs. St. of Haryana (2008) 3 SCC 44 *(followed)*

6. Radhika Devi Vs. UOI 2002 (1) LBSER 949 (All) *(followed)*

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Hemendra Pratap, learned counsel for the petitioner and Dr. Uday Veer Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. The order under challenge is the Pension Payment Order (in short P.P.O.) dated 07.03.2019 issued after retirement of the petitioner on 31.12.2017 from the post of Assistant Engineer (Civil) wherein the pensionery benefits and gratuity have been sanctioned at the reduced rate thereby withholding a sum of Rs.6,93,270/-. Further, per petitioner's counsel the consequential benefits admissible after retirement as per law has not been paid to the petitioner, therefore, the petitioner prayed that those benefits with interest be paid.

3. The brief facts of the case are that the petitioner was initially appointed on the post of Junior Engineer (Civil) on 07.12.1977 against the sanctioned post, strictly in accordance with law. Thereafter, he joined on such post on 27.12.1977.

4. The services of the petitioner were regularized on such post as he was initially appointed on ad hoc basis on 10.12.1990 relating back with effect from 22.03.1984.

5. The petitioner was promoted on the post of Assistant Engineer (Civil) on 29.07.2015, thereafter, he was allowed the second promotional pay-scale and A.C.P. with grade pay of Rs.7600/-.

6. On 26.02.2016, the disciplinary proceedings were instituted against the petitioner.

7. Learned counsel for the petitioner has drawn attention of this Court towards Annexure Nos.6, 7, 8 & 9 of the writ petition, which are the orders dated 09.08.2018, 29.08.2018, 13.09.2018 and 16.11.2018 respectively, making it abundantly clear that after the conclusion of the departmental inquiry the petitioner was fully exonerated on the charge and thereafter consequential orders were passed that no disciplinary/ departmental proceedings or any criminal proceedings are pending against the petitioner. However, before such orders having been passed the petitioner superannuated on 31.12.2017 after completing the age of 60 years from the post of Assistant Engineer (Civil).

8. It has also been noted that vide order dated 07.07.2018 the pay of the petitioner in the revised pay-scale was fixed at Rs.1,12,400/- with effect from 01.01.2016 on 01.07.2017, as order to this effect has been annexed as Annexure No.10 to the writ petition.

9. Annexure Nos.11 and 12 are the orders dated 12.03.2018 and 28.07.2018 to the effect that the petitioner was sanctioned provisional pension, 40% of the commuted value with 10% addition having been deducted.

10. The Executive Engineer concerned has issued the office memo dated 28.07.2018 (Annexure No.14 to the writ petition) sanctioning the additional provisional gratuity to the petitioner to the tune of Rs.9=00 lacs and the impugned P.P.O. dated 07.03.2019 has been issued to this effect.

11. Learned counsel for the petitioner has apprised the Court that the petitioner while working on the post of Junior Engineer (Civil) in the year 2015, one misconceived recovery order dated 28.05.2015 against him had been passed on the basis of some miscellaneous advance. However, the petitioner submitted reply to the Executive Engineer and when no proper order has been passed, he filed the claim petition bearing Claim Petition No.1086 of 2015 before the State Public Service Tribunal, which was decided vide judgment and order dated 28.09.2015 thereby quashing such impugned orders dated 28.05.2015 and 04.06.2015 providing liberty to the Disciplinary Authority to issue show cause notices to the petitioner informing him the substance of imputations on the basis of which the petitioner was held liable for recovery within a period of two months then the petitioner would submit reply within a period of one month and thereafter the inquiry was to be concluded within the period of two months. As per the Tribunal, the whole exercise was to be concluded within a period of six months from the date of a certified copy of the order is served.

12. As per learned counsel for the petitioner, the said inquiry in terms of judgment and order dated 29.08.2015 has not been initiated and the amount, so recovered from the petitioner of Rs.96,000/-, has not been refunded to the petitioner.

13. As per learned counsel for the petitioner, by means of impugned P.P.O. dated 07.03.2019, the D.C.R. gratuity has been sanctioned by counting the total length of 27 years service of the petitioner instead of 33 years which the petitioner actually rendered withholding a sum of Rs.6,93,270/- for no cogent reasons.

14. Therefore in view of the above, the petitioner has prayed that the impugned P.P.O. dated 07.03.2019 be quashed and the opposite parties be directed to sanction and pay the commutation of pension to the petitioner on the basis of age 61 years, 40% of pension to be commuted the same having been deducted, out of provisional pension sanctioned by the opposite party No.5 vide order dated 12.03.2018 and 28.07.2018 (Annexure Nos.11 and 12 to the writ petition).

15. Sri Hemendra Pratap, learned counsel for the petitioner has submitted also that even if for argument sake, it is admitted that some notices have been issued to the petitioner by the Executive Engineer pursuant to the order being passed by the Tribunal, even then such notices may not be sustained in the eyes of law for simple reason that the Executive Engineer was not a Appointing Authority of the petitioner as the Appointing Authority of the petitioner was the State Government. Therefore, such show cause notices were without jurisdiction and being violative of the Rule 6 of U.P. Government Servant (Discipline & Appeal) Rules, 1999 (here-in-after referred to as the "Rules, 1999"). Learned counsel for the petitioner has referred Rule 6 of the Rules, 1999. For

brevity, such rule is being reproduced here-in-below:-

*"**6. Disciplinary authority**. The appointing authority of a Government servant shall be his disciplinary authority, who, subject to the provisions of these rules, may impose any of the penalties specified in Rule 3 on him:*

Provided that no person shall be dismissed or removed by an authority subordinate to that by which he was actually appointed:

Provided further that the Head of Department notified under the Uttar Pradesh Class II Services (Imposition of Minor Punishment) Rules, 1973, subject to the provisions of these rules, shall be empowered to impose minor penalties mentioned in Rule 3 of these rules:"

16. Per contra, Dr. Uday Veer Singh, learned Additional Chief Standing Counsel for the State-respondents has submitted that the services of the petitioner were regularizd only on 10.12.1990 and as per the rules, particularly in view of Regulation 361 of Civil Service Regulations (in short C.S.R.), the ad-hoc services cannot be counted for the purposes of pensionery benefits as qualifying services. Further the P.P.O. dated 07.03.2019 has been prepared in the light of aforesaid regulation and other provision. As such while calculating the service rendered by the petitioner for the purpose of pensionery benefits, the opposite parties have not committed any illegality. Regulation 361 of C.S.R. provides as under:-

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions-

(a) the service must be under Government,

(b) the employment must be substantive and permanent and

(c) the salary must be paid by Government."

17. Dr. Singh has further submitted that the second aspect involved in the matter is the recovery orders being passed by the Executive Engineer in pursuance with the report of the Committee consisting three officers. However, per Dr. Singh, earlier also the Committee consisting three Assistant Engineers was constituted which submitted a report dated 22.02.2014. In furtherance thereto, the order dated 27.05.2015 was issued following consequential order dated 04.06.2015. The aforesaid orders were admittedly challenged by the present petitioner before the State Public Service Tribunal, U.P., Lucknow by way of filing claim petition bearing Claim Petition No.1086 of 2015. The claim petition was allowed by the learned Tribunal quashing the aforesaid orders. However, the opposite parties were given liberty to proceed with the matter in accordance with the direction given in the order dated 28.09.2015 by the Tribunal. The time schedule was also framed to initiate and conclude the enquiry. The enquiry was to be concluded within six months from the date of communication of the order of Tribunal by serving the certified copy.

18. Dr. Singh has also submitted that there is no dispute that the petitioner assailed the recovery order before the Tribunal and the Tribunal allowed the claim petition of the petitioner granting six months time to conclude the departmental inquiry. As per Dr. Singh, in compliance of the aforesaid order of the Tribunal dated 28.09.2015, the show cause notice was

issued to the petitioner on 27.11.2015, which has not been denied by the petitioner. When no response was received, another notice dated 11.02.2016 was issued to remind the show cause notice dated 27.11.2015. On 27.01.2017, another notice was issued to the petitioner to submit reply. As a last opportunity the letter was issued on 15.09.2018 to the petitioner but he did not turn up. So, per Dr. Singh, the petitioner was given ample opportunity to defend his case regarding recovery of total amount of bitumen Rs.4,79,475/- and such recovery was inclusive of the amount embezzled/ misappropriated to the tune of Rs.1,07,400/- towards MNREGA.

19. As per Dr. Singh, instead of defending the aforesaid charge of recovery the petitioner preferred letters to the department to adjust/ deduct the amount from the gratuity and clear the other pensionery benefits. Therefore, a sum of Rs.6,93,270/- has been adjusted from the amount of gratuity of the petitioner and in view of the above, no illegality can be attributed to the impugned order.

20. Heard learned counsel for the parties and perused the material available on record.

21. During the course of arguments, learned Additional Chief Standing Counsel was asked that even if the petitioner had shown his willingness to recover/ adjust the amount from the amount of gratuity if the same is recoverable, as to whether the recoverable amount has been determined by the Disciplinary Authority strictly in accordance with law and as to whether any formal order to that effect has been issued providing the copy thereof to the petitioner seeking explanation from him.

22. The aforesaid query of the Court was based on the trite law to the effect that if the recoverable amount has not been determined by the Disciplinary Authority, or if it is determined but the formal order to that effect has not been provided to the incumbent seeking explanation from him, the amount may not be recovered/ adjusted from the amount of gratuity of an employee, as it would not only against the principles of natural justice but would be against the public policy. Further, if any impugned order entails civil consequences, such order may not be issued without providing an opportunity of hearing to that effect.

23. Learned Additional Chief Standing Counsel has tried to defend the impugned action of the opposite parties by submitting that since the petitioner had already given his undertaking to recover/ adjust the recoverable amount, therefore, no such formal order has been issued to the petitioner seeking explanation to that effect. So far as the point of factum of determination of recoverable amount is concerned, learned Additional Chief Standing Counsel has submitted that the petitioner was aware about the amounts, therefore, the determination of total recoverable amount has not been made.

24. As per the learned Additional Chief Standing Counsel, a sum of Rs.4,79,475/- was recoverable for loss of bitumen; sum of Rs.1,07,400/- was recoverable towards the loss of MNREGA scheme and other amounts claimed from the petitioner were related to the incident/ misshaping committed during his supervision when he was in service. Therefore, the total amount recoverable was Rs.6,93,270/-.

25. This Court is unable to comprehend as to how the aforesaid amount, which has been recovered from the petitioner, may sustain in the eyes of law when no exercise of determination of the amount recoverable has been made and no formal order to that effect could have been issued, therefore, no question arises for affording an opportunity of hearing in consonance with the principles of natural justice.

26. The arguments of learned Additional Chief Standing Counsel that ad hoc services of the petitioner cannot be counted for the purpose of pensionery benefits as qualifying service does not sustain in the eyes of law inasmuch as it is trite law that the services rendered by an employee on substantive post on ad hoc basis and later on the same are regularized under the rules, such ad hoc period shall be counted for the purpose of pensionery benefits as the qualifying service.

27. The Division Bench of this Court in re: ***Krishna Kant Pandey vs. State Public Services Tribunal, U.P. Lucknow and others*** reported in ***[2018 (36) LCD 109*** has held by following the dictum of Hon'ble Supreme Court in re: ***Amarkant Rai vs. State of Bihar and others reported in (2015) 8 SCC 265*** that retrospective regularization can be given to the employee as per rules.

28. After the judgment and order of the Tribunal having been passed, the Executive Engineer is said to have issued some notices against the petitioner to which the petitioner is said to have not replied and the contention of learned counsel for the petitioner that since the said notices were without jurisdiction being issued by the incompetent authority, therefore, the petitioner was not required to submit the reply to the notices.

29. Sri Hemendra Pratap has rightly referred Rule 6 of the Rules, 1999, which categorically provides that the Appointing Authority of the government servant shall be his Disciplinary Authority and only the DisciplinaryAuthority may impose any penalty. In the present case, undisputedly the Appointing Authority of the petitioner is the State Government. The second proviso of Rule 6 empowers the Head of the Department to impose minor punishment. In the case in hand, the Head of the Department would be the Engineer-in-Chief. The Engineer-in-Chief had also not issued any show cause notice to the petitioner but the Executive Engineer has issued the notice, who is incompetent authority in view of the Rule 6 of the Rules, 1999.

30. Therefore in view of the dictum of Hon'ble Supreme Court in re: ***Union of India & others vs. B. V. Gopinath*** reported in ***[2014 (1) LBESR 75 (SC)]*** the show cause notices would be non est as the same are without jurisdiction. The relevant paras-47 and 49 are being reproduced here-in-below:-

"47. Further, it appears that during the pendency of these proceedings, the appellants have, after 2009, amended the procedure which provides that the charge memo shall be issued only after the approval is granted by the Finance Minister.

49. Although number of collateral issues had been raised by the learned Counsel for the appellants as well the respondents, we deem it appropriate not to opine on the same in view of the conclusion that the charge-sheet/ charge memo having

not been approved by the disciplinary authority was not est in the eye of law."

(emphasis supplied)

31. Since the Tribunal had allowed six months time to conclude the denovo inquiry by providing show cause notice to the petitioner, such inquiry must have been conducted and concluded within the time frame and in view of the Full Bench judgment of this Court in re: ***Abhishek Prabhakar Awasthi vs. The New India Assurance Company Limited and others*** reported in ***[2014 (32) LCD 405]*** , the Disciplinary Authority shall be precluded for conducting the departmental inquiry and in that case the imputation against the employee shall loose its efficacy.

32. In the present case, instead of Disciplinary Authority/ Appointing Authority or Head of the Department, the show cause notice has been issued by the incompetent officer, which is non est in the eyes of law. Therefore, the amount so withheld by the authority could have not been withheld and the petitioner should have been paid his entire post retiral dues counting his total length of service of 33 years at least after 13.09.2018 or 16.11.2018 (Annexure Nos.8 & 9 to the writ petition) whereby the State Government and Head of the Department itself observed that the petitioner retired from service on 31.12.2017 and on superannuation no departmental, administrative or criminal proceedings are pending against him, even no prosecution is pending against him. Therefore the delay of making payment of retiral dues would be unreasoned and uncalled for, hence, the petitioner would be entitled for interest on delayed payment.

33. The purpose of awarding interest is that the interest would be the compensation which is allowed in law for use of money belonging to another or for delay in paying the said money after it has become double. If the reason to withhold the pensionery benefits are unreasonable having no cogent reason to that effect, the employee who has suffered, should be compensated in the eyes of law for the simple reason that the money belonging to the employee, which should have been utilized by him but has been utilized by the department having no legal lien on that after the retirement of an employee.

34. The Hon'ble Supreme Court in re: ***S.K. Dua vs. State of Hariyana*** reported in ***(2008) 3 SCC 44,*** vide para-14 has observed as under:-

"14. In the circumstances, prima facie, we are of the view that the grievance voiced by the appellant appears to be well-founded that he would be entitled to interest on such benefits. If there are Statutory Rules occupying the field, the appellant could claim payment of interest relying on such Rules. If there are Administrative Instructions, Guidelines or Norms prescribed for the purpose, the appellant may claim benefit of interest on that basis. But even in absence of Statutory Rules, Administrative Instructions or Guidelines, an employee can claim interest under Part III of the Constitution relying on Articles 14, 19 and 21 of the Constitution. The submission of the learned counsel for the appellant, that retiral benefits are not in the nature of "bounty" is, in our opinion, well-founded and needs no authority in support thereof. In that view of the matter, in our considered opinion, the High Court was not right in dismissing the petition in limine

even without issuing notice to the respondents."

(emphasis supplied)

35. The Division Bench of this Court in re: ***Radhika Devi vs. Union of India & others*** reported in ***[2002 (1) LBSER 949 (All)]*** has observed in para-2 as under-

"2. The petitioner has prayed for family pension, which has been paid, and now she claims interest due to late payment. Interest is the normal accretion on capital and it is not a penalty or punishment. If a certain amount is payable at a certain time, then the person to whom it is paid in time would invest it and earn interest. However, if there is delay in payment then the person who retained the money would have earned interest on the same. Hence, he has to pay not only the principal amount but also interest on the same."

(emphasis supplied)

36. In view of the facts and circumstances considered here-in-above and also in view of the dictum of Hon'ble Supreme Court as well as of this Court, I am of the considered opinion that the impugned P.P.O. dated 07.03.2019 does not sustain in the eyes of law so far as it calculated the total length of service of the petitioner as 27 years instead of 33 years and made deduction of Rs.6,93,270/-, therefore, the same is hereby quashed.

37. A writ in the nature of mandamus is issued commanding the opposite parties to sanction and pay full admissible D.C.R. gratuity on the basis of length of service of 33 years of service and also to refund the amount of Rs.6,93,270/-, which has been withheld, with interest at the rate of 6% per annum.

38. The opposite parties are also commanded that the petitioner shall be paid all consequential service benefits, for that, the appropriate order shall be passed by the Competent Authority.

39. Since the denovo inquiry has not been conducted by the Disciplinary Authority/ Appointing Authority in terms of judgment and order dated 28.09.2015 passed by the State Public Service Tribunal in Claim Petition No.1086 of 2015 within the stipulated time, therefore, no such inquiry can be conduced against the petitioner and the petitioner shall be treated exonerated from the said charges.

40. The compliance of this order shall be made within a period of two months from the date of production of a certified copy of this order.

41. Accordingly, the writ petition succeeds and is allowed.

(2020)03-05ILR A832
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.04.2020

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Misc. Bench No. 4517 of 2013
and
Misc. Bench No. 2397 of 2013

IFCI Ltd. ...Petitioner
Versus
Lucknow Municipal Corp. & Ors. ...Respondents

Counsel for the Petitioner:
Apoorva Tewari, Ashish Kumar Sharma, Ganga Sagar Misra

Counsel for the Respondents:
Shashi Prakash Singh, Dinesh Kumar Pathak, Kuldeep Pati Tripathi, Mudit Agarwal, Shailendra Singh Chauhan

Civil Law-L.N.N. is owner -leased to Uptron India Ltd.-financial need-UPTRON India Ltd. Mortgaged the land with IFCI Ltd-NOC was issued by L.N.N.-UPTRON committed default-IFCI initiated action against UPTRON u/s 13(2) SERFAISI Act,2002-no reply by UPTRON-possession notice issued-L.N.N. terminated lease upon non payment-and for being rented to third party.

Writ by L.N.N. -challenging-auction proceeding by IFCI-maintainable -remedy of Appeal u/s17 of Act,2002 not available to L.N.N.-neither borrower-nor guarantor-nor person.

L.N.N. determined lease deed-as per terms and conditions of lease deed-and section 111 of Act,1882-no violation.

Auction proceeding by IFCI Ltd.-not sustainable—had lease hold rights-notice published for-selling the property and not the lease hold rights.

Rights and Liabilities -governed by registered lease deed-no direction can be issued to lessor-L.N.N. to renew lease.
Auction proceedings-carried by IFCI Ltd.-unsustainable-lease rightly determined byL.N.N.-M/s. Shalimar-bidder-entitled to refund of 25% of bid amount with interest from IFCI Ltd. W.P. No. 4517 (MB) of 2013-dismissed; W.P. No.2397 (MB) of 2013-allowed. (E-9)

Cases cited:

1. Jagdish Singh Vs. Heeralal & ors., (2014) 1 SCC 479

2. U.O.I. Vs. Satyawati Tondon, (2010) 3 SCC (Civ.) 260

3. Regl. Provident Fund Commr. Vs. Hooghly Mills Co. Ltd. & ors., (2012) 2 SCC 489 at page 499,

4. Krishan Lal Vs. F.C.I. & ors., (2012) 4 SCC 786 at page 792

5. Durga Enterprises (P) Ltd. & anr. Vs. Principal Secy. Govt. of U.P. & Ors., (2004) 13 SCC 665 at page 665

6. Bal Krishna Agarwal (Dr.) Vs. St. of U.P. & ors., (1995) 1 SCC 614
7. Ram and Shyam Co. Vs. St. of Hary. & prs., (1985) 3 SCC 267 at page 274

8.Rajasthan SEB Vs. U.O.I. & ors., (2008) 5 SCC 632 at page 633

9. Rakesh Kumar Kaushal Vs. St. of U.P. & Ors., 2019 (1) ADJ 689

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Kuldeep Pati Tripathi, learned counsel appearing for Lucknow Nagar Nigam, Sri Asit Chaturvedi, Senior Advocate, assisted by Sri G. S. Misra, Advocate appearing for IFCI Ltd., Sri J. N. Mathur, Senior Advocate assisted by Sri Mudit Agarwal appearing for Shalimar Corporation Ltd. and Sri Manjiv Shukla, Additional Chief Standing Counsel for State.

2. In both the connected writ petitions, primarily, the subject matter of dispute is the property/land measuring 2,17,936 sq. ft. of the Sullage Farm situated at Village Ujariyon Gaon, District-Lucknow and it appears that keeping in view the same, both the writ petitions were clubbed vide order dated 31.05.2003 passed in Writ Petition No.4517 (MB) of 2013 filed by IFCI Ltd.

3. The Writ Petition No.2397 (MB) of 2013 was filed by Lucknow Nagar Nigam (in short "L.N.N.") challenging the auction

proceedings of property/land in issue carried out by IFCI Corporation Ltd. The main prayers sought in the writ petition are as under: -

"(1) Issue writ, order or direction in the nature of certiorari for quashing of the proceedings of the Sale of the land measuring about 2,17,936 sq. ft. land of Sullage Farm Situated in Village-Jagauli (earlier village-Ujariyaon) leased out to M/s Uptron Digital System Limited (M/s. Uptron India Ltd.), after summoning the same.

(2) Issue writ, order or direction in the nature of mandamus commanding the opposite parties to stop further proceedings of confirmation of Sale of the land measuing about 2,17,936 sq. ft. land of Sullage Farm situated in Village-Jugauli (earlier Village-Ujariyaon) leased out to M/s Uptron Digital System Limited (M/s Uptron India Ltd.)."

4. The Writ Petition 4517 (MB) of 2013 was filed by IFCI Ltd. challenging the order dated 20.03.2013, whereby the L.N.N. determined/terminated the lease of the property/land in issue with effect from 19.06.2013 and the order dated 06.04.2013, whereby the L.N.N. has refused to accept the arrears of lease rent which was deposited by IFCI Ltd. During the pendecy of writ petition the relief for quashing of the order dated 19.06.2013 (Annexure No.20A to the writ petition) was added through amendment. The main prayers sought in the writ petition are as under:-

"To issue a writ, order or direction in the nature of certiorari to quash the impugned orders dated 20.03.2013 and 06.04.2013.

To issue a writ, order or direction in the nature of certiorari to quash the impugned order dated 19.06.2013.

To issue a writ, order or direction in the nature of mandamus commanding the Lucknow Municipal Corporation not to interfere in the enjoyment of lease hold rights of the property in question by the petitioner.

To issue a writ, order or direction in the nature of mandamus commanding the Lucknow Municipal Corporation to consider the renewal of the lease in respect of the property in question in favour of the petitioner."

5. It is relevant to clarify here that the order dated 20.03.2013, under challenge in the Writ Petition No.4517 (MB) of 2013, is in fact is a 'Notice' determining the lease and as such hereinafter the "Order dated 20.03.2013" is referred as "notice dated 20.03.2013".

6. Brief facts, which lead to the filing of the writ petitions, are as under:

7. The property/land in issue admittedly belongs to L.N.N. In other words, it is also not in dispute that the L.N.N. is the owner of the property/land in issue. The property/land in issue was leased out to Uptron India Ltd. The lease deed was executed on 23.05.1985 for a period of 30 years on payment of Rs.25,06,285 as a premium and as per term of the lease deed the Uptron India Ltd. the lessee was required to pay the lease rent by the end of month of April each year in advance and any failure in making of such payment of rent regularly in advance by the end of month of April each year shall render the lease deed terminable by the lessor/L.N.N. by giving only three months notice to the lessee through registered post to the registered office of Uptron India Ltd. The relevant part of the lease deed on reproduction reads as under:

"NOW THEREFORE it is mutually agreed and consented between the lessor and the lessee that in consideration of the said premium of Rs.22,06,265/-

(already paid by the lessee to the lessor in three installments by three cheques aggregating to Rs.25,06,265/- as stated above the receipt of which as already stated above, the lessor hereby acknowledges with the liability of refunding Rs.3,00,000/- as stated above) and in consideration of the rent of Rs.25,062.65/- (Rs.Twenty five thousand sixty two and Paise sixty five) only per annum payable from the date of handing over the possession of the land hereby demised, and in consideration of the mutually agreed terms and conditions contained herein, the Lessor does hereby grant to the lessee the lease of the said plot of land of its Sullage Farm in Village Ujariyaon, Lucknow rectangular in shape measuring 2,17,936 sq. ft. more particularly described in the scheduled below and for clarity shown by red lines in the plan attached herewith on the following terms and conditions:-

1. That this lease of the said measuring 2,17,936 sq.ft. with all its advantages and disadvantages what so ever is hereby granted for a term of 30(thirty) years from .....x... the date on which the possession of the plot of land hereby demised was handed over by the Lessor to the Lessee with two rights of renewal for a similar term of 30 (thirty) years on each renewal on the same terms and conditions provided that no premium shall be chargeable on any of the two renewals but the rent will be enhanced with due regard to market value subject to a maximum of 50% of the rent payable before the due date for the renewal.

2. That the rent of Rs. 22,062.65 (Rs. Twenty two thousand sixty two & paise sixty five) only which is calculated as on the reduced premium of Rs,22,06,265/- for the period from the date of handing over the possession aforesaid to 31.03.1985 the date of end of the financial year 1984-85 will be paid up by the lessee to the lessor through Bank draft at the time of presentation of this deed of lease for Registration and thereafter the rent of each year shall be paid up by the lessee to the lessor by Bank Draft latest by the end of the month of April each year in advance the first such advance payment being payable by the end of April 1985 and any failure in making such payment of rent regularly in advance by the end of April each year shall render this lease terminable by the lessor by only three months notice and sending such notice by registered post to the lessee to its Registered Office shall be deemed to be sufficient service.

3. That the lessee shall be entitled to errect a building or buildings without houses etc. on the land hereby demised after getting its plan sanctioned by the Lucknow Development Authority in accordance with law and shall be entitled to use subject of limitations if any under the law enforce the buildings so errected and the land hereby deminised for any of the objects and/or purpose authorised by its constitution under which the Lease has been create and constituted by the Government. Provided that the Lessee shall not use the premises aforesaid for any purposes or in any manner which may become and nuisance to the neighbourers or the people living in the neighbourhood.

4. That in consideration of the Lessee having agreed to absolve the Lessor and to take upon itself the responsibility of filling up and/or raising the level of the land hereby demised at its own cost according to its own desire and needs, the Administrator had agreed to reduce the total amount of the premium from Rs.25,06,265/- to Rs.22,06,265/- and because, this change, in the initial agreement was affected by as agreement subsequent to the said three payments the

Lessor agreed and hereby agrees to refund Rs.3,00,000/- to the lessee within one month of the date or presentation of the deed of lease for registration.

5. That with effect from .....x..... the date of handing over the possession of the land hereby deminised to the lessee, the responsibility and liability of paying up besides the rent hereby reserved all cesses, taxes assessments and levies etc. existing or future whatsoever in respect of or attaching to the land hereby deminised or to any buildings and structures that may be erected or re-errected thereon shall all be absolutely of the Lessee alone and the lessee hereby agrees to discharge the said liabilities by full regular payments to the authorities concerned including the Nagar Maha Palika Lucknow.

6. The lessee shall be fully entitled without the requirement of the consent of the Lessor to enter into the agreements of Collaboration or similar agreements with others or agreements to under let or sublet to subsidiary Companies or Ancillaries permitting these portions the user of the land hereby demised or of the building and structures thereon in connection with the legitimate business objects and activities of the lessee. Any permission or collaboration stipulated above shall be intimated to the lessor within one month of entering into such agreement.

7. That it shall be lawful for the lessor or any one authorised in this respect to enter on or upon land hereby demised or the buildings or structures thereon from time to time to inspect the same and to bring to the notice of the Lessee any matter which may be considered undesirable by the lessor and to remove or discontinue any such thing whereupon the same shall be discontinued or removed unless the matter be amicably settled.

8. That any default on the part of the lessee in respect of any of the terms and conditions required to herein to be carried out or discharged by or on the part of the lessee notwithstanding any previous waiver of any such default shall entitle the lessor to terminate this lease even before the expiry of the said terms of 30 years by notice of three months only.

9. That on the expiry of the terms of this case, if no renewal is obtained, or on sooner determination of this lease by notice as provided herein the Lessee shall be bound to remove all the buildings and structures aforesaid and their materials from the land hereby demised within a period of one month from the date of expiry of the term or within the period of the notice as the case may be and all rights of the Lessee in respect of the building or structure aforesaid shall come to an end at the expiry of the said period of one month and the Lessor shall be entitled to re-enter on into or upon the land hereby demised on the buildings and structures standing thereon unless the matter is amicably settled between the parties.

10. That any dispute or difference arising from under or in connection with this deed of lease may be referred by any of the parties to the secretary L.S.G. of the State of U.P. and to none else for his arbitration in the matter and his decision thereon shall be binding on both the Lessor and the Lessee and if he refuses or neglects to arbitrate or is otherwise incapable of working as arbitrator the parties shall be free to seek their remedy in a court of law."

8. In view of the undisputed facts related to the ownership of property/land in issue and the terms of lease deed, it would be appropriate to mention here that the L.N.N. did not tansferred the property/land in issue in favour of Uptron India Ltd. and

being lessee the Uptron India Ltd. was entitled to enjoy the rights of lessee as provided under the lease deed read with the provisions of the Transfer of Property Act, 1882 (in short "Act of 1882").

9. It is also not disputed that due to financial needs the Uptron India Ltd. mortgaged the property/land in issue with IFCI Ltd. For the purposes of mortgaging the property/land in issue, no objection certificate dated 13.10.1987 was issued by L.N.N.. It was issued to enable the Uptron India Ltd. to deposit the lease deed of the property/land in issue with Financial Institutions/Banks for the purposes of mortgaged and obtaining loan. The original lease deed dated 23.05.1985 was deposited with IFCI Ltd. and the mortgaged was created with respect to property/land in issue. It would be proper to mention here, on the basis of pleadings on record, that the Uptron India Ltd. took the financial assistance from IFCI Ltd., IDBI Bank, State Bank of India, for which, property in question was mortgaged as security.

10. Needless to say that the mortgaged was/is permissible as per the provisions of Section 108 (j) of the Act of 1882 and such mortgaged can be made by deposit of title deed as provided under Section 58 of the Act of 1882. In view of Section 108 (j) of the Act of 1882 the lessee i.e. Uptron India Ltd. was empowered to transfer the lease hold rights. In view of the Section 108 (j) of the Act of 1882 a lessee is not empowered to transfer more than the rights available to him under the lease deed.

11. It is further undisputed that the Uptron India Ltd. committed default in payment of its dues and as such the loan account(s) with above mentioned Financial Institutions became a Non Performing Assets (NPA). For recovery of due amount a meeting was held between the representative of secured creditors, Managing Director of Uptron India Ltd. and Principal Secretary, Department of Information and Technology, Government of U.P. on 17.01.2012. Thereafter a meeting of creditors was again held on 23.04.2012 and it was decided therein that IFCI Ltd. would initiate action under the Securitization and Reconstruction of Financial Assets and Information of Security Interest Act, 2002 (in short "Act of 2002"). It is also stated in writ petition filed by IFCI Ltd. that in furtherance to the decision dated 23.04.2012 the State Bank of Patiala and IDBI Bank gave their consent in terms of Section 13 (9) of the Act of 2002. The IFCI Ltd. also called upon vide letter dated 02.05.2012 Uptron India Ltd. to make payment in terms of One Time Settlement (in short "OTS"). The amount i.e. Rs.13.90 crores, of OTS was also communicated by the IFCI Ltd. to the Uptron India Ltd. vide letter dated 22.05.2012. In absence of any response from the Uptron India Ltd. as also on account of non payment of due amount in terms of OTS the IFCI vide letter dated 01.08.2012 revoked its offer for OTS. After revoking the offer of OTS the IFCI Ltd. proceeded under the Act of 2002 and issued the notice dated 02.08.2012 under Section 13 (2) of the Act of 2002 to Uptron India Ltd. and its guarantor, the U.P. Electronics Corporation. No reply was given by the Uptron India Ltd. to the notice dated 02.08.2012. However, the reply was given by the guarantor, the U.P. Electronics Corporation. The reply submitted by the guarantor was rejected by the IFCI Ltd. vide order dated 05.10.2012 and thereafter the IFCI Ltd. issued the possession notice dated 08.12.2012 with respect to the

property/land in issue through its authorized officer. The notice dated 08.12.2012 was issued in view of Rule 8 of Security Interest (Enforcement) Rules, 2002 (in short "Rules, 2002"). The notice was published on 09.12.2012 in daily newspaper (s) namely 'Times of India' and 'Dainik Jagran'. The possession notice dated 11.12.2012 under Rule 8 (6) of Rules, 2002 was also issued calling upon the Uptron India Ltd. to clear its dues within thirty days. In the notice dated 11.12.2012 it has been stated that IFCI Ltd. would proceed under Rule 8 (5) of Rules, 2002, if Uptron fails to clear its dues. The Uptron failed to clear the dues and accordingly public notice dated 22.01.2013 inviting bids for sale of the mortgaged properties including the property/land in issue was published on 23.01.2013 in daily newspaper(s) namely 'Times of India' and 'Dainik Jagran'. At this stage this Court feels it proper to reproduce the contents of possession notice dated 08.12.2012 as also the contents of public notice dated 22.01.2013.

"Rule 8 (1) POSSESSION NOTICE

WHEREAS IFCI Ltd. (formerly known as Industrial Finance Corporation of India, being secured creditor of M/s. UPTRON India Ltd. (UIL), (Borrower) has issued demand notice dated 2nd August, 2012 under Section 13 (2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Securitization Act) calling upon the borrower to repay the sum of Rs.140,48,74,218/-(Rupees One hundred forty crore forty eight lakhs seventy four thousand two hundred and eighteen only) towards outstanding dues of IFCI, as on 31.07.2012, with further interest on contractual rates till payment besides the dues of other secured creditors, within sixty days from the date of receipt of the said notice.

The Authorized Officer of IFCI, under the Securitization Act and in exercise of powers conferred under Section 13 (12) read with rule 9 of the Security Interest (Enforcement) Rules, 2002, demanded the amount of Rs.140,48,74,218/-(Rupees One hundred forty crore forty eight lakhs seventy four thousand two hundred and eighteen only) towards outstanding dues of IFCI, as on 31.07.2012, with further interest on contractual rates till payment, besides the dues of other secured creditors from the borrower. The borrower having failed to repay the amount within 60 days from the date of the said notice, IFCI hereby gives notice to the borrower and the public in general that the undersigned, being the Authorized Officer appointed by IFCI has taken possession of the property described herein below, on this 8th day of December, 2012, in exercise of powers conferred on him under Section 13 (4) of the Securitization Act, 2002 read with Rules 6 (1) & 8 (1) of the said Rules. The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the IFCI for Rs.140,48,74,218/-(Rupees One hundred forty crore forty eight lakhs seventy four thousand two hundred and eighteen only) towards outstanding dues of IFCI, as on 31.07.2012, with further interest on contractual rates till payment, besides the dues of other secured creditors.

"DESCRIPTION OF THE PROPERTIES

1. Plot No. A-1 UPSIDC Industrial Area, Deva Chinhat Road, Village Goela,Pargana/Tehsil-Malihabad,

Lucknow Uttar Pradesh admeasuring 39,753 sq. mtrs or 9.82 acres (app) together with all the buildings and structures/erections constructed erected thereon, plant and machinery attached to the earth of permanently fastened to anything attached to the earth and fixtures and fitlings erected/installed thereon and every part thereof, in the name of Company viz. UPTRON India Ltd. (UIL).

2. Village Jugauli (earlier known as Ujariyan Gaon) near Gomti Barrage, Gomti Nagar, Lucknow Uttar Pradesh admeasuring 8 Bigha, 2 Biswani together with all the buildings and structures/erections constructed erected thereon, plant and machinery attached to the earth or permanently fastened to anything attached to the earth and fixtures and fitlings erected/installed thereon and every part thereof, in the name of Company viz. UPTRON India Ltd. (UIL).

Date : 08.12.2012

Sd/-

Place - Lucknow Authorized Officer under Securitization Act"

"PUBLIC NOTICE

(In terms of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI) read with rule 6,7,8,9 of Security Interest (Enforcement) Rules, 2002).

Pursuant to the possession taken by the Authorized Officer under SARFAESI Act, 2002 for recovery of secured debts of Rs.140,48,74,218/-(Rupees One hundred forty crore forty eight lakhs seventy four thousand two hundred and eighteen only) towards outstanding dues of IFCI, as on 31.07.2012, with further interest on contractual rates till payment besides the dues of other secured creditors, SEALED BIDS are invited for purchase of movable and immovable assets of two units of M/s. UPTRON India Ltd. (UIL) at Village Jugauli (earlier known as Ujariyan Gaon) Near Gomti Barrage, Gomti Nagar, Lucknow, Uttar Pradesh AND A-1, UPSIDC Industrial Area, Deva Road, Chinhat, Lucknow, Uttar Pradesh on AS IS WHERE IS AND WHATEVER THERE IS BASIS as per details given below :

Sl. No.	*Particulars of Assets*	*Reserve Price (Rs.In Lakh)*	*Earnest Money Deposit (EMD) (Rs.In Lakh)*
1.	*Unit -1: Gomti Nagar, Lucknow Uttar Pradesh Village- Jugauli (earlier known as Ujariyan Gaon) Near Gomti Barrage, Gomti Nagar, Lucnow, Uttar Pradesh admeasuring 8 Bigha, Biswani together with all the buildings and structures/erections constructed erected thereon, plant and machinery attached to the*	*7400.00*	*744.00*

	earth or permanently fastened to anything attached to the earth and fixtures and fitlings erected/installed thereon and every part thereof.			*constructed erected thereon, plant and machinery attached to the earth or permanently fastened to anything attached to the earth and fixtures and fittings erected/installed thereon and every part thereof.*
2	*Unit 2 : UPSIDC Industrial Area, Chinhat Road, Lucknow Uttar Pradesh Plot No. A-1 UPSIDC Industrial Area, Deva Chinhat Road, Village Goela, Pargana /Tehsil-Malihabad, Lucknow Uttar Pradesh admeasuring 39,753 sq. mtrs or 9.82 acres (app.) together with all the buildings and structures/erections*	*1431.00*	*143.10*	

2. Copy of tender document containing details of assets and particulars of terms and conditions of sale forming part of this sale notice may be collected from the office of Authorized Officer at IFCI Tower, 16th Floor, 61, Nehru Place, New Delhi-1100019 from 1st February, 2013 onwards on payment of Rs.1,000/- by D.D./pay order favouring "IFCI Ltd." payable at New Delhi. The tender document can also be downloaded from IFCI's Website at www.ifciltd.com after 1st February, 2013, however, the submission of such downloaded tender document should be accompanied by a Demand Draft of Rs.1,000/- towards the cost of the tender document at the time of submission of bid.

3. Interested parties shall submit their bid for individual unit along with Earnest Money Deposit (EMD) in the form of demand draft/pay order in favour of "IFCI Ltd." payable at New Delhi drawn

on any Nationalized/scheduled Bank in sealed cover superscribed "Bid for assets of M/s. UPTRON India Ltd., Gomti Nagar, Lucknow, U.P." and "Bid for assets of M/s. UPTRON India Ltd., Chinhat Unit, Lucknow, U.P." addressed to "The Authorized Officer, Sri Anil Kumar Chauhan, AVP, IFCI Ltd., IFCI Tower, 16th Floor, 61 Nehru Place, New Delhi-110019". No interest shall be payable by the Authorized Officer/IFCI Ltd. on the EMD. The sealed bid can be dropped in the "Tender Box' to be kept at the reception on the ground floor of IFCI Tower, 61 Nehru Place, New Delhi-110019 on or before 01.03.2013 by 11:30 A.M..

4. The bid so received by the Authorized Officer shall be opened and considered by an Asset Sale Committee (ASC) specifically constituted for the purpose, at 12:00 noon on 01.03.2013 at IFCI Tower, 61 Nehru Place, New Delhi-110019 in the presence of bidders who wish to attend the auction proceedings. The Authorized Officer may allow inter-se bidding amongst eligible bidders as per the terms of Tender Document. The assets shall not be sold below the reserve price.

5. The successful bidder shall deposit 25% of the amount of sale price after adjusting the EMD already deposited within two (2) working days of acceptance of the offer by the Authorized Officer failing which the EMD shall be forfeited. The balance 75% of the sale price is payable on or before 15th day of issue of letter of acceptance conferring the highest bid (Letter of Acceptance). If the 15th day happens to be Sunday or a holiday the balance 75% may be deposited on the next working day. In case of failure to deposit the balance amount within the prescribed period mentioned above, the amount deposited shall be forfeited. The Authorized Officer reserves the right to accept or reject any/or all the bids or to adjourn, postpone or cancel the auction sale without assigning any reason thereof.

6. For any clarification/information, interested parties may contact Shri S. K. Bhandari (09990725917)/Shri S. G. Kundu (09990725969)/Shri Anil Kumar Chauhan (09990725738)/Shri D. P. Rauhilla (09990725916).

Place : New Delhi
Sd/-
Dated : 22.01.2013
(ANIL KR. CHAUHAN)
AUTHORIZED OFFICER
IFCI Ltd., IFCI Tower, New Delhi"

12. It is also not in dispute that in the auction proceedings the bid of M/s. Shalimar Corporation Ltd. (in short "M/s. Shalimar") was accepted and IFCI Ltd. vide letter dated 01.03.2013 directed the M/s. Shalimar to deposit 25% of sale consideration and 1/4th (25%) of the bid amount i.e. Rs.18,64,01,000/- was deposited by the M/s. Shalimar.

13. On coming to know about the auction proceedings carried out by IFCI Ltd., the L.N.N. being aggrieved by the auction proceedings approached this Court by means of Writ Petition No.2397 (MB) of 2013, for the reliefs quoted herein above, and while entertaining the writ petition, this Court on 19.03.2013 passed a detailed interim order, whereby the opposite parties to the writ petition including the IFCI Ltd. were restrained from confirming the sale proceedings. The interim order dated 19.03.2013 on reproduction reads as under :-

"Yesterday i.e. on 18.3.2013, learned Counsel for thepetitioner made a

mention that the land measuring about 2,17,936 Sq.Ft. situated in village Jugauli (earlier village Ujariyaon) hasbeen auctioned but the sale has not been confirmed and the lastdate of confirmation of sale of the land in question is 20.3.2013.Therefore, it was urged that the matter is urgent and it may betaken up tomorrow. Accordingly, on permission being granted bythis Court, the instant writ petition has come up foradmission/hearing today.

At the outset, Sri S.K. Kalia, Senior Advocate, appearing onbehalf of the petitioner submits that he may be permitted toimplead the auction purchaser i.e. Shalimar Corps. Ltd., Lalbagh,Lucknow as opposite party No.5 in the array of the oppositeparties as he is necessary party.

Let him do so during the course of the day.

Issue notice.

Notice on behalf of opposite party No.1 has been acceptedby the Chief Standing Counsel, whereas notice on behalf ofopposite parties Nos. 2 and 3 has been accepted by Sri G.S.Misra, Advocate and on behalf of opposite party No.4 by SriSanjay Bhasin. On behalf of opposite party No.5, appearance hasbeen put in by Sri Vishal Dixit,

Heard learned Counsel for the parties and perused the records.

Through the instant writ petition under Article 226 of the Constitution of India, the petitioner challenges the proceedings ofthe sale of the land measuring about 2,17,936 Sq. Ft. situated atVillage Jugauli (earlier known as Village-Ujariayon), which hasbeen leased out to M/s UPTRON Digital System Limited (M/s UPTRON India Ltd.). It has also been prayed that opposite partiesmay be directed to stop the further proceedings of confirmation ofSale of the land in question.

According to the petitioner, land in question belongs toNagar Nigam Ltd., which was leased out to M/s UPTRON India Ltd.by the erstwhile Nagar Maha Palika, Luckow on 23.5.1985 for aperiod of 30 years on payment of Rs.25,06,285/- as premium andfurther M/s UPTRON India Ltd. was required to pay Rs.22,062.65per year as lease rent. According to him, M/s UPTRON IndiaLtd./Company registered under the Companies Act, 1956 and anundertaking of Government of Uttar Pradesh, applied for certainloan and cash credit facilities from certain Banks and financialinstitutions, to which State Bank of India required 'No ObjectionCertificate' for creating equitable mortgage pertaining to land inquestion vide letter dated 14.9.1987. The erstwhile Nagar MahaPalika, Lucknow granted 'No Objection Certificate' on 13.10.1987for equitable mortgage. Thereafter, certain loan and financial assistance was granted to M/s UPTRON India Ltd. Of late, M/sUPTRON India Ltd. became sick and as such, Company wasreferred to BIFR on 20.7.1994. Therefore, M/s UPTRON India Ltd.did not pay lease rent since 1998.

Learned Counsel for the petitioners submits that even afternot paying the lease rent since 1998 as per the terms andconditions of the lease agreement, the petitioner did not take anyaction against M/s UPTRON India Ltd. as M/s UPTRON India Ltd. isan undertaking of U.P. State Government. However, all of asudden, vide letter dated 11.3.2013, M/s UPTRON India Ltd.informed the Municipal Commissioner, Nagar Nigam, Lucknow thatthe Company has taken a loan of Rs.9.70 Crores in 1986-87 as along term loan from different banks and financial institutions suchas I.F.C.I,

I.D.B.I., State Bank of India and State Bank of Patialabut due to financial crunch, the Company could not repay thedebts and interest also and as such, the said Bank had publisheda notice in Newspaper 'Dainik Jagran' dated 8.12.2012 for takingpossession of the building of M/s UPTRON India Ltd. andthereafter on 22.1.2013, notice was also published, by which thebuilding was put to sale by inviting tender.

Learned Counsel for the petitioner submits that though the 3I.F.C.I. Ltd. was fully aware that building of M/s UPTRON IndiaLtd. is situated on the land belonging to Lucknow Nagar Nigamand the property was under lease with certain conditions butneither M/s UPTRON India Ltd. nor I.F.C.I. Ltd. brought to thenotice of the petitioner that the land belonging to the LucknowNagar Nigam has been taken possession by the I.F.C.I. Ltd. underRule 8 (1) of the Security and Reconstruction of Financial Assetsand Enforcement of Security Interest Act, 2002 [hereinafterreferred to as the "Act"], which is in violation of the provisions ofSection 6 (1) of the Act. Thus, the entire action has been donebehind the back of the Luckow Nagar Nigam.

Learned Counsel for the petitioner submits that the auctionof the property in question was done on 1.3.2013 but till date thesame has not been confirmed.

Sri Sanjay Bhasin, learned Counsel for the opposite partyNo.4 submits that as stated by the petitioner's counsel, the matterhas been referred to BIFR, wherein the matter was reserved onceupon a time but subsequently, it was released and the matter hasbeen fixed for 18.4.2013. He submits that in the said proceedings,IFCI Ltd. is also one of the parties and as such, the conduct ofIFCI Ltd. is dubious and not on board. Therefore, the entireexercise has been done in a haste manner by the IFCI Ltd.

Sri G.S. Misra, learned Counsel for the opposite parties Nos.2 and 3 has filed a counter affidavit. The same is taken on record. He has raised a preliminary objection that the petitioner has got equally efficacious alternative remedy by filing Securitization Application under Section 17 of the Act before the Debts Recovery Tribunal. He further submits that lease deed, which was executed by the petitioner in favour of M/s UPTRON India Ltd. was for 30 years only and the same is going to expire in the year 2015 andas such, M/s UPTRON India Ltd. has no right.

Per contra, Sri S.K. Kalia, Senior Advocate, appearing onbehalf of the petitioner submits that due to non-availability of thePresiding Officer, Debts Recovery Tribunal, Lucknow, itsjurisdiction is attached with Debts Recovery Tribunal, Jabalpur andthe Presiding Officer, Debts Recovery Tribunal, Jabalpur hasearmarked two days in a month to hear the cases of DebtsRecovery Tribunal, Lucknow. He further submits that the opposite parties Nos. 2 and 3 are adament to confirm the sale of the landin question by fixing 20.3.2013 as date of confirmation of sale andas such, the petitioner has no option but to approach this Courtunder Article 226 of the Constitution of India.

Sri Vishal Dixit, learned Counsel for the auction purchaseri.e. opposite party No. 5 submits that in the auction notice, whichhas been published, it was not made clear as to what would bethe status of the auction purchaser i.e. whether he has been givenlease right or free hold right till 2015 as the term of the lease isgoing to expire in the year 2015. He submits that he has onlydeposited 1/4th amount at the time of

bidding and the Bank hasassured him to consider the matter thereafter.

At this stage, a specific query was put to learned Counselfor the opposite parties Nos. 2 and 3 that since the lease of theland in question is going to expire in the year 2015, as such, whatis the status of the auction purchaser, to which learned Counselfor the opposite parties Nos. 2 and 3 submits that he may beallowed some time to file an affidavit to this effect.

Under the circumstances, we direct the parties to filerespective affidavits by tomorrow.

Since the confirmation of the sale of the property inquestion is going to expire tomorrow, as such, as an interimmeasure, we restrain the opposite parties from confirming thesale of the property in question.

List/put up tomorrow i.e. 20.3.2013."

14. Thereafter on 20.03.2013 the L.N.N. determined/terminated the lease of the land leased out to the Uptron India Ltd. on 23.05.1985. The reasons for termination of lease was non payment of lease rent from 1997-98. It is also stated in the notice dated 20.03.2013 that the Uptron India Ltd. has violated the term no.6 of lease deed, as the Uptron India Ltd. had used the property for the purposes other than those for which it was leased out and the parts of the property were rented out to third parties in an unauthorized manner and no information regarding the same was given to the L.N.N., as required under the lease deed.

15. According to term no. 6 of lease deed, the lessee-Uptron India Ltd. was entitled to entering into the agreements of collaboration or similar agreements with others or agreements to under let or sub-let to subsidiary Companies or Ancilliaries Companies permitting the use of portion of property leased out to the Uptron India Ltd. including building and structure thereon in connection with business objects and activities of lease. However, as per the same term, the Uptron India Ltd. was under obligation to intimate the L.N.N. within one month from the date of entering into agreement, as provied in term no.6 of lease deed.

16. It is also stated in the notice dated 22.03.2013 that Uptron India Ltd did not inform about the facts related to auction proceeding in relation to the property/land in issue at appropriate time.

17. After notice dated 20.03.2013, whereby the lease deed in favour of Uptron India Ltd. was determined/terminated, the IFCI Ltd. on 28.03.2013 tried to deposit the lease rent amounting to Rs.4,00992/- with L.N.N. which was outstanding since 1997-98. The L.N.N. by order dated 06.04.2013 refused to accept the lease rent on the ground that lease had already been determined/terminated and the matter is sub-judice before this Court.

18. Being aggrieved by the notice dated 20.03.2013 and order dated 06.04.2013 the IFCI Ltd. filed the Writ Petition No.4517 (MB) of 2013.

19. It would be appropriate to state here that on 27.05.2013 this Court passed the following order in Writ Petition 2397 (MB) of 2013.

".Heard Sri S. K. Kalia, Senior Advocate for the petitioner, Sri Anil Tiwari, Senior Advocate for the IFCI Limited and Sri J. N. Mathur, Senior Advocate appearing for Shalimar Corporation Limited.

It has been brought to out notice by Mr.J. N. Mathur that after filing of the instant writ petition, certain proceedings for cancellation of lease deed have been initiated by the petitioner. He submits that 1/4th of the bid amount has already been deposited by his client, namely, opposite party No.5/ Shalimar Corp. Limited. He further submits that on account of pendency of instant writ petition, they are losing the interest on the said amount. Accordingly, he prays that the said amount, which has been deposited with the IFCI Limited, may be directed to be invested in an interest bearing account.

The aforesaid request of the opposite party No.5 appears to be genuine.

Accordingly, we direct the IFCI Limited/opposite party No.2 to deposit the amount in the interest bearing account, which will be maintained separately and it will be in the joint name of IFCI and opposite party No.5 initially for a period of one year.The encashment of the aforesaid amount would be subject to the final outcome of the writ petition.

List/put up on 31.5.2013. Till then, interim order granted earlier shall remain in operation. "

20. In regard to the aforesaid order, it is stated by the counsel for the IFCI Ltd. as also by Shri J. N. Mathur, learned Senior Advocate appearing for M/s. Shalimar that the 25% of the bid amount is lying in interest bearing account.

21. It would also be appropriate to state here that the during the pendency of writ petitions, under consideration, the term of the lease provided under the lease deed dated 23.05.1985 i.e. 30 years, which was determined/terminated vide notice dated 20.03.2013 by L.N.N. (Lessor), has expired on 23.05.2015.

22. Sri Kuldip Pati Tripathi, learned counsel appearing for L.N.N. in support of the reliefs sought in Writ Petition No.2397 (MB) of 2013 filed by L.N.N. made following submissions.

(i) The property/land in issue belongs to L.N.N. and the same was leased out on 23.05.1985 to Uptron India Ltd. and only rights available under the lease can be auctioned and the property/land in issue cannot be aucti *the borrowerThe borrowerthe borrowerThe borrowerthe borrower* oned for recovery of any amount due on Uptron India Ltd.

(ii) In the instant case, it appears from the possession notice as well as public notice, pursuant to which auction proceedings were carried out, that in same, it has not been mentioned that lease hold rights are being auctioned. It appears from the contents of notices that ownership rights were being auctioned in the auction proceedings. The impression given in the notices is to the effect that IFCI Ltd. steps in as the owner of the property in issue.

(iii) The IFCI Ltd. had no right to sell the property/land in issue and what could have been auctioned off were only the rights available in the lease deed.

(iv) The notice issued under Section 13(2), order under Section 13(4), possession notice and public notice for auctioning the property are defective as

they do not disclose the correct nature and status of the property/land in issue.

(v) The public notice for auctioning the property is in violation of Rule 8(6) sub-rule (a) and (f) of Rules, 2002, as in the same nowhere it has been mentioned that land in question belongs to L.N.N. which was leased out to Uptron India Ltd. and the lease hold rights are on sale in the auction proceedings.

(vi) The entire auction proceedings were carried out by IFCI Ltd. without giving any information to the L.N.N.. Being owner of the property the L.N.N. ought to have been informed in writing about the recovery of due amount by auctioning the property/land in issue. The fact pertaining to ownership of L.N.N. was well within the knowledge of IFCI Ltd. as the original lease deed was deposited for the purposes of seeking financial assistance by the Uptron India Ltd.

(vii) The property/land in issue is a public land belonging to L.N.N. and it cannot be sold/auctioned in the manner in which it was being sold/auctioned by the IFCI Ltd.

23. On the basis of aforesaid, Sri Kuldeep Pati Tripathi submitted that indulgence of this court is required. Prayer is allowed to the writ petition and quash the entire auction proceedings.

24. In regard to the Writ Petition No.4517 (MB) of 2013, Sri Kuldeep Pati appearing for L.N.N. submitted that the writ petition for the reliefs sought is liable to be dismissed. In this regard, he made following submission.

(i) In the writ petition the notice dated 20.03.2013, whereby the lease deed was determined/terminated, is under challenge and the same is not liable to be interfered as the Uptron India Ltd. violated the term nos. 2 and 6 of the lease deed dated 23.05.1985 and in exercise of power vested under term no.8 of lease deed it was determined/terminated. He further submitted that in the notice dated 20.03.2013 the reasons of termination of lease have been mentioned. Further submitted that reasons for termination of lease deed are that the lease rent due from 1997-98 was not paid and the Uptron India Ltd. failed to provide the information regarding sub-letting the parts of property/land in issue as also that the parts of the property/land in issue was sub-letted to third parties in an unauthorized manner.

(ii) It is further stated that in regard to the grounds/reasons for termination of lease there is no explanation in the writ petition nor it has been mentioned therein that the grounds/reasons mentioned in the notice dated 20.03.2013, whereby the lease was determined/terminated, are unsustainable.

(iii) With regard to the order dated 06.04.2013, whereby the L.N.N. refused to accept the lease rent, it is submitted by Sri Kuldeep Pati Tripathi that after determination/termination of lease on 20.03.2013 the IFCI Ltd. just to claim certain rights in the property/land in issue vide letter dated 28.03.2013 tried to deposit the due lease rent from 1997-98 and vide order dated 06.04.2013 the request to accept the lease rent was rejected on the ground to the effect that lease deed has already been terminated and the matter is sub-judice before this Court. The reasons mentioned in the order dated 06.04.2013 are just and proper.

(iv) It is also stated that during the pendency of writ petition, the term of the lease deed i.e. of 30 years, has already been expired and the present writ petition has become infructuous for all practical purposes.

(v) It is also stated that the tenancy was determined on 20.03.2013 and thereafter on 23.03.2013 the Uptron India Ltd. represented its case before the L.N.N. and after considering entire facts including the notice determining tenancy dated

20.03.2013 the L.N.N. passed the order dated 19.06.2013, challenged by the IFCI Ltd. In the facts of the case as also in view of the provisions of Section 111(h) there is no illegality in the order dated 19.06.2013.

25. Sri Asit Chaturvedi, learned Senior Advocate assisted by Sri G. S. Misra, Advoate for IFCI Ltd. submitted that the writ petition No.2397 (MB) of 2013 filed by L.N.N. which relates to auction proceedings carried out by IFCI Ltd. under the provisions of Act of 2002 is not maintainable in view of availability of remedy of appeal under Section 17 of the Act of 2002 and being so the same is liable to be dismissed and L.N.N. be relegated to avail the remedy provided under Section 17 of the Act of 2002. In this regard reliance has been placed on the judgment passed by Hon'ble the Apex Court in the case of ***Jagdish Singh vs. Heeralal and others, (2014) 1 SCC 479*** and ***Union Bank of India vs. Satyawati Tondon, (2010) 3 SCC (Civ.) 260.***

26. On merits, Sri Asit Chaturvedi, submiited that the possession notice as also the public notice pursuant to which the auction proceedings were carried out are not violative to any provision of Act of 2002 or Rules, 2002 and being so are not liable to be interfered by this Court. In this regard, it is further stated that in the public notice dated 22.01.2013, it has been specifically mentioned that property is being sold "AS IS WHERE IS AND WHATEVER THERE IS BASIS" and the same is sufficient compliance of the provisions contained in Act and Rules. Further submitted that the notice(s) were published in newspaper(s) in wide circulation and as such it is a presumption that the L.N.N. was well aware with the recovery proceedings initiated by the IFCI Ltd. It is further submitted that the IFCI Ltd. being secure creditor entered into the shoes of mortgagor when the property was mortaged with IFCI Ltd. after completion of all formalities including after taking note of NOC issued by the L.N.N. to mortgage the property in favour of Financial Institutions. To recover the due amount towards Uptron India Ltd. the recovery proceedings were initiated under the Act of 2002 against the property/land in issue mortgaged with IFCI Ltd. The recovery proceedings under the Act of 2002 are legally sustainable in view of the contents of possession notice and public notice as also in view of the provisions of Act of 1882. It is also stated that the L.N.N. ought to have applied to redeem the mortgaged property as provided under Section 60 of the Act of 1882 and it is still open for L.N.N. to approach the IFCI Ltd. for redemption of the mortgage property/land in issue.

27. With respect to the reliefs sought in the writ petition No. 4517 (MB) of 2013, it is submitted that :

(i) The L.N.N. being lessor ought to have received the lease rent, which was submitted on coming to know about the default committed by the Uptron India Ltd. The IFCI Ltd. tried to deposit the due lease rent from 1997-98 onwards through Bank Draft vide letter dated 28.03.2013. Further submitted that as per Section 65(d) of the Act of 1882 even after mortgage the Uptron India Ltd. (mortgagor) was bound to pay all the lease rent and for the default committed by the mortgagor the IFCI Ltd. can not be made to suffer ans as such the order dated 06.04.2013 whereby the L.N.N. refused to accept the rent submitted by IFCI Ltd. through demand draft is liable to be interfered by this Court.

(ii) In relation to notice dated 20.03.2013, whereby the lease of the property/land in issue was determined/terminated, Sri Asit Chaturvedi submitted that the notice dated 20.03.2013, terminating the lease was passed without any intimation to the IFCI Ltd. nor any opportunity was provided to the IFCI Ltd. to make the deficiency good. The notice dated 20.03.2003 is violative to the terms of the lease specifically term no.2 of the lease deed.

(iii) It is also stated that the order dated 19.06.2013, cancelling the lease deed is nothing but an eye wash as the decision to determine/terminate the lease was taken vide notice dated 20.03.2013.

(iv) It would be appropriate to mention here that in regard to violation of terms no.6 of the lease deed, one of the reasons of determination/termination of lease mentioned in the notice dated 20.03.2003, no argument has been advanced.

28. Sri J.N. Mathur, learned Senior Advocate assisted by Sri Mudit Agarwal, appearing for M/S Shalimar, submitted that earlier M/s Shalimar was supporting the case of the IFCI Ltd. as the bid was settled in its favour and period of lease was not expired and M/s Shalimar could have utilized the property/land in issue for its business purpose and during the pendency of the present writ petitions the term of lease, which was of 30 years with provison of renewal, has already been expired on 23.05.2015 and now the terms of the lease can not be renewed and as such the 25 % of the bid amount deposited by M/s Shalimar with IFCI Ltd. be provided to M/S Shalimar. In this regard, Sri J.N. Mathur, learned Senior Advocate elaborating his arguments made following submissions:-

(i) Keeping in view the facts of the case as also the term no.1 read with term no.9 of the lease deed and provisions envisaged under Section 56 of the Indian Contract Act, 1872 (in short "Act of 1872") the renewal of term of lease of property/land in issue is not possible.

(ii) Since the lease has been determined/terminated and lease rent by the L.N.N. has not been accepted from IFCI Ltd. as such also the present case would not fall under Section 116 of the Act of 1882, which provides lease by holding over and in this view also the IFCI Ltd. has no right to transfer the property/land in issue in favour of M/s Shalimar.

(iii) It is stated that Section 111 of the Act of 1882, provides determination of lease and taking note of Section 111(a) and (h) now the lease deed is not existence and in view of the same also the IFCI Ltd. has no right to transfer the property/land in issue.

(iv) With regard to deposit of rent it is stated in view of Section 65(d) of the Act of 1882 after the mortgage is created the IFCI Ltd. was under obligation to pay the lease rent.

(v) The lease rent was demanded by L.N.N. vide letter dated 18.01.2002, as appears from the notice dated 20.03.2013, however the lease rent was not paid till the notice dated 20.03.2013 was issued. The IFCI Ltd. through its letter dated 28.03.2013 tried to deposit the lease rent.

(vi) Admittedly, IFCI Ltd. being mortgagee of the property/land in issue took over the possession of the property/land in issue on 08.12.2012, as appears from the possession notice published in news paper on 09.12.2012 (Annexure No. 13 to the writ petition filed by IFCI Ltd.) and even then IFCI Ltd. failed to clear the dues immediately in terms of Section 65(d) of the Act of 1882.

(vii) Section 108 (j) of the Act of 1882 provides that the lessee can only mortgage or sub-lease whole or any part of

his interest in the property and any transferee of such interest or part may again transfer it. It further provides that the lessee shall not by reason only of such transfer cease to be subject to any of the liabilities attaching to the lease and in view of the same as well as in view of Maxim(s) "Nemo Dat Quod Non Habet" (no one can bestow or grant a greater right, or a better title than he has himself) and "Nemo Plus Juris Tribuit Quam Ipse Habet" (no one gives what he has not got) only lease hold rights could have been auctioned but otherwise impression appears from the possession notice as also from the auction notice and accordingly in view of the same as also keeping in view the provisions of Rule 8(6) of the Rules, 2002 the auction proceedings are not sustainable.

29. With regard to the issue of maintainability of the writ petition no.2397 (MB) of 2013, Sri Kuldeep Tripathi and Sri J.N. Mathur, Senior Advocate, made following submissions:-

(i) Keeping in view the Section 2(f), which defines "borrower", Section 13, wherein the expression "borrower" has been used and which relates to taking measures against borrower and secured assets as also Section 17, which provides right to appeal and which says that any person (including borrower), aggrieved by any of the measures referred to in Sub-Section 4 of the Section 13 taken by the secured creditor or his authorized officer may make an application before the Debt Recovery Tribunal (in short "DRT"), the writ petition no.2397 (MB) of 2013 is maintainable and L.N.N. should not be relegated to avail the remedy of appeal provided under Section 17 of the Act of 2002. In this regard, it is further stated that the L.N.N. is neither a borrower nor a guarantor nor claiming any right through borrower or guarantor as legal heir/successor/ representative/ attorney/ assignee etc. nor has entered into the shoes of borrower or guarantor in any manner whatsoever it may be and in fact, the L.N.N. is owner of the property/land in issue as such taking into account the same, the writ petition is maintainable on behalf of L.N.N. challenging the auction proceedings initiated and carried out by IFCI Ltd.

(ii) It is also stated that expression "Any Person" referred in Section 17 of the Act of 2002 can not be read independently and it has to be read in the context of Section 13(4) and (5) of the Act of 2002 and a conjoint reading of both the provisions read with the definition of "borrower" provided under Section 2(f) of the Act of 2002 would make the point in issue crystal clear that expression "Any Person" would mean and cover either the borrower or guarantor or any person claiming through borrower or guarantor and would not cover the true owner of the property, who is neither borrower nor guarantor.

(iii) Further stated that the subject matter of both the writ petition is same i.e. property/land in issue and relegating the L.N.N. to approach the DRT would result in multiplicity of proceedings and it would not be in the interest of substantial justice between the parties.

(iv) Further submitted that the matter is pending since 2013 and more than 6 years have elapsed and the matter is ripe for final hearing as such relegating the matter to another forum would only prolong the litigation between the parties and it would not be in the interest of substantial justice, in this regard placed reliance on the judgments passed in the case of ***Regl. Provident Fund Commr. v.***

Hooghly Mills Co. Ltd. & Ors., (2012) 2 SCC 489 at page 499, Krishan Lal v. Food Corporation of India & Ors., (2012) 4 SCC 786 at page 792, Durga Enterprises (P) Ltd. and another v. Principal Secy. Govt. of U.P. & Ors., (2004) 13 SCC 665 at page 665 and Bal Krishna Agarwal (Dr.) v. State of U.P. & Ors., (1995) 1 SCC 614.

(v) Further stated that it is well settled principle of law that availability of alternative remedy is not an absolute bar for granting relief in exercise of power under Article 226 of the Constitution of India. The restriction to remedy under Article 226 of the Constitution on the ground of alternate remedy is a self imposed restriction. In this regard reliance has been placed on the judgments passed in the cases of **Ram and Shyam Co. v. State of Haryana & Ors., (1985) 3 SCC 267 at page 274 and Rajasthan SEB v. Union of India & Ors., (2008) 5 SCC 632 at page 633.**

30. Heard counsel for the parties and perused the record.

31. We have also taken note of relevant statutory provisions referred by the counsel for the parties i.e. Act of 2002, Rules, 2002 and Act of 1882.

32. During the course of arguments, for the purposes clarification of facts and issues involved in the case, this Court on 18.09.2019 framed following questions:-

"(a) Whether the action on the part of the petitioner to put the auction of the property in question, which was mortgaged by the opposite party no.2/UPTRON Indian Ltd. as security while taking the loan, which was leased out and lease deed was executed in its favour by Lucknow Municipal Corporation, in view of the provisions of Section 105 read with 108 (J) and other relevant provisions of Transfer of Property Act, 1882, is correct or not ?

(b) Whether the public notice dated 22.01.2013 issued by the petitioner inviting bids for sale of the mortgaged property including the property in question (Annexure No.15 to the writ petition) is in accordance with law or not ?

(c) If the Lucknow Municipal Corporation has cancelled the original lease deed executed by it in favour of opposite party no.2/UPTRON India Ltd., then after expiry of the lease deed, the same can be extended by this Court while exercising the power under Article 226 of the Constitution of India."

33. After the above on 11.12.2019, this Court again framed the following questions:-

"(a) Whether the demand notice issued by the IFCI being the secured creditor of UPTRON under section 13 (2) of SARFAESI Act and auction process held for recovery of the amount towards outstanding dues of IFCI, is in accordance with law or not ?

(b) Whether the land in issue can be auctioned treating the UPTRON as owner of the property in question and only the lease hold rights can be auctioned as the Lucknow Nagar Nigam is the original owner of the property in question.

(c) Whether cancellation of lease by Lucknow Nagar Nigam is justified."

34. After conclusion of arguments, this Court feels that following questions are required to be considered in the matter in issue.

(i) Whether the writ petition no.2397 (MB) of 2013 filed by L.N.N. challenging the auction proceedings initiated and carried out by IFCI Ltd. in furtherance to recover the due amount from the Uptron India Ltd. (lessee of L.N.N.),

which became due on account of default in payment of financial assistance provided by IFCI Ltd., is entertainable and maintainable before this Court or the L.N.N. should be relegated to avail the remedy available under Section 17 of the Act of 2002.

(ii) Whether the determination of lease by alleged order/notice dated 20.03.2013 by L.N.N. is just and proper.

(iii) Whether auction proceedings in relation to the property/land in issue, which belongs to L.N.N. and leased out to Uptron India Ltd., carried out by the IFCI Ltd. for recovery of outstanding dues/debt of Uptron India Ltd. under the provisions of the Act of 2002 and Rules 2002 is sustainable in the eye of law.

(iv) Whether the mortgagee IFCI Ltd. for the purposes of recovery of dues was empowered to sell the property/land in issue or was empowered to sell only lease hold rights available to the Uptron India Ltd. under the lease deed.

(v) Whether in the facts of the case, a direction can be issued to lessor to renew the lease.

(vi) Whether M/s. Shalimar is entitled to refund of 25% of bid amount with interest w.e.f. the date of passing of interim order dated 27.05.2013 in the Writ Petition No.2397 (MB) of 2013.

35. First, we would like to consider the issue of maintainability of the writ petition and in this regard, we feel it appropriate to reproduce Section 2(f), Section 13 and Section 17 of the Act of 2002.

*"**Section 2** (f) " borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a (asset reconstruction company) consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance (or who has raised funds through issue of debt securities).*

Section 13. Enforcement of security interest.-

"(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4).

[Provided that :

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and

conditions of security documents executed in favour of the debenture trustee;]

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

[(3A) if, on receipt of the notice under sub-section 92), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate [within fifteen days] of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17A.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub- section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub- section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

[(5A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorized by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.]

[(5B) Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13.]

[5C) The provisions of section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A).]

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub- section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub- section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,-

(i) the secured assets shall not be transferred by way of lease, assignment or sale by the secured creditor; and

(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.]

(9) [Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than (sixty percent) in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen' s dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen' s dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen' s dues cannot be ascertained, the liquidator

shall intimate the estimated amount of workmen' s dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen' s dues, such creditor shall be liable to pay the balance of the workmen' s dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.- For the purposes of this sub- section,-

(a) "record date" means the date agreed upon by the secured creditors representing not less than [sixty percent] in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measured specifies in clause (a) to (d) of sub- section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub- section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written con ent of the secured creditor.

Section 17. Application against measures to recover secured debts.--

"(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application along with such fee, as may be prescribed] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[Explanation.--For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.]

[(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction-

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession of the secured assets to the borrower or other aggrieved person, it may by order,-

(i) declare the recourse to any one or more measures referred to in sub-ssection (4) of section 13 taken by the secured assets as invalid and

(b) restore the possession of the secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c)pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section l3 to recover his secured debt.

[(4A) Where-

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy-

(a) has expired or stood determined; or

(b) is contrary to section 65A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under subsection (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause(c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems

fit in accordance with the provisions of this Act.]

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.]

36. Section 17 of the Act of 2002 provides remedy of appeal before DRT to any person (including borrower), if he is aggrieved by any of the measures referred to in Sub-Section 4 of the Section 13 taken by the secured creditor or his authorized officer.

37. Section 13 of the Act, 2002, which starts from non-obstante clause, says that notwithstanding anything contained in Section 69 or Section 69-A of the Act of 1882, any security interest created in favour of any secured creditor be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of the Act. As per Sub-Section (2) of Section 13 if the account/debt is classified by the secured creditor as NPA on account of default of repayment of secured debt or any installment thereof then the secured creditor may require the "borrower" by notice in writing to discharge in full his liabilities within 60 days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-Section (4).

38. Sub-Section 4 of Section 13 of the Act, 2002 provides measures to recover the secured debt from the "borrower", in case the "borrower" fails to discharge his liabilities in full within the period specified in Sub-Section (2).

39. Sub-section 4 (d) of Section 13 of the Act of 2002 empowers the secured creditors to call upon "any person" who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

40. As per Section 2(f) of the Act of 2002 expression "borrower" means a person who has been granted financial assistance by the Bank or Financial Institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any Bank or Financial Institution and

would also include a person who becomes borrower of a securitization company or reconstruction company consequent upon acquisition by it of any rights or interest of any Bank or financial institution in relation to such financial assistance.

41. Taking into account the scheme of the Act of 2002 and above quoted provision, in our view the expression "borrower" would also cover any person or institution who claims any right in the secured asset as legal heir/successor/representative/assignee/attorney of "borrower" or "guarantor" and would also cover "any person" who by virtue of lawful agreement enters into the shoes of "borrower" or "guarantor". Expression "borrower" would also cover any person who is covered under Section 13 (4) (d) of the Act of 2002. As such, a person who is not in the category, as stated, would not be considered as "borrower".

42. In the instant case, in our view, in the light of the observation made hereinabove, the L.N.N. would not come within the purview of expression "borrower".

43. Reverting to Section 13 and 17 of the Act of 2002, we would like to observe, in the light of aforesaid, that the provisions of Section 13 would apply to the "borrower" and "any persons" who is covered under Section 13 (4) (d) of the Act of 2002 and would not apply on a person who is neither covered under the expression "borrower" nor is person as mentioned in Section 13 (4) (d) of the Act of 2002. Thus, in our view the person who is covered under the expression 'borrower' and "a person" who is covered under Section 13 (4) (d) of the Act of 2002 being "a person" aggrieved by the measures adopted by the secured creditor under Section 13(4) of the Act of 2002 can approach to the appellate forum provided under Section 17 of the Act of 2002.

44. It would be appropriate to mention here that under Section 17 (3) of the Act of 2002, if the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession of the secured assets to the borrower or other aggrieved person, it may by order, (i) declare the recourse to any one or more measures referred to in sub-ssection (4) of section 13 taken by the secured assets as invalid and (b) restore the possession of the secured assets or management of secured assets to the borrower.

45. Taking into consideration the provisions of Section 2 (f), 13 and 17 of the Act of 2002 and what we have observed herein above with respect to expression "borrower", we are of the view that Section 17(1) can not be read independently and it has to be read in the context of Section 13 of the Act of 2002, which provides measures for recovery of debt from the "borrower" and "the person" covered under Section 13 (4) (d) of the Act of 2002, and accordingly we hold that the L.N.N. or any other person, who is neither covered under the expression "borrower", as held by us, nor is a person covered under Section 13 (4) (d) of the Act of 2002 would not be covered under the expression "Any Person" mentioned under Section 17 of the Act of 2002.

46. For the reasons aforesaid, we are of the view that the remedy of appeal

provided under Section 17 of the Act of 2002 is not available to L.N.N. as it is neither a borrower nor guarantor nor covered under the expression "borrower", as observed by us hereinabove, nor is "a person" covered under Section 13 (4) (d) and accordingly, we hold that the Writ Petition No.2397 (MB) of 2013 filed by L.N.N., challenging the auction proceedings initiated and carried out by IFCI Ltd. under the provisions of Act of 2002, is maintainable before this Court. First question answered accordingly.

47. In addition to above, in the light of the judgments, on which reliance has been placed on the issue of maintainability of the writ petition, we would also like to observe that relegating a party to avail the alternative remedy after elapsed of six years would prolonged the litigation between the parties and it would be against the principle of substantial justice. It is also in view of the fact that the matter is ripe for hearing and subjust matter of both the writ petition is the same.

48. In view of the aforesaid, we reject the submissions made by Sri Asit Chaturvedi on the issue of maintainability of writ petition.

49. With regard to question no.2, which relates to determination of lease, we have taken note of the following aspects:-

(i) The lease rent was demanded by the L.N.N. from Uptron India Ltd. vide letter dated 18.01.2002, as appears from notice dated 20.03.2013 (determining the lease) but the lease rent due from 1997-98 was not paid by the Uptron India Ltd.

(ii) The possession was taken by the IFCI Ltd. on 08.12.2012, as appears from the possession notice published on 09.12.2012, but the due lease rent even was not paid by the IFCI Ltd. till issung of notice dated 20.03.2013. The IFCI Ltd. after determination of lease submitted the lease rent to the L.N.N. through demand draft vide letter dated 28.03.2013. In view of the Section 65(d) of the Act of 1882, after taking over the possession of the property/land in issue, it was the liability of the IFCI Ltd. to clear the entire dues towards lease rent. The IFCI Ltd. failed to discharge its obligation as provided under Section 65(d) of the Act of 1882 in reasonable time.

(iii) The term no. 2 of the lease deed says that lease rent of each year shall be paid up by the lessee to lessor by the demand draft latest by the end month of April each year in advance and failure in making of such payment of rent regularly in advance by the end of April each year rendered the lease terminable by lessor by three months notice.

(iv) The violation of term no.6 of the lease deed, one of the reasons of determination of lease, is undisputed, which is the effect that Uptron India Ltd. failed to provide the information regarding sub-letting the parts of property/land in issue as also that the parts of the property/land in issue was sub-letted to third parties in an unauthorized manner.

(v) Terms no.8 of the lease deed provides termination of lease even before the expiry of the term of lease i.e. 30 years by notice of three months only.

(vi) Section 108(j) of the Act of 2002 empowers the lessee to transfer whole or any part of his interest in the property, which includes mortgage or sub-lease. It further provides that lessee shall not, by reason only of such transfer ceased to be subject to any of the liabilities attaching to the lease and in view of the same the determination of lease by the L.N.N., after

taking possession of the property/land in issue by the IFCI Ltd., in terms of the lease deed could not be held faulty.

(vii) The determination of lease is provided under Section 111 of the the Act of 1882. Section 111 does not provide that prior to determination of lease through notice determining the lease an opportunity should be provided to the lessee. Moreover, in the terms and conditions of the lease deed dated 23.05.1985, in issue, it has not been mentioned that prior to determining the lease an opportunity should be given to lessee. We have taken this issue of opportunity of hearing as the same was raised by the counsel for IFCI Ltd.

(viii) Under this question, we are also taking up the issue related to orders dated 06.04.2013 and 19.06.2013, challenged by IFCI Ltd. It is in view of the fact that no question has been framed in this regard as the orders dated 06.04.2013 and 19.06.2013 relate to determination/termination of lease. In regard to order dated 06.04.2013, whereby the L.N.N. refused to accept the lease rent tendered by the IFCI Ltd., we are of the view that to accept the lease rent or to refuse to accept the lease rent after determination of lease is the choice of the lessor and the lessee can not compel the lessor to accept the lease rent. It is in view of the provisions of the Act of 1882 particularly Section(s) 112, 113 and 116. Thus, we are of the view that the order dated 06.04.2013 there is no illegality in the order dated 06.04.2013. In regard to the order dated 19.06.2013, we have taken note of the fact that after determination of lease vide notice dated 20.03.2013 the Uptron India Ltd. represented its case before the L.N.N. vide letter/representation dated 23.03.2013, as appears from the order dated 19.06.2013, and the same was rejected by the impugned order dated 19.06.2013 on the basis of the fact that the tenancy has already been determined. In view of Section 111(h) of the Act of 1882 the tenancy would come to an end on the expiration of notice to determined the lease and in the instant case, on 20.03.2013 the L.N.N. informed the Uptron India Ltd. that the lease would come to end after expiration of three months on 19.06.2013 and the same has been narrated in the impugned order dated 19.06.2013. Thus, we are of the view that there is no illegality in the order dated 19.06.2013. For the reasons aforesaid, we are of the view that the orders dated 06.04.2013 and 19.06.2013 are not liable to be interfered.

50. Taking into account the above said facts, we are of the view that the L.N.N. determined the lease deed as per terms and conditions of the lease deed dated 23.05.1985 and Section 111 of the Act of 1882 and there is no violation of any term of the lease deed or statutory provisions. Question no. 2 answered accordingly.

51. With regard to question no.3, which relates to auction proceedings, in relation to property/land in issue, initiated and carried out for recovery of debt by the IFCI Ltd., we have considered the following aspect of the case:-

(i) Admittedly, the property/land in issue, of which the L.N.N. is the owner, was leased out to Uptron India Ltd. and in this regard the lease deed dated 03.05.1985 was executed and being so the Uptron India Ltd. was entitled to the rights available under the lease deed read with Section 108 of the Act of 1882.

(ii) The Uptron India Ltd. was never become the owner of the property/land in issue.

(iii) The Uptron India Ltd. by submitting the title deed as provided under Section 58(f) of the Act of 1882 with the IFCI Ltd. mortgaged the property/land in issue, leased out by L.N.N. It was for taking financial assistance.

(iv) The Uptron India Ltd. committed default and failed to repay the due amount to the IFCI Ltd.

(v) The IFCI Ltd. for recovery of debt took recourse of the provisions of the Act of 2002 particularly Section 13.

(vi) A perusal of the possession notice dated 08.12.2012, published in the newspaper on 09.12.2012, shows that in the said notice it has not been specifically mentioned that IFCI Ltd. has taken the possession of the property leased out by the L.N.N. to the Uptron India Ltd. and IFCI Ltd. steps into the shoes of Uptron India Ltd. as lessee of the L.N.N.. From the contents of the possession notice, an impression can be drawn by the public at large that the IFCI Ltd. steps in as owner of the property.

(vii) From the letter dated 11.12.2012 written by IFCI Ltd. to Uptron India Ltd., U.P. Electronic Corporation and the Principal Secretary, Telecommunication Government of U.P., relevant portion of which is quoted hereinunder, also gives an impression that IFCI Ltd. was intending to sell the property/land in issue and not the lease hold rights.

(a) "We hereby give you notice under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 and in case the dues as mentioned in the possession notice are not cleared within the stipulated time off 30 days from the date of this letter, the secured creditor will ***proceed with the sale of the secured assets*** *by invoking any modes as mentioned in Rule 8(5) of the Security Interest (Enforcement) Rules, 2002".*

(viii) The auction/public notice dated 22.01.2013 is already quoted above, however, for ready reference relevant part of the same is quoted below:-

(b) ""... Sealed bids are invited for purchase of movable and immovable assets of two units of M/s UPTRON INDIA LTD. (UIL) at Village Jugauli (earlier known as Ujariyan Gaon), Near Gomti Barrage, Gomti Nagar, Lucknow, Uttar Pradesh AND ....."

Further under particulars of Assets, the description of the property for sale has been mentioned as under :

"Unit 1: Gomti Nagar, Lucknow, Uttar Pradesh

Village Jugauli (earlier known as UjariyanGaon) Near Gomti Barrage, Gomti Nagar, Lucknow, Uttar Pradesh admeasuring 8 Bigha, 2 Biswansi togather with all the buildings and structures / erections constructed erected thereon, plant and machinery attached to the earth or permanently fastened to anything attached to the earth and fixtures and fittings erected / installed thereon and every part thereof."

Para 5 of the auction/public notice again mentions reads as under:-

"The successful bidder shall deposit 25% of the amount of sale price after adjusting the EMD already deposited within two (2) working days of acceptance of the offer by the Authorized Officer failing which the EMD shall be forfeited. The balance 75% of the sale price is payable on or before 15th day of issue of letter of acceptance confirming the highest bid (Letter of Acceptance)."

(ix) A perusal of the auction notice dated 22.01.2013 would shows that in the same it has not been mentioned that the auction proceedings would be carried out by the IFCI Ltd. only with respect of lease hold rights.

(x) Section 108 (j) of the Act of 1882 provides that the lessee can only mortgage or sub-lease whole or any part of his interest in the property and any

transferee of such interest or part may again transfer it and it further provides that the lessee shall not by reason only of such transfer cease to be subject to any of the liabilities attaching to the lease and in view of the same as well as in view of Maxim(s) "Nemo Dat Quod Non Habet" (no one can bestow or grant a greater right, or a better title than he has himself) and "Nemo Plus Juris Tribuit Quam Ipse Habet" (no one gives what he has not got) only lease hold rights could have been auctioned but otherwise impression appears from the possession notice as also from the auction notice, and accordingly in view of the same as also keeping in view the provisions of Rule 8(6) (a) of the Rules, 2002 the auction proceedings are not sustainable.

(xi) It would be relevant at this stage to refer the judgment of the Division Bench passed in the case of Rakesh Kumar Kaushal vs. State of U.P. & Others, 2019 (1) ADJ 689. In this case, the Division Bench of this Court after considering the Section 13,14 and 17 of the Act of 2002 and Rules 8 and 9 of the Rules, 2002, in facts of the case held that writ petition is maintainable and also held that the responsibility of bank does not get diluted by merely inserting a clause "as is where is and as is what is" and further held that secured creditor is under a mandate to disclose every aspect of the property to be auctioned under the provisions of Act of 2002 and Rules, 2002. The relevant paras are quoted below :

21. The manner and procedure, in which the secured assets have to be disposed of, has been detailed in the Rules, 2002, and especially in Rule 8 and 9 of the said Rules. For ready reference Rule 8 and 9 are quoted below:-

"8. Sale of immovable secured assets.--

(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:--

(a)by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5): Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,--

(a) The description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e)depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems if fit, put on the web-site of the secured creditor on the Internet.

(8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing.

9. Time of sale, issues of sale certificate and delivery of possession, etc.--

(1)No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower. .

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor: Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9: Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent. of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the

purchaser in the form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if the thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.

(8) On such deposit of money for discharge of the encumbrances, the authorised officer may issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9)The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10)The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."

22. The aforesaid provisions enjoins that Authorised Officer shall take or cause to be taken possession, by delivering a possession notice, and the same should also be published within 7 days in two leading newspapers, and the notice is also to be served upon the borrower as per the methods prescribed therein.

23. Sub-rule (3) of Rule 8 provides for possession of immovable property if it is actually taken by the Authorised Officer, who shall keep the same in his own custody or in the custody of any other person appointed by him, and it shall be his duty to take steps for preservation and protection of the secured interest. The rules further provides for obtaining the valuation of the property by the approved valuer and the secured asset also to fix reserve price of property by methods provided for in sub rule (5) by obtaining quotations, tenders, public auctions or by private treaty, and in case the secured asset is being sold by inviting tenders or holding public auction the secured creditor shall have the notice published in two leading newspapers having sufficient circulation clearly stating the terms for sale including description of the immovable property to be sold, the detail of encumbrances known to the secured creditor, the reserve price and place of public auction, deposit of earnest money, and any other thing which the Authorised Officer considers it material for a purchaser to know in order to judge the nature and value of the property.

24. Rule 9 of the aforesaid Rules provides for time of sale, issue of sale certificate and delivery of possession apart from other mandatory guidelines. Further, sub-rule (9) of Rule 9 provides that the Authorised Officer shall deliver the property to the purchaser free from encumbrances.

25. As far as the present case is concerned, the petitioner is not aggrieved by any of the measures taken by the respondent bank, rather he is aggrieved by inaction in not handing over the possession of the auction property and, therefore, there is no occasion for the petitioner to approach the Debt Recovery Tribunal challenging any action of the Bank taken under subsection (4) of section 13.Under sub-section (b), the Debt Recovery Tribunal can only restore the possession. It is admitted case of the parties that the

petitioner was never in possession, inasmuch as he is only an auction-purchaser seeking possession of the auctioned property being the successful bidder.

26. The entire gamut of remedies provided under Section 17 of the SARFAESI Act is to oversee that the statutory provisions of Section 13(4) read with Rule 8 and 9 of the Rules, 2002 are adhered to, and the Debt Recovery Tribunal would immediately step in, whenever it finds any infraction by the secured creditor.

27. The respondent Bank in paragraph 8 of its short counter affidavit has stated that they have moved an application under Section 14 of the SARFAESI Act on 08/05/2017, which was supposed to be disposed of by 7th June 2017, but the District Magistrate has failed to pass the order even till date i.e. 26.11.2018 despite the case being fixed on fifty nine occasions. It is for this reason that the physical possession could not be handed over to the petitioner and the Bank is eventually pursuing the matter before the District Magistrate Sultanpur. They have also stated that the Field General Manager of the Bank has also written a letter dated 09/08/2018 to the Director General, Directorate of Institutional Finance, Uttar Pradesh for early disposal of various application moved by the Bank under Section 14 of the SARFAESI Act where the property in question is also involved.

28.That the respondent bank in support of its contention with regard to the alternative remedy has placed before us judgement of the Hon'ble Supreme Court in the case of Agarwal Tracom Pvt Ltd vs Punjab National Bank and Others, 2017 AIR (SC) 5562.

29. That in the aforesaid judgment there was a dispute between the bank and the auction purchaser whereby the bank had forfeited the deposit money as the appellant therein had failed to pay regular instalments towards sale money in terms of memorandum of understanding. The Hon'ble Supreme Court in paragraph number 31 of the said judgement have stated that the auction purchaser is one such person who is aggrieved by the action of the secured creditor in forfeiting their money, and found that the action of secured creditor in forfeiting the deposit made by the auction purchaser is part of the measures taken by the secured creditor under section 13 (4) and, therefore, the High Court was justified in dismissing the writ petition on the ground of availability of alternate remedy.

30. So far as the present case is concerned, there is no dispute between the auction-purchaser and the Bank with regard to any of the measures under section 13 (4) of the SARFAESI Act read with rule 8 and 9 of the Rules, 2002. Here, the petitioner, who is a auction-purchaser has deposited the entire amount of bid and the Bank has issued a sale certificate dated 15/07/2017, wherein it has been recorded that "the undersigned acknowledges the receipt of the sale price of Rs. 60 lakhs in full and handed over the delivery in possession of the schedule property". The said sale certificate issued under rule 9(6) has been signed by Authorised Officer, Allahabad bank. The Bank has stated that though the sale certificate has not been received by the petitioner, but the Bank is ready to hand over the sale certificate to the petitioner. In view of the above the judgment of the Hon'ble apex court in the case of Agarwal Tracom Pvt Ltd vs Punjab National Bank and Others is clearly distinguishable on facts, and in the peculiar set of facts and circumstances of this case, the petitioner does not have any efficacious

alternative remedy under the SARFAESI Act.

31. Putting it differently, here the petitioner is not aggrieved by the action of the secured creditor nor any of the reliefs to which the DRT is empowered to grant under this section, would be of any use to redress the grievance of the petitioner, and therefore the plea of alternate remedy raised by the respondent bank is misconceived and is rejected.

32. It may be clarified here that the District Magistrate has not passed any order in excise of powers conferred upon him under Section 14 of the SARFAESI Act, despite 59 dates having been fixed in this regard, and we, therefore, record our strong disapproval in the manner in which the District Magistrate has not taken any action on the application of the bank. It has further been brought out on record that a list of 47 properties is being enclosed wherein application under Section 14 of SARFAESI Act have been moved before the various District Magistrates in Uttar Pradesh, which are pending for more than 60 days without any order. The inaction on part of the District Magistrates will have a detrimental effect in securing the possession of the properties and therefore effective mechanism must be taken by respondent no.1 in this regard.

33. The 2nd issue which arises for our consideration is with regard to the clause contained in the advertisement for e-auction, which provides that the property was being sold on "as is where is Basis, as it is where it is Basis and whatever there is", which according to the Bank, dis-entitles the petitioner from seeking any claim against the respondent bank.

34. In this regard, we would like to mention that relevant provisions of the SARFAESI Act and the Security Interest (Enforcement) Rules have already been quoted wherein sub rule (5) of Rule 8 of the Rules, 2002, provides for publication of the notice into leading newspapers which shall include details as set forth in sub-clause (a) to (f). Sub-clause 6 (f) of Rule 8 provides for publishing of "any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property". In these circumstance, a duty is cast upon the Authorized Officer to publish all details with regard to the property, whether the property has any encumbrances or not, whether the property is a vacant property or is tenanted, whether there is any other charge on the said property, and all other details which is material for the purchaser to know in order to judge the nature and value of the property.

35. In the present case, the advertisement does not disclose any such detail about the property from which it can be easily inferred that the same is in possession of some third-party, or that there is a litigation pending or for some material reason, it would be difficult to obtain the vacant possession of the property. A joint reading of section 13 (4) of the SARFAESI Act and Rule 9 (clauses 9 and 10) would clearly show that the Authorised Officer, shall deliver the property to the purchaser, free from all encumbrances, on deposit of money as specified in sub rule 2. However, the aforesaid rule does not prevent the bank from bringing the property for auction, when there are encumbrances attached to the property. Merely, by including a clause "as is where is basis or as is what is' condition stated in the sale notice does not obviate the bank from disclosing the encumbrances attached to the property, brought for auction.

36. The bank cannot shrug off its responsibility in disclosing the

encumbrances in the advertisement when it is known that transparency is the essence of good governance and fair play. Concept of transparency is is becoming a core value in democratic and participative governance. The public demand for transparency is getting stronger in good governance. Transparency is built on the basis of free flow of information and the whole process of government, institutions and information needs to be accessible to the interested parties, as well as the information provided should be sufficient to be understood.

37. The undisputed fact in the case at hand is that when notice under section 13(4) of the SARFAESI Act was issued by the Bank, the physical possession of the mortgaged property was not taken. There is a duty cast upon the Bank under clause (9) of rule 9 of the Rules, 2002 to deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub rule (7). In the writ petition it has rightly been asserted by the petitioner that he was shocked when he came to know that there were some defects in title of the aforesaid property and the same is defective, which was not disclosed by the Bank at any stage, rather it suppressed the material information.

38. It may be noted that when a person participates in auction to purchase a property, he relies on the auction notice and the documents shown to him by the secured creditor, as he is under a bona fide belief that any material aspect of the property must have been disclosed by the secured creditor inasmuch as the secured creditor is under a mandate to disclose any aspect which the Authorised Officer considers it material for the purchaser to know in order to judge the nature and value of the property as mandated under rule 8(6). The respondent bank has failed to disclose any such circumstance or material fact from which it could be gathered that the physical possession of the property would be difficult or near impossible. In the aforesaid circumstances the respondent Bank cannot take umbrage of the clause "as is where is" "as it is where it is" in order to deny physical possession of the auction property to the petitioner and to non-suit him. In other words, the respondent cannot shirk away the statutory responsibility to deliver possession of the property free from all encumbrances, to the person who was paid full consideration for the said property.

39. Accepting the contention of the Bank would be absolutely inequitable, wholly arbitrary and may on the contrary permit withholding of necessary information by the secured creditor in relation to its valuation in order to seek a higher price of the property. If such an advantage is permitted, it would directly affect the credibility of the entire process and the object of the SARFAESI Act, which is sought to be achieved.

40. The third-party, who comes forward to purchase the secured asset must have the confidence that he would get the property at the earliest and in case, considerable long time is consumed in transferring the property not only it would defeat the purpose of the Act but would also cause colossal loss and injury to a auction-purchaser, like the petitioner.

41. In light of the above, we are of the considered opinion that by merely inserting a clause "as is where is" and "as is what is" the responsibility of the Bank does not get diluted nor it can in any manner assist the bank in denying physical possession to the auction purchaser.

42. Needless to say, that when the Bank has information that there is certain charge on the property, or the property is

already encumbered, etc. it can be made known when a notice is published under Rule 8(6) and it would not be necessary for the Bank in such a situation to hand over the physical possession of the property. But in the present case, the Bank has not given any details of any encumbrances, or charge on the property or any such fact which would deny the auction purchaser from the physical possession of the property, and therefore, just by inserting a clause "as is where is"" as is what is" it would not dis-entitle the successful auction purchaser from claiming the physical possession of the secured asset after paying the bid price to the satisfaction of the secured creditor."

52. Taking into consideration the above pointed out facts related to possession notice as also in the auction notice dated 22.01.2013 and the Rule 8(6) (a) of Rules, 2002 and the observation made by this Court in the case of Rakesh Kumar Kaushal (supra), we are of the view that the auction proceedings in relation to the property/land in issue carried out by the IFCI Ltd. are not sustainable. Question no. 3 answered accordingly.

53. Question no. 4 broadly relates to rights of the IFCI Ltd. in the property/land in issue. In this regard, Section 108(j) of the Act of 1882 is relevant, which empowers the lessee to transfer whole or any part of his interest in the property. It says that the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property and any transferee of such interest or part may again transfer it. In the instant case, the property/land in issue was mortgaged by the lessee-Uptron India Ltd. (Mortgager) with IFCI Ltd. (Mortgagee). By virtue of mortgage as also in view of Section 108(j) of the Act of 2002, the IFCI Ltd. entered into the shoes of lessee-Uptron India Ltd.

54. Thus, after taking note of the aforesaid as well as the Maxim(s) "Nemo Dat Quod Non Habet" (no one can bestow or grant a greater right, or a better title than he has himself) and "Nemo Plus Juris Tribuit Quam Ipse Habet" (no one gives what he has not got), we hold that IFCI Ltd. was not having more than the rights which were available under the lease to Uptron India Ltd. Question no.4 answered accordingly.

55. Question no. 5 is that whether in the facts of the case a direction can be issued to the lessor to renew the lease. In this regard, we have considered the following aspects:-

(i) The lease is a contract between the lessor and lessee. The lessor must have the capacity and the right to grant a lease. As per Section 7 of the Act of 1882 every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property. Though a minor cannot, his guardian can grant a lease. The manager of a lunatic, the Karta of a joint Hindu family, can grant a lease. But one out of several co-sharers cannot grant a lease unless he is authorized by all the co-sharers to do so. A lease of immovable property, as per Section 105 of the Act of 1882, is a transfer of a right to enjoy of such property made for certain time, express or implied or in perpetuity. The transaction must be in consideration of a price paid or promised (premium, salami or nazrana). In consideration of money, share of crops, service or any other thing of value to be rendered periodically or on specified

occasions to the transferor by the transferee (rent). The rights and liabilities of the parties to the lease would be governed by the terms and conditions settled between the parties.

(ii) In the instant case, there is a registered lease deed and accordingly the rights and liabilities of the parties to the lease would be governed by the terms and conditions settled between the parties to the deed.

(iii) It is open to the parties to fix the duration or period of the lease. Section 106 of the Act of 2002 provides that, in the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, and a lease for any other purpose shall be deemed to be a lease from month to month.

(iv) Sometimes a lease contains a renewal clause. In the instant case, the lease was provided for 30 years with two rights of renewal for the similar term of 30 years.

(v) As per term 9 of the lease deed dated 23.05.1985, the lessee is under obligation to obtain the renewal from the lessor on the expiry of term of the lease.

(vi) A right of renewal should be exercised in writing.

(vii) The tenant not being in breach of terms of the lease is entitled for renewal of lease.

(viii) It appears from term 9 of the lease deed dated 23.05.1985 that right of renewal can be exercised during the term of the lease and not after determination of lease.

(ix) In the instant case, the lease was determined on 20.03.2013 and till that date the right of renewal was not exercised by lessee or any other person entered into the shoes of lessee.

(x) The term of the lease deed dated 23.05.1985 has already been expired on 23.05.2015.

56. In the facts of the case, as narrated herein above, we are of the view that no direction can be issued to the lessor-L.N.N. to renew the lease. Question no.5 is answered accordingly.

57. Question no.6 is to the effect that whether M/s. Shalimar is entitled to refund of 25% of bid amount with interest from the date of passing of order dated 27.05.2013. In this regard, we have considering the following aspects of the case.

(i) The bid, with respect to property/land in issue, submitted by M/s. Shalimar pursuant to auction notice dated 22.01.2013, published on 23.01.2013 in daily newspaper namely Dainik Jagran, was accepted by IFCI Ltd. and vide letter dated 01.03.2013 M/s. Shalimar was called upon to deposit 25% of the bid amount i.e. Rs.18,64,01,000/-, which was deposited by M/s. Shalimar.

(ii) On 19.03.2013 this Court passed the interim order, whereby restrained the opposite parties to the Writ Petition No.2397 (MB) of 2013 including IFCI Ltd. from confirming the sale of the property/land in issue.

(iii) Till today the sale of property in issue has not been confirmed in favour of M/s. Shalimar.

(iv) This Court on 27.05.2013 passed the interim order whereby directed the IFCI Ltd. to deposit the bid amount in the interest bearing account.

(v) Rule 9 (6) and 9 (9) of the Rules, 2002 casts duty on the authorized officer of the Financial Institution to issue sale certificate on confirmation of sale and also to deliver the possession of the property to the purchaser free from all encumbrances known to the secured creditor on deposit of amount as specified in Sub-rule (7) of Rule 9 of Rules, 2002.

(vi) In the instant case, on account of interim order passed by this Court, neither sale was confirmed nor possession was delivered to M/s. Shalimar by the authorized officer. On account of the same M/s. Shalimar could not utilize the property/land in issue.

(vii) In the preceding paras we have already held that auction proceedings in relation to property/land in issue carried out by IFCI Ltd. are unsustainable and the lease, which was rightly determined and no direction to renew the lease can be issued.

58. Taking into account the aforesaid, we are of the view that M/s. Shalimar is entitled to refund of 25% of bid amount i.e. 18,64,01,000/- from IFCI Ltd with interest from the date of passing of interim order dated 27.05.2013.

59. For the foregoing reasons, the Writ Petition No.4517 (MB) of 2013 (IFCI Ltd. vs. Lucknow Municipal Corporation and others) is hereby ***dismissed*** and Writ Petition No.2397 (MB) of 2013 (Lucknow Nagar Nigam vs. State of U.P. and others) is ***allowed*** and the auction/sale proceedings carried out in relation to property/land in issue i.e. land measuring 2,17,936 sq. ft. land of Sullage Farm situated in Village-Jugauli (earlier Village-Ujariyaon) leased out to M/s Uptron Digital System Limited (M/s Uptron India Ltd.) by Lucknow Nagar Nigam through lease deed dated 23.05.1985 are hereby quashed. Consequence shall follow. Further, keeping in view the interim order dated 27.05.2013 passed in Writ Petition No.2397 (MB) of 2013 and the observations made by us that M/s. Shalimar Corporation Ltd. is entitled to refund of 25% of bid amount from IFCI Ltd. as also in the interest of substantial justice, we provide liberty to M/s. Shalimar Corporation Ltd. to represent its case before the IFCI Ltd. for refund of 25% of the bid amount with interest within two months from the date of receipt of a certified copy of this order and we hope and trust that the IFCI Ltd. would release the same keeping in view the observations made herein above expeditiously.

(2020)03-05ILR A869
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.03.2020

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Application U/S 482/378/407 No. 783 of 2019

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

Counsel for the Applicant:
Lakshmi Narain, R.D. Pathak, Shamsher Ali, V.K. Tripathi

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law – Code of criminal procedure, 1973 - Section 482 - Inherent jurisdiction - Indian Penal Code, 1860 - Section 406, Section 504, Section 506 - Magistrate - rejected the complaint - Revisional court - rejected the revision – ground - matter of being civil nature - ingredients of Section 406, Section 504, Section 506 I.P.C. are absent - No case made out to invoke the extraordinary writ jurisdiction under Section 482 CrPC. (Para-8,12)

The petitioner and the private respondent were known and familiar to each other and because of this, the petitioner gave a loan of Rs. 2 lacs to the private respondent - respondent did not repay the borrowed money. (Para-10)

HELD:- Criminal proceedings cannot be invoked as a short cut for the purely civil remedies as the latter is more time consuming – petitioner is at liberty to avail other remedies, provided under law, for recovery of his money. (Para-10)

Petition u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Kailash Kumar Sanwatia Vs. St. of Bihar & anr., (2003)7 SCC 399

2. Indian Oil Corporation Vs. NEPC India Ltd., (2006)6 SCC 736

3. Binod Kumar & ors. Vs. St. of Bihar & anr., (2014)10 SCC 663

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. The petition has been filed under Section 482 Criminal Procedure Code for quashing order dated 20.11.2017 passed in Complaint Case No.2664/2014 by Addl. Chief Judicial Magistrate, Court No.31, Lucknow and order dated 16.10.2018 passed by Addl. District & Sessions Judge, Court No.9, Lucknow in Criminal revision No.966 of 2017

2. In the petition it has been pleaded that respondent No.2 Jagdish Saran had borrowed a sum of Rs.2 lacs from the petitioner on 20.11.2010, however, respondent did not repay the borrowed money. On a request being made by the petitioner to repay the money, respondent No.2 abused him and threatened to kill. The petitioner, in this context, submitted an application to the police of police station Talkatora, Lucknow and higher police authorities. However, finding that no action was being taken by the police, the petitioner filed a Complaint Case No.2664 of 2014 which has been rejected by the Court below vide order dated 20.11.2017.

Feeling aggrieved, the petitioner filed a Criminal Revision No.966 of 2017 before the Sessions Court, which too has been rejected vide a detailed order dated 16.10.2018 (Annexure-3).

3. Learned counsel for the petitioner has submitted that the learned Magistrate has ignored the averment contained in para 7 of his complaint dated 12.8.2014 filed before the Court below, whereby he had demonstrated that on a phone call, the respondent No.2 used abusive language, with threat to kill him, and rejected the complaint on the ground of the dispute being of civil nature. The respondent No.2 has committed a criminal breach of trust by not repaying the loan taken by him. In this context, learned counsel relied on a judgment of Hon'ble Supreme Court of India reported in **(2003)7 SCC 399 Kailash Kumar Sanwatia versus State of Bihar and another.**

Learned counsel has submitted that the learned Magistrate as well as the revision Court have committed a manifest error in treating the issue involved in the matter of civil nature.

4. Per contra, learned Additional Government Advocate Mr. S.N. Goswami appearing on behalf of the State has submitted that the orders passed by both the Courts below are justified order(s). The dispute is of civil nature between two private parties as it involves transaction of money. He further submits that none of the ingredients of Section 405 or Section 409 are attracted in the present case.

5. I have heard learned counsel for the petitioner, learned Additional Government and perused the orders passed by the Courts below.

6. A perusal of the complaint dated 12.8.2014 filed under Sections 406, 504, 506 I.P.C., P.S. Tal Katora, district Lucknow shows that in paras 3 to 7 thereof, it has been stated by the petitioner that he gave loan of Rs.2 lacs on 20;11.2010 to the private respondent Jagdish Saran who assured to return it in a month. Thereafter, when the petitioner tried to recover his loan, the private respondent assured him on telephone that he will return the loan. Thereafter again, he assured that since he is about to get some money he would return the loan. Ultimately, the private respondent stopped coming to the petitioner's home and also stopped talking on telephone. Lastly, when the petitioner contacted him from his (private respondent) other telephone number, the latter abused and threatened him.

Contrary to the averments made in the complaint , it has been contended that the money was entrusted to the private respondent who with a dishonest intention misappropriated it for his own use to the detriment of the petitioner.

A further perusal of the averments made in the complaint reveals that the issue between the parties is a pure case of lending and borrowing, may be even a friendly loan. However, by no stretch of imagination, it can be an entrustment.

7. In the case of Kailash Kumar Samwatia (supra), the appellant entrusted a sum of Rs.1,50,200/- to the accused at the instance of another accused/Head Cashier of the State Bank of India and for preparing the drafts. Later on, he was informed that the money handed over by him was missing from the cash counter. On this, the informant appellant filed a written report on the basis of which case was instituted and investigation undertaken. Hon'ble Supreme Court in para 9 has explained the basic requirements to bring home the accusations under Section 405 I.P.C. which reads as under :

*"The basic requirement to bring home the accusations under section 405 are the requirements to prove con-jointly (1) entrustment, and (2) whether the accused was actuated by the dishonest intention or not; misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful g*uidance in deciding whether in a particular case the accused had mens rea for the crime."

In Kailash Kumar Sanwatia' case (supra), there was a loss of money, therefore, it was held that ingredients necessary to constitute criminal breach of trust were absent and the accused persons cannot be convicted under Section 409 I.P.C. Although, there was an entrustment, however, due to an intervening situation, the accused person whom the money was entrusted was incapacitated from carrying out the job and therefore, it was held that the provisions of Section 405 or 409 I.P.C. are not attracted.

8. In the present case, even the element of entrustment is absent and therefore, learned Magistrate vide order dated 20.11.2017 has rightly rejected the complaint on the ground that the matter is purely of civil nature. Likewise, the learned

revisional court has also rejected the revision on the same ground of the matter of being civil nature and since no element of criminal breach of trust is borne out from the record, therefore, ingredients of Section 405 I.P.C. are absent. Learned Courts below have rightly held that the dispute is purely of civil nature.

9. I find that there is a growing tendency in the business circles to convert purely civil disputes into criminal cases so as to unnecessary harass the common man by giving a criminal colour to civil dispute(s). In this context, Hon'ble Supreme Court in the case reported in **(2014)10 SCC 663 Binod Kumar and others versus State of Bihar and another** while relying on Indian Oil Corporation versus NEPC India Limited (2006)6 SCC 736 held in paras 10 and 11 as under :

"10. In Indian Oil Corporation versus NEPC India Limited, this Court has summarized the principles relating to exercise of jurisdiction under Section 482 Cr.P.C. to quash complaints and criminal proceedings as under:-(SCC pp. 747-48, para 12)

"12.The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few- Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre (1988) 1 SCC 692, State of Haryana v. Bhajan Lal,1992 Supp (1) SCC 335; Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995) 6 SCC 194, Central Bureau of Investigation v. Duncans Agro Industries Ltd (1996) 5 SCC 591; State of Bihar v. Rajendra Agrawalla (1996) 8 SCC 164, Rajesh Bajaj v. State NCT of Delhi,(1999) 3 SCC 259; Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd(2000) 3 SCC 269 [pic]Hridaya Ranjan Prasad Verma v. State of Bihar (2000) 4 SCC 168, M. Krishnan v. Vijay Singh (2001) 8 SCC 645 and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque(2005) 1 SCC 122. The principles, relevant to our purpose are:

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted

only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or

(b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

"11. Referring to the growing tendency in business circles to convert purely civil disputes into criminal cases, in paragraphs (13) and (14) of the Indian Oil Corporation's case (supra), it was held as under:-

"13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, [pic]leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. In G. Sugar Suri v. State of U.P., this Court observed : (SCC p. 643. para 8)

*"8....**It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.'***

14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

(Emphasised by me)

10. In view of the law laid down by Hon'ble Supreme Court and also considering the material on record, no offence under Section 406 I.P.C. is made out. The petitioner and the private respondent were known and familiar to

each other and because of this, the petitioner gave a loan to the private respondent, therefore, the dispute is purely of civil nature. Hence, no offence under Section 406 is made out. Criminal proceedings cannot be invoked as a short cut for the purely civil remedies as the latter is more time consuming.

11. As regards the other allegation with regard to Sections 504, 506 I.P.C., there is a bald assertion in the complaint that the petitioner on being demanded his money was threatened, however, in support thereof, the statement under Sections 200 and 202 CrPC recorded by the trial court have not been filed with the present petition. It appears to be an effort on the part of the petitioner to settle civil dispute and claims which do not involve any criminal offence by applying pressure through criminal prosecution.

12. In view of the above, this Court does not find any fault with the orders impugned in the present petition. No case is made out to invoke the extraordinary writ jurisdiction under Section 482 CrPC.

13. The petition fails and is accordingly dismissed. The petitioner is at liberty to avail other remedies, provided under law, for recovery of his money.

(2020)03-05ILR A874
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 65 of 2020

The Director General, R.P.F. Railway Board New Delhi & Ors. ...Appellants
Versus
Rajiv Kumar Singh ...Respondent

Counsel for the Appellants:
Sri Praveen Kumar Srivastava

Counsel for the Respondents:
Sri Vijay Gautam, Sri Ambrish Chatterji

(A) Civil Law-Railway Protection Force Rules, 1987 - Section 21 -Intra-Court Special Appeal - - made by the Central Government in exercise of powers conferred by of the Railway Protection Force Act, 1957 which are referrable to subject mentioned under Entry 22 of List 1 of the Seventh Schedule - special appeal against any revisional or appellate order passed under the aforesaid Act would be maintainable

The appellate and revisional jurisdiction having thus been exercised under a Central Act in respect of a matter enumerated under the Union List and not in respect of a matter under the State list or the Concurrent List of the Seventh Schedule of the Constitution of India, the exclusion under Chapter VIII Rule 5 would not be attracted and therefore special appeal would be maintainable. (para 12)

(B) Civil Law-Railway Protection Force Rules, 1987-- Rule 52 -Concealment of facts in declaration form - clear obligation upon a prospective candidate to make a candid and truthful disclosure in respect of the information sought in the verification form - non disclosure or concealment of the material facts would have a direct link to the suitability of the person for being appointed in service

As per Rule 52, a prospective employee may be refused employment on the ground of unsatisfactory antecedents and character. Suppression of material information or making a false statement in reply to specific queries in the

verification form which may lead to an inference of a dubious conduct and absence of a character of the prospective employee at the time of making the declaration may therefore also be held making him unsuitable for being appointed as a member of the force. (Para 37)

Special Appeal Allowed. (E-10)

List of cases cited:

1. Vajara Yojna Seed Farm & ors. Vs. Presiding Officer, Labour Court II & ors. (2003) 1 UPLBEC 496

2. Sheet Gupta Vs. St. of U.P. & ors. AIR 2010 All 46 (FB)

3. Oriental Bank of Commerce, Kanpur Vs. UOI & ors. 1997 (3) A.W.C. 1597

4. Director General, C.R.P.F. Vs. Lalji Pandey (2010) 2 UPLBEC 1589

5. Jainendra Singh Vs. St. of U.P. through Principal Secretary, Home & ors. (2012) 8 SCC 748

6. Avatar Singh Vs. UOI and ors. 2016 98) SCC 471 *(followed)*

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

1. The present special appeal has been filed against the judgment and order dated 21.10.2019 passed in Writ-A No. 37611 of 2002 (Rajiv Kumar Singh Vs. Director General/R.P.F. and others) whereby the writ petition has been allowed and the orders dated 22.07.2002, 31.5.2001 and 12.4.2001, which were under challenge therein, have been set aside.

2. A preliminary objection has been raised by the learned Senior Counsel appearing for the respondent-petitioner that the special appeal is not maintainable as per the provisions contained under Chapter VIII Rule 5 of the Allahabad High Court Rules (Rules of the Court, 1952)1 inasmuch as the writ petition had been filed seeking to challenge the order of termination against the petitioner as also the orders passed in appeal and revision under the statutory rules.

3. The provision with regard to filing of an intra-court appeal under the Rules of the Court, 1952, is contained under Chapter VIII Rule 5 of the aforementioned Rules, and the same is as follows :-

"5. Special appeal :- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of Appellate Jurisdiction) in respect of a decree or order made by a Court subject to the Superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of Superintendence or in the exercise of criminal jurisdiction or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award-- (a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of Appellate or Revisional Jurisdiction under any such Act of one Judge."

4. The language under Rule 5, referred to above, is couched in a manner whereunder an intra-court appeal would not lie in certain specified cases. The Rule

provides for certain specified exclusions whereunder a special appeal would not lie from a judgment of one judge of this Court. The exclusions under Chapter VIII Rule 5 of the Rules of the Court, 1952 were considered in the case of **Vajara Yojna Seed Farm and Ors. Vs. Presiding Officer, Labour Court II and Ors.2 ,** and it was held as under :-

"64. From the above discussions and looking into the provisions of U.P. Act No. 14 of 1962 as amended by Amendment Act of 1981 and Chapter VIII, Rule 5 of the Rules of the Court, 1952, special appeal is excluded from a judgment of one Judge of this Court in following categories :-

(i) Judgment of one Judge passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court.

(ii) Judgment of one Judge in the exercise of revisional jurisdiction.

(iii) Judgment of one Judge made in the exercise of its power of Superintendence.

(iv) Judgment of one Judge made in the exercise of criminal jurisdiction.

(v) Judgment of order of one Judge made in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award of a Tribunal, Court or Statutory Arbitrator made or purported to be **more** in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in State List or Concurrent List.

(vi) Judgment or order of one Judge made in exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award by the Court or any officer or authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any Uttar Pradesh Act or under any Central Act."

5. The issue of maintainability of a special appeal under the aforementioned Rule again came up for consideration before a Full Bench of this Court in **Sheet Gupta vs. State of U.P. and others3,** and it was stated thus:-

"15. Having given our anxious consideration to the various plea raised by the learned counsel for the parties, we find that from the perusal of Chapter VIII Rule 5 of the Rules a special appeal shall lie before this Court from the judgment passed by one Judge of the Court. However, such special appeal will not lie in the following circumstances:

1. The judgment passed by one Judge in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the Superintendence of the Court;

2. the order made by one Judge in the exercise of revisional jurisdiction;

3 the order made by one Judge in the exercise of the power of Superintendence of the High Court;

4. the order made by one Judge in the exercise of criminal jurisdiction;

5. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award by

(i) the tribunal,

(ii) Court or

(iii) statutory arbitrator

made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or

under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India;

6. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of India in respect of any judgment, order or award of

(i) the Government or

(ii) any officer or

(iii) authority,

made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India. "

6. The various exclusions provided for under Rule 5 of Chapter VIII whereunder an intra-court appeal would not lie would therefore include a case where an appeal is sought to be preferred against an order made by one judge in exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of India in respect of any judgment, order or award of the government or any officer or authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any Uttar Pradesh Act or any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India.

7. The question of maintainability of a special appeal under the Rules of the Court, 1952, in the context of a judgment rendered by a Single Judge in exercise of jurisdiction conferred by Article 226 and 227 of the Constitution in respect of judgment, order or award of a tribunal, Court or statutory arbitrator made in exerecise of jurisdiction under Uttar Pradesh or Central Act with respect to a matter enumerated in the Union List earlier came up for consideration in the case of **Oriental Bank of Commerce**, **Kanpur Vs. Union of India (UOI) and Ors.4**, and it was stated as follows:-

"4. Rule 5 of Chapter VIII of the High Court Rules, on the interpretation of which depends the decision on the point, reads as follows:

5. Special Appeal -- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award -- (a) of a Tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated, in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge.

On a plain reading of the above provision, it is clear that if the judgment of the learned single Judge has been passed in exercise of the jurisdiction conferred by

Article 226 or Article 227 of the Constitution in respect of any judgment, order or award of a Tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act with respect to any of the matters enumerated in the State List or the Concurrent List of the Seventh Schedule to the Constitution or of the Government or any officer or authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, then no appeal shall lie against the judgement of the single Judge. If on the other hand, the judgment of the single Judge is rendered with respect to any matter enumerated in the Union List, then an appeal may be filed against the judgment. " (emphasis supplied)

8. In a similar set of facts, as in the present case, whereunder objection was raised against maintainability of a special appeal challenging the judgment rendered by a Single Judge whereby an order of punishment and also the appellate and revisional orders thereagainst under the Cental Reserve Police Force Act, 1949, were questioned, a Division Bench of this Court in the **Director General, C.R.P.F. Vs. Lalji Pandey5,** repelled the objection and held the special appeal maintainable after taking into consideration that the subject matter in question was referable to armed forces of Union which was under the Union List. The observations made in the judgment are as follows :-

"11. From bare perusal of the above decision it is very much clear that no special appeal shall lie against the order made by Single Judge in exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of India in respect of any judgment, order or award of the government or any officer or any authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act i.e., under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the 7th Schedule to the Constitution of India. Meaning thereby that in case the order under challenge in writ jurisdiction before the learned Single Judge was the order passed by the Government or any officer or any authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Central Act with respect to any of the matters enumerated in the Union List then the special appeal would be maintainable.

12. It is relevant to notice here that the Central Reserve Police Force Act, 1949 has been enacted in exercise of powers conferred to the Central Government under Paragraph 1 of List-I of 7th Schedule to the Government of India Act, 1935, which is presently Entry-2, List-I of the 7th Schedule of the Constitution of India.

Entry 2 of List-I (Union List) of 7th Schedule provides as under:

Naval, military and air force; any other armed forces of the Union.

13. In the case of Akhilesh Prasad v. Union Territory of Mizoram, AIR 1981 Supreme Court 806, it has been held that any other armed force of the Union includes the Central Reserve Police Force. Therefore, it can easily be concluded that the Central Reserve Police Force is covered under any other armed forces of the Union as provided in Entry 2, List-I (Union List) of the 7th Schedule of the Constitution of India.

14. In view of above, the present special appeal is maintainable and the preliminary objection raised by the

respondent having no legal force is hereby rejected."

9. It is therefore seen that in a case, where the order under challenge before learned Single Judge exercising jurisdiction conferred by Article 226 or Article 227 of the Constitution of India, is in respect of any judgment, order or award by a Court or any officer or authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any Uttar Pradesh or under any Central Act with respect to any of the matters enumerated in the Union List under the Seventh Schedule to the Constitution of India, a special appeal under Chapter VIII Rule 5 of the Rules of the Court, 1952, would lie.

10. In the case at hand, the appellate and revisional orders have been passed by authorities under the provisions of the Railway Protection Force Rules,19876.

11. The Rules 1987 have been made by the Central Government in exercise of powers conferred by Section 21 of the Act, 1957. The Railway Protection Force Act and the Rules made thereunder would be referable to the subject matter under Entry 22 of List 1 of the Seventh Schedule, which reads as follows :-

"22. Railways".

12. The appellate and revisional jurisdiction having thus been exercised under a Central Act in respect of a matter enumerated under the Union List and not in respect of a matter under the State List or the Concurrent List of the Seventh Schedule of the Constitution of India, the exclusion under Chapter VIII Rule 5 would not be attracted, and therefore the special appeal would be maintainable, and the objections raised by the learned senior counsel appearing for the respondent-petitioner with regard to maintainability of the special appeal cannot be sustained.

13. The facts of the case, as reflected from the records, are that the services of the petitioner who was working as a Constable in the Railway Protection Force, were terminated by an order dated 12.04.2001 passed by the Divisional Security Commissioner, Railway Protection Force, Samastipur on the ground that he had deliberately concealed the fact relating to the pendency of a criminal case registered as Case Crime No. 234 of 1993 dated 20.11.1993 under Sections 147, 148, 149, 323, 307, 504 and 506 IPC, in the declaration form submitted by him. The appeal filed there against under the provisions of the Railway Protection Force Act, 19577 was rejected by an order dated 31.5.2001 passed by the Chief Security Commissioner, Railway Protection Force, Gorakhpur. The petitioner thereafter preferred a revision, which too was rejected by means of an order dated 27.7.2001 passed by the Director General Railway Protection Force Railway Board, New Delhi.

14. The aforementioned orders were assailed by the petitioner by filing a writ petition, Writ-A No. 37611 of 2002, raising various grounds.

15. A detailed counter affidavit was filed on behalf of the respondents (appellants herein) *inter alia* submitting as under :-

"2.That before giving para-wise reply, it is therefore, expedient and necessary in the interest of justice to submit brief facts of the case which are as under:

(i) That in pursuance of the Employment Notice No. 1/96 issued on

01.11.96, the petitioner was selected and temporarily appointed on the post of constable in Railway Protection Force of N.E. Railway, Gorakhpur.

(ii) That after the selection, of the petitioner, a letter No. E/P/227/1/3 Pt-XI/1017 dated 08.09.1997 was issued to him by the Assistant Security Commissioner/N.E. Railway/Gonda through which he was called upon to fill up the declaration attestation form. In para- 18 of the aforesaid letter dated 08.09.1997, it was clearly stated that the appointment on the post of constable in R.P.F. will be subject to the satisfactory report from the Police authority about the character of the petitioner.

Photostat copy of the letter dated 08.09.1997 is being filed as Annexure No. CA-1 to the Counter Affidavit.

(iii) That it is further relevant to mention that at the top of the page no. 2 of the Attestation form, it was clearly mentioned that any wrong information or concealment of the true facts in the attestation form will be unsuitability and such person can be declared as unsuitable for the Government service. It was also mentioned that at any time during the service if it comes into knowledge that any false information has been given or true facts have been concealed in the attestation form by any candidate he can be discharged from service. It was also mentioned at page no. 4 Column (12) (i) of the attestation form that whether any case is pending in any court against him at the time of filling the attestation form, the petitioner concealed the true fact and answered in negative.

Photostat copy of the attestation form is being filed as Annexure No. C.A.-2 to this Counter affidavit.

(iv)That it is further submitted that in the police verification report submitted by the police authority through District Magistrate, Deoria about the petitioner it was found that the petitioner was an accused in a criminal case No. 234/93 under Section-147, 148, 149, 307, 323 and 504 I.P.C., P.S. Lar, District-Deoria and the same is still pending. Thus it is clear that the petitioner concealed the true facts and mislead the Railway Administration in obtaining Government Service on the post of constable in R.P.F. For the aforesaid concealment, the petitioner was issued charge sheet under Rule-153 of the R.P.F. Rules, 1987. The allegation against him was that he mislead the department and disobeyed the Rule 146.6 (IV) of R.P.F. Rule 1987.

(v) That a disciplinary enquiry was conducted as per Rules against the petitioner and the charges leveled against him were found proved. The Enquiry Officer submitted enquiry report to the disciplinary authority and the copy of the same was also given to the petitioner on 25.02.2001 and the petitioner submitted his defence/reply on 17.03.2001.

(Vi) That the disciplinary authority passed the order of removal from service dated 12.04.2001 after considering the entire material facts and circumstances as well as the relevant records. The petitioner preferred appeal as well as revision which were rejected by the competent authorities i.e. Chief Security, Commissioner, N.E. Railway, Gorakhpur and Director General, RPF, Railway Board, New Delhi on 31.05.2001 and 22.07.2002 respectively.

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6- That the contents of para-5 the Writ Petition are not admitted and are vehemently denied. In reply it is submitted that a F.I.R. was lodge against the petitioner as well as others on 20.11.1993 against which the petitioner and others filed a

Criminal Misc. Writ Petiton No.43732 of 1993; Kapildeo Singh & others Vs. State of U.P. and others and an iterim order was also passed on 2.12.1993. Later on the aforesaid writ petition was dismissed as having become infructuous on 11.2.1997. The petitioner as well as others filed a case u/s-482 Cr.P.C. in High Court for quashing the entire criminal proceedings in case crime No.234 of 1993 which is still pending. These facts have been disclosed by the petitioner in the Supplementary Affidavit filed by him in the present writ petition. Thus the averments of the petitioner in the para under reply that "the petitioner was not well aware about the pendency of any criminal case against him and therefore this fact was not mentioned by the petitioner while filling up the character verification form" are totally false and concocted. The petitioner has concealed the true facts in the writ petition also and has tried to mislead the Hon'ble Court. Thus the petitioner has given the contradictory statements and which one is correct is not known. The petitioner has been rightly punished with the penalty of removal from service for the concealment of the true facts.

xxx

11. That the content of para 12,13,14,15, & 16 of writ petition need no reply being the matter of record. However it is submitted that the statement of the petitioner in the paras under reply that he did not make any false declaration as he was not aware about the pendency of the criminal case, are totally false. In the supplementary affidavit filed by the petitioner, it has been specifically mentioned that a F.I.R. was lodged against him as well as others against which a Criminal Misc. Writ Petition No. 43732/1993 was filed and an intrim order was passed. Later on a case under section 482 Cr.P.C. was also filed in this Hon'ble Court which is pending. Thus petitioner was fully aware about the criminal case pending against him in which he was bailed out but he concealed this fact in his declaration form intentionally."

16. A rejoinder affidavit was filed by the petitioner in reply to the aforesaid counter affidavit whereunder the petitioner inter alia submitted as under :-

"4(d). That, it is relevant to mention here that the applicant filled up his Attestation Form in the month of September 1997, and that time the applicant was not disclosed the criminal case because the applicant was in impression that he would be acquitted from criminal charges for the reason that he has been falsely implicated in the aforesaid criminal case therefore the applicant has not disclosed the aforesaid criminal case at the time of filing up the attestation form."

17. Contention of learned counsel for the appellants is that despite there being a specific clause in the declaration form requiring the petitioner to furnish particulars of the pendency of any case before any court, the fact with regard to the pendency of the criminal case was deliberately suppressed by the petitioner and in view thereof his services were rightly terminated. It has been submitted that learned Single Judge though has extracted the relevant clause in his judgment, yet he has held that there was no clause in the declaration form wherein pendency of a criminal case was required to be disclosed, and solely on the basis of the said reasoning, the orders which were challenged in the writ petition have been set aside and the writ petition has been allowed.

18. Learned Senior Counsel appearing for the petitioner respondent has supported the order passed by the learned Single Judge and tried to contend that there being no clause in the declaration form specifically requiring information with regard to pendency of criminal proceedings there was no occasion for the petitioner to give any such information and accordingly the orders passed by the departmental authorities were rightly set aside by the learned Single Judge.

19. Rival contentions fall for consideration.

20. The outcome of the case rests upon the fact as to whether in terms of the relevant clause in the declaration form the petitioner was required to disclose any information with regard to pendency of a criminal case, and, further, whether on account of non-disclosure of the said fact the petitioner could be held to be guilty of the suppression of material information.

21. The information required to be furnished in the declaration form in para 12, which has been duly extracted in the judgment of the learned Single Judge, is as follows:-

"12 (प) (क) क्या आप कभी गिरफ्तार हुए हैं?

(ख) क्या कभी आप का चालान हुआ हैं?

(ग) क्या आप कभी बन्दी के रूप में रखे गये हैं?

(घ) क्या आप कभी परिबन्धित किए गये हैं?

(ड़) क्या कभी किसी न्यायालय द्वारा आप पर जुर्माना किया गया हैं?

(च) क्या कभी किसी न्यायालय द्वारा अभिशस्त किए गए हैं?

(छ)क्या आप किसी विश्वविद्यालय अथवा किसी अन्य शिक्षा प्राधिकारी/संस्था द्वारा किसी परीक्षा से वर्जित अथवा निष्कासित किए गये हैं?

(ज) क्या कभी कभी रेल अथवा लोक सेवा आयोग द्वारा इसकी किसी परीक्षा/चुनाव में भाग लेने से निवर्जित आयोग्य घोषित किय गये हैं?

(झ) क्या इस साक्ष्यंकन–पत्र को भारते समय आप के विरूद्ध किसी न्यायालय में कोई मामला विचाराधीन हैं?

(ञ) क्या इस साक्ष्यंय–पत्र को भरते समय आप के विरूद्ध किसी विश्वविद्यालय अथवा किसी प्राधिकारी के यहां संस्था में कोई मामला विचाराधीन हैं?

(पप) यदि उपयुक्त प्रश्नों में से किसी का उत्तर 'हां' हो तो उस मामले गिरफ्तारी/बन्दी बनाए जाने जुर्माना अभिशिस्त दण्डादेश/सजा इत्यादि तथा अथवा इस फार्म को भरते समय न्यायालय/विश्वविद्यालय शिक्षण/प्राधिकारी इत्यादि के यहॉ विचाराधीन मामले का विवरण देंण"

22. The english translation of the aforementioned para 12 of the declaration form, as given in the judgment of the writ court, is also being extracted below.

"12(i)(a) Whether you have ever been arrested?

(b) Whether you have ever been challaned?

(c) Whether you have ever been detained?

(d) Whether you have ever been bound?

(e) Whether any fine has ever been imposed by court on you?

(f) Whether you have ever been convicted by any court ?

(g) Whether you have ever been forbidden or expelled from any examination by any university or any other educational authority/institution?

(h) Whether you have ever been disqualified or with-held by the Railways or the Public Service Commission from

appearing in any examination/selection process conducted by them?

(I) Whether any case is pending before any court while filling this verification form?

(j) Whether any case is pending with any university or any authority of any institution while filling this verification form?

(k) If reply to any of the queries raised above is in 'yes', then kindly give the details of arrest/detention, fine, conviction / sentence/punishment etc. or of the matter pending with the court/university/educational authority etc."

23. A plain reading of the aforementioned para 12 of the declaration form clearly shows that as per terms of para 12 (i) ¼>½ or 12 (i) (I) as per english translation, the petitoner was specifically required to give a response to the following question.

"12 (i) (झ) क्या इस साक्ष्यंकन–पत्र को भारते समय आप के विरूद्ध किसी न्यायालय में कोई मामला विचाराधीन हैं?

"12(i) (I) Whether any case is pending before any court while filling this verification form?"

24. It is therefore clear that the declaration form which was filled up by the petitioner at the time of his entry into service specifically required the petitioner to disclose information with regard to any case pending before any court at the time of filling up the verification form.

25. It is not the case of the petitioner that there was no requirement in the declaration form to disclose the information with regard to pendency of any criminal case against him rather the defence sought to be put forward by the petitioner before the departmental authorities, as is evident from the grounds urged by him in his revision filed before the Director General Railway Protection Force Railway Board, New Delhi, is to the effect that the revisionist did not mention the pending criminal case in the character verification form inadvertently and not deliberately because he was not aware of the technicalities of the rules at that time. The aforementioned ground, as taken by the petitioner in the revision filed by him, is as follows :-

"14. That the revisionist did not mention the pending criminal case in the character verification form inadvertently and not deliberately because he was not aware of the technicalities of the rules at that time."

26. The lodging of an F.I.R., registration of the criminal case and the petitioner subsequently having been enlarged on bail, are facts which have been admitted in the writ petition also, as stated in paragraph 6 thereof, which reads as follows :-

"6. That it may be pointed out that due to enmity and rivalry in the village politics a first information report was lodged at Police Station-Lar, District-Deoria on 20.11.1993 by one Ramji Singh of the same village against 17 persons of village Barhiha Dalpat and name of the petitioner was also included with other villagers in the aforesaid information report. The F.I.R. was lodged under Sections 147, 148, 149, 323, 307, 504 & 506 I.P.C. and was registered as Crime Case No. 234/93 at P.S.-Lar, District-Deoria. The petitioner alongwith other villagers however have been granted bail in the aforesaid case."

27. Further, admission with regard to the pendency of the criminal case has also been made by the petitioner in his rejoinder affidavit and the reason which he has sought to furnish therein to justify the non-disclosure of the information of the pending criminal case is that he was under an impression that he would be acquitted of the criminal charges.

28. In the face of the aforementioned facts, the contention of the learned Senior Counsel appearing for the respondent-petitioner disputing the fact that in terms of the declaration required in the verification form there was no specific requirement with regard to disclosure of the information in respect of any pending case before any court at the time of filling up the verification form, cannot be accepted.

29. The purpose of verification of the character and antecedents is one of the criteria to test the suitability of a candidate for the post in question before appointment is made.

30. It is considered desirable that the incumbent should not have antecedents of such a nature which may adjudge him unsuitable for the post.

31. The order dated 12.04.2001 terminating the services of the petitioner has taken note of the fact that the petitioner had suppressed the material information with regard to pendency of the criminal case while filling up the declaration in the verification form at the time of his entry into service.

32. It is not in dispute that a criminal case under Sections 147, 148, 149, 323, 307 504 and 506 IPC, registered as Case Crime No. 234 of 1993, was pending at the relevant point of time, in the year 1997, when the petitioner filled up the verification form and did not disclose the information regarding pendency of the said criminal case.

33. The declaration required to be furnished as per clause 12 (i) of the verification form specifically required disclosure of information with regard to pendency of any case before any court at the time of filling up the verification form. The requirement of filling the particulars under clause 12 (i) of the aforesaid verification form was for the purpose of verification of character and antecedents of the petitioner respondent as on the date of filling the verification form.

34. Suppression of material information or making a false statement would have a clear bearing on the character and antecedents of the respondent in relation to his continuance in service. The purpose of seeking information as sought in clause 12 of the verification form may not be for the purpose of finding out the nature and gravity of the offence or the result of the criminal case ultimately but the same would have to be seen with a view to verify the character and antecedents of the respondent so as to judge his suitability for being appointed in service.

35. The constitution and regulation of the Railway Protection Force is provided for in terms of the Railway Protection Force Act, 1957 and in exercise of the rule making power conferred by Section 21 of the aforesaid Act, the Railway Protection Force Rules, 1987 were made. Rule 52 thereof provides for verification of character and antecedents to test the suitability of the recruit being appointed as a member of the force. Rule 52 of the Rules, 1987, reads as follows.

"52. Verification:

52.1. As soon as a recruit is selected but before he is formally appointed to the Force, his character and antecedents shall be got verified in accordance with the procedure prescribed by the Central Government from time to time.

52.2. Where after verification, a recruit is not found suitable for the Force, he shall not be appointed as a member of the Force."

36. The aforementioned Rule, which provides for verification of character and antecedents of a recruit, also provides that where after the verification a recruit is not found suitable for the force, he shall not be appointed as a member of the force.

37. It is therefore seen that as per Rule 52, referred to above, a prospective employee may be refused employment on the ground of unsatisfactory antecedents and character. Suppression of material information or making a false statement in reply to specific queries in the verification form which may lead to an inference of a dubious conduct and absence of character of the prospective employee at the time of making the declaration may therefore also be held as making him unsuitable for being appointed as a member of the force.

38. The question of suppression of information or submitting false information in the verification form as to the question of having been criminally prosecuted or arrested or as to pendency of a criminal case was subject to divergent views and noticing the conflict of opinion in the various decisions, the Supreme Court in **Jainendra Singh vs. State of U.P. through Principal Secretary, Home & Ors.8** pointed out certain cardinal principles, before granting relief to the aggrieved party in such matters, and referred the issues for consideration to a larger bench. The observations made in the judgment are as follows :-

"29. As noted by us, all the above decisions were rendered by a Division Bench of this Court consisting of two-Judges and having bestowed our serious consideration to the issue, we consider that while dealing with such an issue, the Court will have to bear in mind the various cardinal principles before granting any relief to the aggrieved party, namely:

29.1. Fraudulently obtained orders of appointment could be legitimately treated as voidable at the option of the employer or could be recalled by the employer and in such cases merely because the respondent employee has continued in service for a number of years, on the basis of such fraudulently obtained employment, cannot get any equity in his favour or any estoppel against the employer.

29.2. Verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to the post under the State and on account of his antecedents the appointing authority if finds it not desirable to appoint a person to a disciplined force can it be said to be unwarranted.

29.3. When appointment was procured by a person on the basis of forged documents, it would amount to misrepresentation and fraud on the employer and, therefore, it would create no equity in his favour or any estoppel against the employer while resorting to termination without holding any inquiry.

29.4. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services.

29.5. The purpose of calling for information regarding involvement in any criminal case or detention or conviction is

for the purpose of verification of the character/antecedents at the time of recruitment and suppression of such material information will have a clear bearing on the character and antecedents of the candidate in relation to his continuity in service.

29.6. The person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service.

29.7. The standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.

29.8. An employee on probation can be discharged from service or may be refused employment on the ground of suppression of material information or making false statement relating to his involvement in the criminal case, conviction or detention, even if ultimately he was acquitted of the said case, inasmuch as such a situation would make a person undesirable or unsuitable for the post.

29.9. An employee in the uniformed service presupposes a higher level of integrity as such a person is expected to uphold the law and on the contrary such a service born in deceit and subterfuge cannot be tolerated.

29.10. The authorities entrusted with the responsibility of appointing Constables, are under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a constable and so long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of Constable."

39. Upon reference, the matter was placed before three judge bench of the Supreme Court in **Avatar Singh Vs. Union of India and others9,** and upon taking notice of the various decisions on the issue the Hon'ble Bench summarized its conclusion and stated as follows :-

"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarise our conclusion thus:

38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2. While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3. The employer shall take into consideration the government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4. In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted:

38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2. Where conviction has been recorded in case which is not trivial in

nature, employer may cancel candidature or terminate services of the employee.

38.4.3. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case.

38.7. In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8. If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9. In case the employee is confirmed in service, holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10. For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11. Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

40. In the facts of the case at hand, the petitioner- respondent has admitted that the details of the pending criminal case were not disclosed by him in the declaration made in the verification form. It is also not the case of the petitioner that he was not aware of the pendency of the criminal case. The factum of deliberate suppression is highlighted from the stand taken by the petiitoner before in the departmental revision wherein it was stated that he did not mention pending criminal case in character verification form due to inadvertence. This is further fortified from the pleading in the writ petition wherein the fact with regard to lodging of an F.I.R. and the registration of criminal case and also enlargement on bail have been admitted. The averments in the rejoinder affidavit filed before the writ court further reinforce the admission with regard to suppression of the material fact inasmuch as the petitioner has sought to contend that at the time of filling up of the attestation form in the month of September, 1997, he had not disclosed pendency of the criminal case for the reason that he was under an impression that he would be acquitted in the criminal charges. It is in the above backdrop that the decision taken by the appellant-respondents that the petitioner had suppressed material

information having a bearing on his character and antecedents, cannot be faulted with.

41. In terms of the principles laid down in the case of **Avatar Singh** (supra), referred to above, information given to the employer by a candidate as to the pendency of a criminal case whether before or after entering into service must be true and there should be no suppression or false mention of required information. There is thus a clear obligation cast upon a prospective candidate to make a candid and truthful disclosure in respect of the information sought in the verification form. Non-disclosure or concealment of the material facts would have a direct link to the suitability of the person for being appointed in service.

42. Having regard to the aforementioned facts and circumstances, we are unable to persuade ourselves to agree with the reasoning given and the order passed by the learned Single Judge while allowing the writ petition.

43. The judgment dated 21.10.2019 passed by the writ Court having been founded on a wrong premise that there was no requirement in the verification form with regard to disclosure of information regarding pendency of any case, the same cannot be legally sustained.

44. The judgment and order dated 21.10.2019 passed in Writ-A No. 37611 of 2002 (Rajiv Kumar Singh Vs. Director General/R.P.F. and others) is, therefore, liable to be set aside and is accordingly set aside.

45. The special appeal is accordingly allowed.

46. The writ petition stands dismissed.

(2020)03-05ILR A888
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2020

BEFORE

THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 104 of 2020

Veer Bahadur Singh ...Appellant
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Piyush Asthana

Counsel for the Respondents:
Sri Manoj Nigam

(A) Civil Law-U.P. Cooperative Societies Employees' Service Regulations, 1975-Regulation 83(i), 85(vi)(c), proviso to 85(vi)(c) and clause (g) - Harmonious construction of statutes - on combined reading it is inferred that the suspension of an employee arrested for debt or on a criminal charge is obligatory and is to be made effective from the date of his arrest and the same is to continue for the period during which he is so detained in custody or is undergoing imprisonment

Where alternate construction are possible while interpreting a statutory provision, the Court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme for the purpose of enactment. (para 10)
In the said circumstance, the provision under clause (e) of Regulation 85 with regard to

suspension not taking retrospective effect would not be applicable in a case where the suspension has been made under clause (i) of Regulation 83 for the reason that the employee has been arrested on a criminal charge. The suspension order having been passed as a consequence of the deeming provision under the Regulations, the validity of the same cannot be assailed by raising a plea of retrospectivity. (Para 12)

Special Appeal Rejected. (E-10)

(Delivered by Hon'ble Biswanath Somadder, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. The present Special Appeal has been filed against the judgment and order dated 20th December, 2018, passed in Writ-A No.27513 of 2018 (Veer Bahadur Singh Vs. State of U.P. and two others), whereby the writ petition has been dismissed.

2. The appellant before us is the writ petitioner.

3. The contention raised by the appellant-writ petitioner that the suspension order could not have been passed with retrospective effect, has been dealt with by the learned Single Judge by referring to the provisions contained under the Uttar Pradesh Cooperative Societies Employees' Service Regulations, 1975.

4. For ease of reference, the relevant provisions under the aforesaid Regulations are being extracted below:-

"83. (i) An employee arrested for debt or on a criminal charge shall be placed under suspension from the date of his arrest:

Provided that if he is released on bail or on recognizance, he may with the approval of the Registrar, be permitted to resume and continue on duty until charges are framed against him by the trying Court:

Provided further that his duties may be varied if continuance on original duty be inexpedient or prejudicial to the interest of the society in the opinion of the Registrar or the appointing authority.

(ii) An employee who is convicted of a criminal charge involving moral turpitude by a Criminal Court shall be liable to dismissal.

Explanation.--"Conviction" means sentence of punishment, fine or both.

x x x x x

85. Disciplinary proceedings.--(i) The disciplinary proceedings against an employee shall be conducted by the Inquiring Officer (referred to in clause (iv) below) with due observance of the principles of natural justice for which it shall be necessary that--

(a) .....

(b) .....

(c) .....

(ii) (a) Where an employee is dismissed or removed from service on the ground of conduct which has led to his conviction on a criminal charge; or

(b) Where the employee has absconded and his whereabouts are not known to the society for more than three months; or

(c) Where the employee refuses or fails without sufficient cause to appear before the Inquiring Officer when specifically called upon in writing to appear; or

(d) Where it is otherwise (for reasons to be recorded) not possible to communicate with him, the competent authority may award appropriate punishment without taking or continuing disciplinary proceedings.

(iii) Disciplinary proceedings shall be taken by the society against the employee on a report made to this effect by the inspecting authority or an officer of the society under whose control the employee is working.

(iv) The Inquiring Officer shall be appointed by the appointing authority or by an officer of the society authorised for the purpose by the appointing authority:

Provided that the officer at whose instance disciplinary action was started shall not be appointed as an Inquiring Officer nor shall the Inquiring Officer be the appellate authority.

(v) In the case of an erring employee falling in sub-section (c) of clause (i) or sub-clause (a) of clause (ii) of Regulation No.5, the committee of management of the society, and if so provided in the bye-laws the Chairman or the Secretary of the society, shall draw up a duplicate charge-sheet against the employee and the same shall be communicated to the parent employer who shall, if prima facie case has been made out by the reporting authority, withdraw him from the society and take disciplinary action against him.

(vi) An employee other than one referred to in clause (v) may be placed under suspension in the following circumstances by the appointing authority or any other officer authorised for the purpose--

(a) when the said authority is satisfied that a prima facie case exists, which is likely to result in the removal, dismissal or reduction in rank of the employee;

(b) when an enquiry into his conduct is immediately contemplated or is pending and his further continuance on his post is considered detrimental to the interest of the society;

(c) when a complaint against him of any criminal offence is under police investigation for which he has been arrested or he is undergoing trial in a court of law for offence under the Indian Penal Code, U.P. Co-operative Societies Act, 1965 or any other Act or charges have been framed against him by the criminal court:

Provided that suspension shall be obligatory where it is called for in terms of clause (i) of Regulation No.83.

(vii) (a) An employee under suspension shall be entitled to a subsistence allowance as per relevant rules applicable to State Government employees from time to time:

Provided that an employee who is under suspension on the date of coming into force of these regulations shall continue to draw such portion of pay and such allowances as he was allowed to draw for the period of suspension:

Provided further that no payment of the subsistence allowance shall be made unless the employee has furnished a certificate, and the authority passing the order of suspension is satisfied that the employee was not engaged in any other employment, business, profession or vocation and had not earned remuneration therefor during the period under suspension.

(b) (1) When an employee is reinstated, the authority competent to order the reinstatement shall make specific order regarding pay and allowances to be paid for the period of suspension and whether or not the said period shall be treated as a period spent on duty:

Provided that where the authority passing the order of reinstatement is of the opinion that the employee has been fully exonerated or the suspension was wholly unjustified, the employee shall be given the full pay and allowances to which he would

have been entitled had he not been suspended.

(2) In cases not covered by the proviso to foregoing sub-clause (1) the employee shall be given such proportion of pay and allowance as the competent authority may order.

(c) In cases falling under proviso to clause (b)(1) the period of suspension shall be treated as a period spent on duty for all purposes.

(d) In cases falling under clause (b)(2) the period of suspension shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated.

(e) The order of suspension shall not take retrospective effect.

(f) Leave shall not be granted to an employee under suspension.

(g) An employee against whom proceedings have been taken either for his arrest for debt or a criminal charge or who is detained under any law for preventive detention shall be considered as under suspension for the period during which he is so detained in custody or is undergoing imprisonment and not be allowed any pay and allowances other than the subsistence allowance admissible under sub-clauses (a) and (b) for such period until the termination of the proceedings taken against him or until he is released from detention and allowed to rejoin duty as the case may be.

(viii) In case of fine, the total amount of fine shall not exceed half month's pay or maximum fine, chargeable under the Payment of Wages Act, 1936, where this Act is applicable to the employee concerned and it shall be deducted from his pay in monthly instalments, each such instalment not exceeding one-fourth of his monthly salary.

(ix) The order of suspension may be revoked by--

(a) the authority which passed the orders, or

(b) the appointing authority, if there are sufficient reasons for revocation and the same shall be recorded in the order of revocation.

(x) No employee shall ordinarily remain under suspension for more than 6 months:

Provided that this conduction shall not apply to such cases where the suspension is made on criminal charges on the direction of the Court."

5. The learned Single Judge has referred to Regulation 83(i) wherein it is provided that an employee arrested for debt or on a criminal charge shall be placed under suspension from the date of his arrest. Further, notice has been taken of clause (vi)(c) under Regulation 85 which provides for placing an employee under suspension in the circumstance when a complaint against him of any criminal offence is under police investigation for which he has been arrested or he is undergoing trial in a court of law for an offence under the Indian Penal Code, U.P. Cooperative Societies Act, 1965 or any other Act or in a case where charges have been framed against him by the criminal court. The proviso to the aforesaid clause (vi)(c) makes the suspension obligatory where it is in terms of clause (i) of Regulation 83.

6. The learned Single Judge has held that the provision under clause (vii)(e) of Regulation 85, which was sought to be relied upon by the writ petitioner to contend that suspension shall not take retrospective effect would not be applicable in the case at hand for the reason that the suspension in this case was covered under clause (vi)(c) of Regulation 85, and the

proviso contained therein made the suspension obligatory in a case where the same was in terms of clause (i) of Regulation 83.

7. Notice may also be taken of clause (g) of Regulation 85 wherein it is provided that an employee against whom proceedings have been taken either for his arrest for debt or a criminal charge or who is detained under any law for preventive detention shall be considered as under suspension for the period during which he is so detained in custody or is undergoing imprisonment and would not be allowed any pay and allowances other than the subsistence allowance admissible under sub-clauses (a) and (b) for such period until the termination of the proceedings taken against him or until he is released from detention and allowed to rejoin duty as the case may be.

8. It is, therefore, seen that in terms of Regulation 83(i) an employee arrested for debt or on a criminal charge is required to be mandatorily placed under suspension from the date of his arrest. Furthermore, under clause (vi)(c) of Regulation 85 the employee is to be placed under suspension in the circumstance when a complaint against him of any criminal offence is under police investigation for which he has been arrested or he is undergoing trial in a court of law for an offence under the Indian Penal Code, U.P. Cooperative Societies Act, 1965 or any other Act or charges have been framed against him by the criminal court.

9. The proviso to clause (vi)(c) makes the suspension obligatory where the same is in terms of clause (i) of Regulation No. 83. Also, under clause (g) of Regulation 85, the employee against whom proceedings have been taken for arrest is to be considered as under suspension for the period for which he is so detained in custody or is undergoing imprisonment. The provisions contained under Regulation 83 and Regulation 85 have to be read in their entirety and are required to be given a harmonious construction.

10. We may, in this regard, reiterate the settled principle of statutory construction that where alternative constructions are possible while interpreting a statutory provision, the Court must choose the one which will be in accord with other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme for the purpose of enactment.

11. A combined reading of the provisions contained under clause (i) of Regulation 83, clause (vi)(c) and the proviso thereof of Regulation 85, as also clause (g) of Regulation 85, lead to the inference that suspension of an employee arrested for debt or on a criminal charge is obligatory and is to be made effective from the date of his arrest and the same is to continue for the period during which he is so detained in custody or is undergoing imprisonment.

12. In the said circumstance, the provision under clause (e) of Regulation 85 with regard to suspension not taking retrospective effect would not be applicable in a case where the suspension has been made under clause (i) of Regulation 83 for the reason as that the employee has been arrested on a criminal charge. The

suspension order having been passed as a consequence of the deeming provision under the Regulations, the validity of the same cannot be assailed by raising a plea of retrospectivity. The contention raised by the learned counsel for the appellant-writ petitioner in this regard therefore has rightly been rejected.

13. After considering the submissions made by the learned advocates for the parties and upon perusing the impugned judgment and order, we notice that the same has been rendered by the learned Single Judge with cogent and justifiable reasons.

14. In an Intra-Court Special Appeal, no interference is usually warranted unless palpable infirmities or perversities are noticed on a plain reading of the impugned judgment and order. In the facts and circumstances of the instant case, on a plain reading of the impugned judgment and order, we do not notice any such palpable infirmity or perversity. As such, we are not inclined to interfere with the impugned judgment and order dated 20th December, 2018.

15. For reasons stated above, the Special Appeal is liable to be dismissed and stands, accordingly, dismissed.

(2020)03-05ILR A893
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2020

BEFORE
THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE KARUNESH SINGH PAWAR, J.

Special Appeal No. 156 of 2019 and 157 of 2019 connected with

Special Appeal Defective No. 176 of 2019 and other cases

Raghvendra Pratap Singh & Ors. ...Appellants

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Amrendra Nath Tripathi, Durga Prasad Shukla

Counsel for the Respondents:
C.S.C., Abhisar Dev, Agnihotri Kumar Tripathi, Ajay Kumar, Ajit Shukla, Amit Kr. Singh Bhadauriya, Anand Nandan, Ashutosh, Atul Yadav, HN Singh, Haridhwar Singh Kushwaha, Himanshu Raghave, Krishna Vishwakarma, Lal Bahadur Singh, Neeraj Kandpal, Neha Singh, Om Prakash Nag, Palash Yadav, Pankaj Verma, Pawan Kumar Maurya, Raghunath Prasad, Rahul Kumar Singh, Rahul Pandey, Rajesh Kumar Verma, Ram Kumar Singh, Rishabh Kapoor, Santosh Kr. Yadav "Warsi", Seemant Singh, Varun Kumar Mishra, Vineet Mishra, Vishal Kumar Yadav

(A) Eligibility Test - Assistant Teacher Recruitment Examination (ATRE) are only for qualification for recruitment not for advertisement for recruitment - eligibility tests are not meant for selection to any post but is conducted to determine the eligibility of the candidate for the post –

Once Sikhsha Mitras attain minimum qualification they shall form a class of persons and the benefit of judgment of *Anand Kumar Yadav* can be extended.

(B) Minimum qualifying marks - Rule 2(x) of U.P. Basic Education (Teachers) Service Rules, 1981 - Government competent to prescribe cut off marks for passing ATRE - it is not necessary that the minimum qualifying marks are to be provided before examination starts - the principle that the Rules of the game cannot be changed once the game has started are not

applicable in this case - competent authority was given power under aforesaid Rule to fix minimum qualifying marks and the same ought not to be interfered - ATRE -2018 and ATRE-2019 is valid only for a particular year

Qualifying marks are prescribed after the examination is conducted as the Recruitment Authority is in a position to assess how the candidates performed and determine the benchmarked keeping in mind the number of vacancies. The State Government rightly in the advertisement dated 1.12.2018 did not declare the cut off marks for qualifying the ATRE-2019. Arguments of the writ petitioner that the increase in the cut-off marks by the Government order dated 07.01.2019 nullifying the beneficial direction of the Hon'ble Supreme Court in *Anand Kumar Yadav* case has no legs to stand and is pre mature as the benefit is available only at the time of recruitment, once they hold the prescribed minimum qualification and their names published in the merit list prepared under Rule 14(2) of the 1981.(paras 72 and 73) B.Ed. candidates were made eligible to be considered for appointment to the post of Assistant Teacher, subject to them acquiring the minimum qualification, the State Government was bound to permit them to participate in the ATRE-2019 pasing which is the minimum qualification to be considered for appointment to the post of Assistant Teacher. Accordingly, the State Government carried out the necessary amendments to the Rules 1981 to align them with the National Council for Teacher Education (NCTE) notification, prior to commencement of the recruitment process. (para 92)

(C) Aggrieved person - does not includes a person who suffers from a psychological or an imaginary injury only - the person whose right or interest has been adversely affected or jeopardized

Special Appeal Allowed. (E-10)

List of cases cited:

1. Anand Kumar Yadav & ors. Vs. U.O.I. & ors. & connected writ petitions (2015) 8 ADJ 338

2. St. of U.P. & anr. Vs. Anand Kumar Yadav & ors. (2018) 13 SCC 560

3. Kul Bhushan Mishra & ors. Vs. St. of U.P. & ors. (2019) 2 ADJ 442

4. Jharkhand Public Service Commission Vs Manoj Kumar Gupta & ors. Civil Appeal No. 9441 of 2019 *(followed)*

5. Municipal Corporation of Delhi Vs. Surendra Singh & ors. (2019) 8 SCC 67*(followed)*

6. Bhoola Prasad Shukla & ors. Vs. U.O.I. & ors. Petition(s) for Special Leave to Appeal (C) No(s). 14621/2019

7. Pradeep Kumar & ors. Vs. St. of Hary. & ors. 2017 (1) SCT 799 (P&H)

8. State of U.P. & ors. Vs. Bhupendra Nath Tripathi & ors. 2010(5) ESC 630

9. St. of U.P. Vs. Shiv Kumar Pathak (2018) 12 SCC 595 *(followed)*

10. Harsh Kumar & ors. Vs. St. of U.P. & ors. (2014) 2 ADJ 703

11. St. of Raj. Vs. Sanyam Lodha (2011) 13 SCC 262

12. Harsh Kumar Vs. St. of U.P. & ors. *(followed)*

13. Ayaaubkhan Noorkhan Pathan Vs. St. of Maharashtra (2013) 4 SCC 465

14. K. Manjusree Vs. St. of A.P. & anr. 2008 (3) SCC 512 *(distinguished)*

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

(1) Heard Sri Raghvendra Singh, Advocate General assisted by Sri Abhinav N. Trivedi, learned Additional Chief Standing Counsel for the appellants, Sri Upendra Nath Mishra, learned Senior Counsel assisted by Sri Amit Kumar Singh

Bhadauriya, learned Counsel for private respondents (original writ petitioners) and Sri H. N. Singh, learned Senior Advocate assisted by Sri Agnihotri Kumar Tripathi for the respondents in **Special Appeal No.207 (D) of 2019,** Sri S. K. Kalia, learned Senior Counsel assisted by Sri Durga Prasad Shukla, learned Counsel for the appellants and Sri H. G. S. Parihar, learned Senior Counsel assisted by Sri Prashant Kumar Singh & Ms. Minakshi Singh Parihar, for the respondents in **Special Appeal No.157 of 2019**, Sri Prashant Chandra, learned Senior Counsel assisted by Ms. Meha Rashmi for the appellants in **Special Appeal No. 165 (D) of 2019,** Sri Anil Tewari, learned Senior Counsel assisted by Sri Durga Prasad Shukla, Sri Amrendra Nath Tripathi and Sri Pawan Awasthi, learned Counsel for the appellants, Dr. L. P. Mishra & Sri Avadesh Shukla for the respondents and Sri Humanshi Raghav, learned Counsel for the intervenors on behalf of Shhika Mitra in **Special Appeal No.156 (D) of 2019** and Sri Jaideep Narain Mathur, learned Senior Counsel assisted by Sri Gaurav Mehrotra & Ms. Ishita Yadu, learned Counsel for the appellants in **Special Appeal No.158 of 2019.**

(2) This Special Appeal alongwith the connected matters has, with the consent of parties, been taken up for disposal together since the issues raised are identical.

(3) These Special Appeals arise out of judgment and order dated 29.3.2019 passed in Writ Petition No.1188 (SS) of 2019 and other connected matters filed by Shiksha Mitras challenging the Government Order dated 7.1.2019, by which the State Government has fixed the qualifying marks of Assistant Teacher Recruitment Examination - 2019 at 60% - 65% (for general and reserved category respectively). The facts are being narrated from *Mohd. Rizwan and others v. State of U.P. and others* (Writ Petition No. 1188 (SS) of 2019).

(4) The reliefs sought in the aforesaid writ petitions were:

(a) A writ of Certiorari quashing the Government Order dated 7.1.2019; and

(b) A writ of mandamus directing the Secretary, Examination Regulatory Authority to declare the result of the ATRE - 2019 for 69,000 vacancies in terms of the Government Order dated 1.12.2018.

(5) The main grounds of challenge of the writ petitions to the policy decision were:

(a) Upon qualifying the TET examination prescribed by the NCTE, the Shiksha Mitras constituted a *'homogeneous class'* and increasing the qualifying marks from 40-45% (as notified for ATRE - 2018) to 60-65% for ATRE - 2019 amounted to discrimination and nullification of the benefit granted to them by the Apex Court in ***Anand Kumar and others v. Union of India and others v. Union of India and others and connected writ petitions [(2018) 13 SCC 560]***. The fixation of cut-off marks at 60%-65% was arbitrary and with a view to eradicate/ disqualify the petitioners (Shiksha Mitras) from being appointed on the post of Assistant Teacher; and

(b) There was a change in the rules of the game after the game had been played as the impugned Government Order notifying the qualifying marks was issued on 7.1.2019, i.e., a day after holding the ATRE - 2019 examination on 6.1.2019.

(6) The learned Writ Court allowed the writ petitions and quashed the Government Order dated 7.1.2019 fixing the minimum qualifying marks for

Assistant Teacher Recruitment Examination, 2019 as 65% for General Category and 60% for reserved category and directed to declare the result of Assistant Teacher Recruitment Examination, 2019 in terms of Government Order dated 1.12.2018 and also notification/advertisement dated 5.12.2018, ignoring the Government Order dated 7.1.2019, in the same manner as the earlier result of Assistant Teacher Recruitment Examination-2018 was declared so far as the minimum qualifying marks are concerned, within a period of three months and the entire exercise shall be completed at the earliest, strictly in accordance with law. Relevant part of the impugned judgment contained in paras 181 and 182 reads as under:-

"181. Considering the entire facts and circumstances of the issue and case law so cited by the learned counsel for the respective parties I am of the considered view that the Government Order dated 7.1.2019 is not sustainable in the eyes of law being arbitrary and violative of Article 14 of the Constitution of India as it makes an unreasonable classification by giving different treatment to two groups of identically situated persons appearing in two consecutive examinations and there is no valid reason and justification for drastically increasing minimum qualifying marks without having any nexus with the object sought to be achieved. It further appears that the Government Order dated 7.1.2019 is nullifying the beneficial direction of the Hon'ble Apex Court in re: ***Anand Kumar Yadav (supra)****, pursuant to which 25 marks of weightage has been prescribed under Rule 14(3)(a) of the Rules 1981 (22nd Amendment, 2018) purposely for practical experience which is an integral part of merit.*

182. Accordingly, a writ in the nature of certiorari is issued quashing the Government Order dated 07.01.2019 issued by the Special Secretary, Basic Education Anubhag-4, Government of U.P., Lucknow."

(7) In the State of Uttar Pradesh, out of 1,78,000 'Shiksha Mitras', who were given fortuitous appointments as Primary Teachers on contractual basis, a total of approximately 1,37,500 'Shiksha Mitra' were absorbed as Assistant Teachers in Junior Basic Schools. Their absorption into the regular service of State as Assistant Teachers by amendment made by the State Government by its notification dated 30.5.2014 introducing the provision of Rule 16-A in the U.P. Right of Children to Free and Compulsory Education Rules, 2011 by the U.P. Right of Children to Free and Compulsory Education (First Amendment) Rules, 2014 and consequential executive orders of the State Government were challenged in Writ-A No.34833 of 2014, ***Anand Kumar Yadav and others v. Union of India and others and connected writ petitions [(2015) 8 ADJ 338]***. Ultimately, the Full Bench found that the engagement of Shiksha Mitras was not in the regular service of the State since they had not been appointed in accordance with the U.P. Basic Education (Teachers) Service Rules, 1981 [In short, it has been referred to as '1981 Rules']. It found that their engagement was purely on contractual basis for a stipulated term of eleven months renewable subject to satisfactory performance and on payment of an honorarium. It also found that their appointments were not against sanctioned posts as determined by the Board of Basic Education under the ***1981 Rules***. It was also observed that the Shiksha Mitras did not fulfil the qualifications for a regular teacher under the 1981 Rules. The Full

Bench thereafter proceeded to evaluate the rights of the Shiksha Mitras to continue in service in the light of the provisions of the Right of Children to Free and Compulsory Education, 2009 [In short, it is referred to as ***'RTE Act'***] as well as the qualifications prescribed by the National Council For Teacher Education for Teachers [in short, it is referred to as 'NCTE'] imparting instructions in basic schools. On a detailed scrutiny of the aforesaid provisions, it held that the Shiksha Mitras did not possess the requisite qualification and therefore could not be appointed. The Full Bench also proceeded to strike down the Government Order dated 30.5.2014 which purported to the effect of their absorption even though they did not hold the qualification as were prescribed under the RTE Act and notifications issued by the NCTE.

(8) The decision of the Full Bench was subject to challenge by the State of U.P. before the Apex Court which upheld the judgment and the view taken by the Full Bench. While doing so, the Apex Court in ***State of U.P. and another v. Anand Kumar Yadav and others [(2018) 13 SCC 560]*** in paras 28 to 30 observed as under:-

"28. We are in agreement with the above findings. In view of clear mandate of law statutorily requiring minimum qualification for appointment of teachers to be appointed after the date of Notification dated 23rd August, 2010, there is no doubt that no appointment was permissible without such qualifications. Appointments in the present case are clearly after the said date. Relaxation provision could be invoked for a limited period or in respect of persons already appointed in terms of applicable rules relating to qualifications. The Shiksha Mitras in the present case do not fall in the category of pre 23 rd August, 2010 Notification whose appointment could be regularized.

29. Further difficulty which stares one in the face is the law laid down by this Court on regularization of contractually appointed persons in public employment. Appointment of Shiksha Mitras was not only contractual, it was not as per qualification prescribed for a teacher nor on designation of teacher nor in pay scale of teachers. Thus, they could not be regularized as teachers. Regularization could only be of mere irregularity. The exceptions carved out by this Court do not apply to the case of the present nature.

30. In view of our conclusion that the Shiksha Mitras were never appointed as teachers as per applicable qualifications and are not covered by relaxation order under Section 23(2) of the RTE Act, they could not be appointed as teachers in breach of Section 23 (1) of the said Act. The State is not competent to relax the qualifications.

(9) The Apex Court thereafter proceeded to consider the fate of 1,78,000 Shiksha Mitras who were continued in service pursuant to the decision of the State Government and it held thus:-

32. On the one hand, we have the claim of 1.78 Lakhs persons to be regularized in violation of law, on the other hand is the duty to uphold the rule of law and also to have regard to the right of children in the age of 6 to 14 years to receive quality education from duly qualified teachers. Thus, even if for a stop gap arrangement teaching may be by unqualified teachers, qualified teachers have to be ultimately appointed. It may be permissible ***to give some weightage to the experience of Shiksha Mitras or some age***

relaxation may be possible, mandatory qualifications cannot be dispensed with. Regularization of Shiksha Mitras as teachers was not permissible. *In view of this legal position, our answers are obvious. We do not find any error in the view taken by the High Court.*

33. Question now is whether in absence of any right in favour of Shiksha Mitras, they are entitled to any other relief or preference. In the peculiar fact situation, ***they ought to be given opportunity to be considered for recruitment if they have acquired or they now acquire the requisite qualification in terms of advertisements for recruitment for next two consecutive recruitments. They may also be given suitable age relaxation and some weightage for their experience as may be decided by the concerned authority.*** *Till they avail of this opportunity, the State is at liberty to continue them as Shiksha Mitras on same terms on which they were working prior to their absorption, if the State so decides."*

(10) The Apex Court confirmed the position found by the Full Bench that Shiksha Mitras did not possess requisite qualifications required for an Assistant Teacher and thus, they could not be regularized. However, the Apex Court also sought to balance the rights of 1,78,000 persons engaged by the State in Basic Schools in their capacity as Shiksha Mitras by observing that in the peculiar fact situation, they ought to be given an opportunity to be considered for recruitment if they have acquired or they now acquire the requisite qualifications in terms of advertisement for recruitment in the next two consecutive recruitment exercises to be conducted by the Board. ***It was held that they may be given suitable age relaxation "some weightage for their experience". Weightage, consciously, was to be given in respect of "experience" and not in connection with any examination.***

(11) The appointment of Assistant Teachers in Junior Basic Schools is regulated by U.P. Basic Education Act, 1972 [in short, it has been referred to as '1972 Act'] which was enacted by the State Legislature to control basic education (education upto eighth class) in the State of U.P. Section 19 of the 1972 Act authorizes the State Government to make rules to carry out the purpose of the Act. 1981 Rules lay down sources of recruitment and qualification for appointment of teachers. Part III of the 1981 Rules relate to recruitment. Qualifications for teachers of basic schools are defined in Part IV.

(12) The National Council for Teachers' Education Act, 1993 [in brief, it is referred to as **'NCTE Act'**] was enacted by Parliament for planned and co-ordinated development for the teacher education system and the regulation and proper maintenance of norms and standards.

(13) The RTE Act was enacted by the Parliament for free and compulsory education to all children of the age of 6 to 14 years. The RTE Act lays down the qualifications for appointment and terms and conditions of service of Teachers. Section 23 provides for qualification for appointment of teachers. The NCTE was designated as the authority under Section 23 (1) to lay down the qualifications for appointment of teachers. The Central Government in exercise of its powers conferred under Section 23 of the RTE Act issued a notification dated 31.3.2010 authorizing the NCTE as the ***'Academic Authority'*** to lay down minimum qualification for a person to be eligible for

appointment as a Teacher. On 1.4.2010, by 86th amendment to the Constitution of India, Article 21-A was inserted for providing free and compulsory education to the children of 6-14 years.

(14) The NCTE issued notification dated 23.8. 2010 laying down qualifications for appointment of teachers for elementary education. With regard to teachers appointed prior to the said notification, it was stated that they were required to have qualifications in terms of the National Council for Teacher Education (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001 [in brief, it is referred to as **'the 2001 Regulations'].**

(15) One of the minimum qualifications for a person to be appointed as Teachers in Classes I to VIII, as contained in notification dated 23.8.2010 is that he/she should pass the Teacher Eligibility Test (TET) which will be conducted by the appropriate Government. Being the Academic Authority, NCTE prescribed guidelines for conducting TET examinations by the appropriate Government vide its notification dated 11.2.2011 under Section 12-D read with Section 12-A of the NCTE Act and Section 23 of the RTE Act.

(16) The State Government in exercise of its powers conferred under Entry 25 of List III of Schedule VII and 1972 Act has prescribed an additional minimum qualification, i.e., passing the **Assistant Teacher Recruitment Examination** for being considered for appointment to the post of Assistant Teacher which the Shiksha Mitra must qualify by obtaining the prescribed passing marks, and no special rights, relaxation or benefit can be claimed by the Shiksha Mitras. Necessary amendments were carried out in the 1981 Rules, incorporating qualifying the ATRE in the manner prescribed as a minimum qualification for being considered eligible for appointment as Teacher.

(17) After decision of the Apex Court, the State of U.P. proceeded to amend 1981 Rules. The ***Twentieth amendment*** to the 1981 Rules came to be notified on 9.11.2017. This Amendment, in Rule 2(v) defined a ***Shiksha Mitra*** to mean a person working in Junior Basic Schools run by the Basic Shiksha Parishad under Government Orders issued prior to the commencement of the U.P. Right of Children to Free and Compulsory Education Rules 2011 [in short ***'UPRTE Rules, 2011']***. It also included ***Shiksha Mitras*** appointed as Assistant Teachers in Junior Basic Schools and reverted as Shiksha Mitras pursuant to the judgment of the Supreme Court in ***Anand Kumar Yadav (supra).*** It also introduced a definition for the ***"Assistant Teacher Recruitment Examination"*** to mean a written examination conducted by the Government for recruitment of persons in junior basic schools run by the Basic Shiksha Parishad. The ***"Qualifying Marks of Assistant Teacher Recruitment Examination"*** was defined to mean such minimum marks as would be determined by the Government from time to time. The relevant Clauses (w) (x) and (y) inserted vide Twentieth amendment in Rule 2 (1) of the 1981 Service Rules are being reproduced hereunder:-

Rule 2(1)(w) "Assistant Teacher Recruitment Examination" means ***a written examination conducted by Government for recruitment of a person in junior basic schools run by Basic Shiksha Parishad;***

Rule 2(1)(x) *"Qualifying marks of Assistant Teacher Recruitment Examination" means* ***such minimum marks as may be determined from time to time by the Government;***

Rule 2(1)(y) *"Guideline of Assistant Teacher Recruitment Examination" means s****uch guidelines as may be determined from time to time by the Government."***

(18) By the said ***Twentieth*** Amendment, the requirement to qualify the Assistant Teacher Recruitment Examination was included both in Rule 8 and Rule 14 as follows:-

*"****Rule 8 (1)(ii)(a) and (c)"*** *and passed Assistant Teacher Recruitment Examination conducted by the Government";*

Rule 14 (1)(a)" *and passed Assistant Teacher Recruitment Examination conducted by the Government";*

(19) Rule 5 which prescribed the essential qualifications to be possessed by a person desirous of being appointed as an Assistant Master or Mistress in a junior basic school read as follows:

"(a) Bachelors degree from a University established by law in India or a degree recognised by the Government equivalent thereto together with any other training course recognised by the Government as equivalent thereto together with the training qualification consisting of a Basic Teacher's Certificate (BTC), two years BTC (Urdu) Vishisht BTC. Two year Diploma in Education (Special Education) approved by the Rehabilitation Council of India or four year Degree in Elementary Education (B.EI.Ed.), two year Diploma in Elementary Education (by whatever name known) in accordance with the National Council for Teacher Education (Recognition, Norms and Procedure), Regulations, 2002 or any training qualifications to be added by National Council of Teacher Education for the recruitment of teachers in primary education.

and

teacher eligibility test passed conducted by the Government or by the Government of India and passed Assistant Teacher recruitment Examination conducted by the Government.

(b) a Trainee Teacher who has completed successfully six months special training programme in elementary education recognised by NCTE.

(c) a shikshamitra who possessed bachelors degree from a University established by law in India or a degree recognised by the Government equivalent thereto and has completed successfully two years distant learning B.T.C. course or Basic Teacher's Certificate (B.T.C.), Basic Teachers Certificate (B.T.C.) (Urdu) or Vishisht B.T.C. conducted by the State Council of Educational Research and Training (SCERT) and passed the Teacher Eligibility Test conducted by the Government or by the Government of India and passed Assistant Teacher Recruitment Examination conducted by the Government."

(20) The selection of Assistant Teacher as per the 1981 Rules is made in accordance with the "quality points" that may be obtained by an applicant computed in accordance with Appendix-I to the 1981 Rules. The Twentieth Amendment amended the Appendix-I to read as follows:

"[APPENDIX-I]

Quality points, and weightage for selection of candidates

	Name of Examination/ Degree	Quality Points
1.	High School	Percentage of marks in the examination x10 / 100
2.	Intermediate	Percentage of marks in the examination x10 / 100
3.	Graduation Degree	Percentage of marks in the examination x10 / 100
4.	**B.T.C. Training**	Percentage of marks in the examination x10 / 100
5.	**Assistant Teacher Recruitment Examination**	Percentage of marks in the examination x10 / 100
6.	**Weightage** Teaching Experience as shiksha mitra or an teacher working as such in junior basic schools run by Basic Shiksha Praishad	2.5 marks per completed teaching year, upto maximum 25 marks, whichever is less.

Note:

1. If two or more candidates have equal quality points, the name of the candidate who is senior in age shall be placed higher in the list.

2. If two or more candidates have equal quality points and age, the name of the candidate shall be placed in the list in English alphabetical order."

(21) The 1981 Rules were thereafter amended yet again on 15 March 2018 when the Twenty-Second Amendment came to be promulgated.

(22) For a Shiksha Mitra, the Twenty-Second Amendment prescribed the essential academic qualifications as under:

"Rule 5(a)(ii)(c) a shikshamitra who possessed bachelors degree from a University established by law in India or a degree recognised by the Government equivalent thereto and has completed successfully two years distant learning B.T.C. course or Basic Teacher's Certificate (B.T.C.), Basic Teacher's Certificate (B.T.C.) (Urdu) or Vishisht B.T.C. conducted by the State Council of Educational Research and Training (SCERT) and passed the Teacher Eligibility Test conducted by the Government or by the Government of India."

(23) For the purpose of determination of vacancies, Rule 14(1)(a) after the Twenty-Second Amendment reads as follows:

"14(1)(a) Determination of vacancies

In respect of appointment, by direct recruitment to the post of Mistress of Nursery Schools and Assistant Master or Assistant Mistress of Junior Basic Schools under clause (a) of Rule 5, the appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, and other categories under Rule 9 and published in at least two leading daily newspapers having adequate circulation in the State as well as in concerned district inviting applications from candidates possessing prescribed training qualification and passed teacher eligibility test, conducted by the

Government or by the Government of India and passed Assistant Teacher Recruitment Examination conducted by the Government."

(24) It would be also to be pertinent to compare sub-rules (2) and (3) of Rule 14 as amended by the Twentieth and Twenty-Second Amendments. This would be evident from the chart which is extracted herein below:-

(2) The appointing authority shall scrutinize the applications received in pursuance of the advertisement under clause (a) or (b) of sub-rule (1) of rule 14 and prepare a list of such persons as appear to possess the prescribed academic qualifications and be eligible for appointment.	(2) Preparation of Merit List- The appointing authority shall scrutinize the applications received in pursuance of the advertisement under clause (a) or clause (c) of sub-rule (1) and **prepare a merit list of such persons as appear to possess the prescribed academic qualifications and passed Assistant Teacher Recruitment Examination be eligible for appointment.**
(3)(a). The names of candidates in the list prepared under sub-rule (2) in accordance with clause (a) of sub-rule (1) of rule 14 shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points and weight-age as specified in the appendix-I:	(3)(a). The names of candidates in the list prepared under sub-rule (2) in accordance with clause (a) of sub-rule (1) of rule 14 **shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points and weightage as specified in the appendix-I:**
Provided that if two or more candidates obtain equal marks, the candidate senior in age shall be placed higher:	Provided that if two or more candidates obtain equal marks, the candidate senior in age shall be placed higher:
	Provided that a person working as Shiksha Mitra in Junior Basic Schools run by Basic Shiksha Parishad shall be given weightage in the recruitment of the post of Assistant Teacher, only in two consecutive Assistant Teacher Recruitment Examination conducted by the Government after July 25, 2017.
	(b) The names of candidates in the list prepared under sub-rule (2) in accordance with clause (c) of sub-rule (1) of rule 14 shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points specified in the appendix-II:
3(b). The names of candidates in the list prepared under sub-rule (2) in accordance with clause (b) of sub-rule (1) of rule 14 shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points specified in the appendix-II	
	Provided that if two or more candidates obtain equal marks, the candidate senior in age shall be placed higher.
Provided that if two or more candidates obtain equal marks, the candidate senior in age shall be placed higher.	

(25) Sub-Rule (2) clearly mandates the preparation of a merit list to include only such persons who possess the prescribed academic qualifications and have passed the ATRE. Sub-rule (3) (a) reinforces the above position by prescribing that the names of candidates prepared under sub-rule (2) of Rule 14 is to be arranged in accordance with the quality points and weightage as specified in Appendix - I. It is in unequivocal terms provides for a weightage only in respect of every teaching year completed by Shiksha Mitra. As per clause 6 of the Appendix - I, Shiksha Mitras are entitled to a weightage of 2.5 marks subject to a maximum of 25 marks in respect of every completed year of teaching alone. Clause 5 of the Appendix - I does not make any provision for the grant of weightage at the stage of declaration of results.

(26) Significantly Rule 8 after its Twenty-Second Amendment while prescribing essential qualifications, has done away with the requirement of passing of the Assistant Teacher Recruitment

Examination conducted by the Government. Similarly the said Rule while prescribing the academic qualifications for a Shiksha Mitra has deleted the requirement of a Shiksha Mitra having passed the Assistant Teachers Recruitment Examination. This requirement however, is continued in Rule 14(1)(a) as well as in sub-rules (2) and (3) thereof.

(27) After dictum of the Hon'ble Supreme Court in the case of ***Anand Kumar Yadav (supra),*** the ATRE was introduced. Statutory Guidelines under Rule 2(y) of 1981 Rules for conducting **first ATRE - 2018** examination were issued on 9.1.2018 and selection process was undertaken to fill-up approximately 68,500 vacancies in the primary schools in the State and the State Government started conducting written examination **called Assistant Teacher Recruitment Examination 2018** and issued an advertisement for filling up of 68,500 posts of Assistant Teachers in Junior High School. Clauses 1 (kha) and 7 (3) of the Guidelines dated 9.1.2018 for ATRE - 2018 read as under:-

Clause 1 (kha) सहायक अध्यापक भर्ती परीक्षा उ0प्र0 बेसिक शिक्षा परिषद द्वारा संचालित प्राथमिक विद्यालों में सहायक अध्यापक के पदों पर भर्ती हेतु कुल 68500 पदों के सापेक्ष आयोजित की जायेगी । विशेष परिस्थितियों में पदों की संख्या घट/बढ सकती है । **यह परीक्षा मात्र इसी भर्ती के लिये ही मान्य होगी ।**

Clause 7 (3) : सहायक अध्यापक भर्ती परीक्षा करना किसी व्यक्ति को भर्ती/ रोजगार के लिए अधिकार नहीं होगा क्यूंकि यह नियुक्ति के लिए केवल पात्रता मानदण्डो में से एक है।

(28) From clause 1 (Kha) it has been clearly mentioned that the said examination is valid for the recruitment of the particular year. In the said examination, the minimum qualifying marks for TET was 60% and 55%, as the case may be and for Assistant Teacher Recruitment Examination 2018, it was 45% for general category and 40% for reserve category as per clause 7 (1) and 7 (2) of the guidelines which read as under:-

"7(1) सहायक अध्यापक भर्ती परीक्षा में शामिल हाने वाले अभ्यर्थियां का परीक्षा परिणाम वेबसाइट पर जारी किया जायेगा। सामान्य एवं अन्य पिछडा वर्ग के अभ्यर्थियों को पूर्णांक 150 में ो 67 अंक अर्थात 45 प्रतिशत और अधिक अंक प्राप्त करने वाले अभ्यर्थियों को सहायक अध्यापक भर्ती परीक्षा उत्तीर्ण होने का प्रमाण पत्र जारी किया जायेगा ।

7(2) अनुसूचित जाति/अनुसूचित जनजाति श्रेणी के अभ्यार्थियों के लिए न्यूनतम अर्हक अंक 40 प्रतिशत अर्थात पूर्णांक 150 में से 60 अंक होगा ।"

(29) Recruitments of first ATRE - 2018 were carried out under the ***Twenty-second*** Amendment. At that time, a challenge was laid by the Shiksha Mitras that after the ***Twenty-second*** Amendment qualifying the ATRE is no longer a minimum requirement, in the case of ***Kul Bhushan Mishra and others v. State of U.P. and others [(2019) 2 ADJ 442],*** wherein the writ petitioners have prayed for a direction that while preparing the merit list of the ATRE - 2018, which was conducted by the State of U.P. on 27.5.2018, weightage of 2.5% marks for every year of the working as Shiksha Mitra should be given and result be declared after adding the same.

(30) The Division Bench of this Court dealt with the aforesaid issues exhaustively in ***Kul Bhushan Misra's case (supra)***, and found that the Shiksha Mitras cannot claim the benefits under the ***Anand Kumar Yadav's case (supra)*** before they hold the prescribed minimum qualifications and

qualify the ATRE and come within the zone of eligibility for being considered for appointment as Assistant Teacher. This Court held that not only is qualifying the ATRE a mandatory and minimum qualification to be considered for appointment to the post of Assistant Teacher, but also that any benefit under the ***Anand Kumar Yadav's case (supra)*** shall be available to the Shiksha Mitras only during the 'process of recruitment' which will start once they qualify the ATRE by scoring the prescribed qualifying marks, and until they do so they cannot stake a claim to such weightage. Relevant portion of the judgment of ***Kul Bhushan Misra (supra)*** reads as under:-

"In our considered opinion the submission advanced on behalf of the appellants/petitioners must necessarily be evaluated bearing in mind the decision of the Supreme Court in Anand Kumar Yadav as well as the statutory amendments introduced in the 1981 Rules by virtue of the Twentieth and Twenty-Second Amendments.

Anand Kumar Yadav, expressly upheld and affirmed the decision rendered by the Full Bench of this Court. The Supreme Court confirmed the position found by the Full Bench that Shiksha Mitras did not possess the requisite qualifications required of an Assistant Teacher and, thus, they could not be regularised. *However, the Supreme Court also sought to balance the rights of 1,78,000 persons engaged by the State Government in Basic Schools in their capacity as Shiksha Mitras by observing that in the peculiar fact situation, they ought to be given an opportunity to be considered for recruitment if they have acquired or they now acquire the requisite qualifications in terms of advertisements for recruitment in the next two consecutive recruitment exercises to be conducted by the Board. It is in that light that the second proviso to Rule 14 (3) must be read. The second proviso must also necessarily be interpreted in conjunction and against the backdrop of the significant observation of the Supreme Court in Anand Kumar Yadav where it was held that they may be given suitable age relaxation and "some weightage for their experience...". Weightage, crucially was to be given in respect of "experience" and not in connection with any examination.*

The appointment of Shiksha Mitras as Assistant Teachers was unequivocally made subject to they having either acquired or now acquiring the requisite qualifications as prescribed under the 1981 Rules. Viewed in this light, it is manifest that Shiksha Mitras were not exempted from the rigours of possessing either the essential qualifications or otherwise meeting the requirements of the 1981 Rules and more particularly Rule 14 thereof. Rule 14(1)(a) in unambiguous terms confines the zone of eligibility to those who (a) possess the prescribed training qualification, (b) have passed the Teacher Eligibility Test and (c) the Assistant Teacher Recruitment Examination. The procedure for preparation of the merit list is then prescribed in sub-rule (2) which mandates the inclusion of only such persons, who possess the prescribed academic qualifications and have additionally passed the Assistant Teacher Recruitment Examination. Sub-rule (3) then proceeds to prescribe that the name of candidates shall be arranged in accordance with the quality points and weightage as specified in Appendix-I. Clause 5 of the Appendix-I provides for the manner in which quality point marks are to be computed with

respect to marks obtained in the Assistant Teacher Recruitment Examination. There is thus an unambiguous command enshrined in sub rules (1) and (2) read with the Appendix-I of a candidate passing the Assistant Teacher Recruitment Examination. These provisions, significantly, do not prescribe or envisage the conferral of weightage to the marks obtained in the said examination.

The Appendix-I and more particularly Clause 5 thereof, provides for the computation of quality points based upon the marks obtained by an applicant in the Assistant Teacher Recruitment Examination. As is evident from Clause 6 of the Appendix-I the weightage of 2.5 marks subject to a maximum of 25 marks is confined to every completed year of teaching. Weightage is not provisioned for in Clause 5 which deals with the computation of quality points with regard to the Assistant Teacher Recruitment Examination. The Appendix-I in unambiguous terms provides for a weightage of 2.5 marks subject to a maximum of 25 only in respect of every completed year of teaching. Significantly although the second proviso to sub rule (3) was introduced by way of the Twenty-Second Amendment on 15 March 2018, the Appendix-I as amended by the Twentieth Amendment was not touched. This clearly seems to suggest that the ***rule making authority had no intention of amending or modifying the manner in which quality point marks were to be computed. Neither Clause 5 nor Clause 6 of the Appendix-I were varied.*** *They continue to link the grant of weightage solely to every completed year of teaching. Similarly, Clause 5 continues to maintain the formula for computation of quality point marks as it is without providing for any addition or weightage being provided at this stage."*

....

"Both sub-rules (1) and (2) of Rule 14 unequivocally mandate that a candidate desirous of appointment as an Assistant Teacher must have passed the Assistant Teacher Recruitment Examination. Rule 14 (3)(a) then proceeds to prescribe that the names of candidates prepared under Rule 14 (2) is to be arranged in accordance with quality points and weightage as specified in Appendix-I. Appendix-I as noticed above restricts the application of weightage to every completed teaching year. Neither sub rules (2) and (3) nor the Appendix-I contemplate weightage being accorded at the time of computing quality points with respect to the Assistant Teacher Recruitment Examination or at the time of declaration of results of the said exam. This subject is dealt with exclusively by clause 5 of Appendix-I. This particular clause, as noticed above, has remained unaltered and untouched by the Twenty-Second Amendment. Even this clause does not prescribe a weightage being accorded to the marks obtained in the examination in question. The subject of weightage is considered principally by Clause 6. It is also signifiant to note that Clause 6 restricts the application of weightage to every completed teaching year alone. This particular Clause was also neither visited nor touched by the Twenty-Second Amendment.

Viewed in the above backdrop, we are of the considered view that weightage was not contemplated to be added to the marks obtained by a person in the Assistant Teacher Recruitment Examination. *Following the principle of identifying the hierarchy of provisions as enunciated by the Supreme Court, we find that sub-rules (2) and (3) of Rule 14 are the principal provisions. The prescription and requirements placed by these two*

provisions must be recognised to be the fundamental pedestal which must be achieved by any candidate seeking appointment as an Assistant Teacher. The second proviso to Rule 14 (3) must, therefore, be interpreted so as to fall in line and in tune with sub-rules (2) and (3). This would also flow from the language of the second proviso itself, which principally deals with the subject of grant of weightage in respect of recruitment to the post of Assistant Teacher. Sub-rule (4) of Rule 14 is also of no less significance. This provision in unambiguous terms prescribes that no person shall be eligible for appointment unless his or her name is included in the list prepared under sub-rule (2). Sub-rule (4) expressed in negative terms clearly operates as a statutory injunction against the appointment of any person unless he or she finds place in the list prepared in accordance with Rule 14 (2). Sub-rule (2) of Rule 14, as we have held above, clearly requires all persons to pass the Assistant Teacher Recruitment Examination. This sub rule does not contemplate the grant of weightage at the stage of preparation of the result of the Assistant Teacher Recruitment Examination. We have also recognised sub-rules (1), (2) and (3) of Rule 14 as well as Appendix-I to be the principal provisions. On a conjoint reading of these provisions, it is manifest that weightage is not liable to be accorded at the stage of computation of marks obtained by a candidate in the Assistant Teacher Recruitment Examination. At the cost of repetition, we may only reiterate that the observation of the Supreme Court in Anand Kumar Yadav with respect to the grant of weightage also stood confined to the experience gained by a Shiksha Mitra. This observation stands embedded in the statute with Appendix-I prescribing weightage being accorded for every completed year of teaching."

(31) After conducting first ATRE - 2018 on 27.5.2018, the State Government by a Government Order dated 8.8.2018 has issued an order directing the concerned authorities to prepare the list as per minimum marks provided in clause 7 (1) and 7 (2) of the Government Order dated 9.1.2018. Result of first Assistant Teacher Recruitment Examination 2018 was declared on 13.8.2018 in which 41,556 candidates were declared ***'pass'***. Pursuant to the result of revaluation being declared 4500 and odd candidates were also declared ***'pass'***.

(32) The State Government vide Government Order dated 1.12.2018 issued statutory guidelines and applications were invited for conducting **second Assistant Teacher Recruitment Examination 2019** (In short, it is referred to as '**ATRE - 2019**') for filling up of **69,000** posts of Assistant Teachers and its advertisement was issued on **5.12.2018** wherein the date of examination was fixed as **6.1.2019**. Clauses 1 (kha), 4 (2), 7 (2) and 17 (10) are relevant which read as under:-

1 (Kha) सहायक अध्यापक भर्ती परीक्षा उ0प्र0 बेसिक शिक्षा परिषद द्वारा संचालित प्राथमिक विद्यालों में सहायक अध्यापक के पदों पर भर्ती हेतु कुल 69000 पदों के सापेक्ष आयोजित की जायेगी । विशेष परिस्थितियों में पदों की संख्या घट/बढ सकती है । यह परीक्षा मात्र इसी भर्ती के लिये ही मान्य होगी ।

4 (2) राष्ट्रीय अध्यापक रिक्षा परिषद, नई दिल्ली द्वारा न्यूनतम अर्हता कक्षा 1 से 5 के सम्बन्ध में निर्गत अधिसूचना दिनांक 23.08.2010, 29.07.2011, 12.11.2014, 28.11.2014 ;एपेंडिक्स –2 की प्रस्तावना 1.2 में उल्लिखितद्ध तथा दिनांक 28. 06.2018 में निर्धारित अर्हताधारी सहायक अध्यापक भर्त्ती परीक्षा 2019 में आवेदन करने के लिए पात्र होंगें ।

7 (2) सहायक अध्यापक भर्ती परीक्षा उत्तीर्ण करना किसी व्यक्ति को भर्ती/रोजगाार के

लिए अधिकार नही होगा क्योंकि यह नियुक्ति के लिए केवल मानदण्डों में से एक है ।

17 (10) यदि किसी अभ्यर्थी को सहायक अध्यापक भर्ती परीक्षा में बैठने की अनुमति दे दी गई है तो इसका यह अर्थ नहीं लिया जायेगा कि अभ्यर्थी की पात्रता प्रमाणित हो गई है, इससे अभ्यर्थी को नियुक्ति के लिए कोई अधिकार नही मिलता है । पात्रता संबोधित भर्ती/नियोक्ता प्राधिकारी द्वारा अंतिम रूप से प्रमाणित की जाएगी । अभ्यर्थी को आवेदन करने से पहले अपनी योगयता से पूर्णतः संतुष्टि हानेा चाहिए और यदि यह दिए गए योग्यता मापदण्ड के अनुसार आवेदन के लिए योगय नही है तो वे आवेदन न करें और फिर भी आवेदन करतेहै तो इसके लिए अभ्यर्थी स्वयं जिम्मेदार होगा ।

(33) The **second ARTE 2019** was conducted on 6.1.2019. In the said examination no minimum cut-off marks was fixed for Assistant Teacher Recruitment Examination and the examination was conducted on 6.1.2019 without any such fixation of minimum qualifying marks. After the guideline dated 1.12.2018 was published in which the cut-off marks were not published, Writ Petition No.27461 of 2018 was filed before this Court calling for fixation of cut off marks of ATRE 2019 and the State Government had proceeded with expedition to secure punctilious compliance with orders issued by this Court therein fixing the cut off marks after taking relevant factors into consideration vide Government Order dated 7.1.2019 in exercise of powers conferred under the 1972 Act and Rule 2(1)(x) of the 1981 Rules in accordance with the procedure prescribed upon, which the said writ petition was dismissed as having become infructuous, fixing minimum 65% for general category and 60% for reserve category. The said Government Order dated 7.1.2019 has been assailed by the Shiksha Mitras by filing writ petitions on various grounds.

(34) Learned counsel for the writ petitioners proposed five issues for consideration before the learned Writ Court which read as under:-

"I. Whether the impugned Government Order makes an unreasonable classification by giving different treatment to two groups of identically situated persons appearing in two consecutive examinations?

II. Whether there are valid reason and justification for drastically increasing minimum qualifying marks and whether it has any nexus with the object sought to be achieved.

III. Whether the issuance of impugned Government Order nullifying the beneficial direction of the Hon'ble Apex Court's judgment is permissible in law?

IV. Whether practical working experience is an integral part of merit and whether special provision regarding weightage added in the statute can be nullified by general provisions of Rules?

V. Whether by providing the eligibility marks after holding the written examination the respondents are changing the Rule of game after the game starts?"

(35) The arguments of the learned Senior Counsel for the appellants (respondents in the writ petition) that the examination is a part of recruitment process is entirely misplaced as it is not the case that every candidate who qualifies the second ARTE has to necessarily be appointed as Assistant Teacher and he/she must meet the further criteria laid down under the 1981 Rules and the relevant recruitment advertisement. The learned Writ Court by impugned judgment has observed that no logic is fixed fixing the minimum qualifying marks for ATRE 2019 examination as 65% and 60% respectively.

The qualifying marks have been fixed for examination after completion of examination and there is no justification as to why the cut-off marks have been enhanced from 45% and 40% to 65% and 60% respectively. Relying on Rule 2 (x) of 1981 Rules, it has been observed that the qualifying marks should be 'minimum' and 'minimum' should be seen like 'minimum'. 'Minimum' may not be seen as 'maximum' and allowed the writ petitions vide impugned judgment and order dated 29.3.2019.

(36) Aggrieved by the said order, these Special Appeals have been filed on the ground that the learned Writ Court allowed the writ petitions while mixing the issue of qualifying examinations with the final recruitment, which is yet to commence, as even notification has not yet been issued for the purpose of recruitment by the State Government.

(37) In Special Appeal No. 207 (D) of 2019, Sri Raghvendra Singh, learned Advocate General has submitted that for filling up of 69,000 vacancies of Assistant Teachers in Primary Schools run by the U.P. Basic Education Board, the guidelines/schedule was issued by the State Government on 1.12.2018 for holding the ATRE - 2019. The selection was to be held in terms of 1981 Rules as amended from time to time including Twentieth and Twenty-second amendment. On 6.1.2019, the written examination was held. Thereafter, on 7.1.2019, the State Government determined the minimum qualifying marks of Assistant Teacher Recruitment Examination as 65% for unreserved category and 60% for reserved category. This order was issued by the Anubhag - 4 of the Basic Education Department determining the minimum qualifying marks as per Rule 2(x) of the Twentieth and Twenty-second amendments made in the 1981 Rules. He submitted that the determination of minimum marks was within the statutory competence of State Government. The increase in the minimum qualifying marks is justified on the ground of change in the pattern of the examination and increase in the number of applicants from approximately 1.07 lakhs in the year 2018 (first ATRE - 2018) to 4.1 lakhs in the year 2019, (second ATRE - 2019) learned Advocate General submits that minimum qualifying marks were increased keeping in view the change in procedure and criteria of examination inasmuch as in the previous selection, the examination was subjective whereas in the current examination, the paper was objective (multiple choice questions) and there is no whisper in rejoinder affidavit that allegedly there is no difference in subjective and objective type of questions. The determination of the quantum of minimum marks on 7.1.2019 is prior to declaration of result which could not have been construed as change in the rules of game. The qualifying marks were increased in order to increase in standard and merit in education. The learned Writ Court has erred in allowing the writ petitions on the premise that fixing the minimum qualifying marks are disadvantageous to Shiksha Mitras and allegedly trying to negate the case of ***Anand Kumar Yadav (supra).***

(38) He further submitted that the order dated 7.1.2019 issued by the Anubhag - 4 was within the statutory competence of the State Government. There is no violation of U.P. Distribution of Work Rules, 1975 (Uttar Pradesh Karya (Batwara) Niyamawali, 1975) and even otherwise, no prejudice can be said to have been caused to the Shiksha Mitras.

According to the learned Advocate General, upholding the judgment of the learned Writ Court would entail appointments of such candidates who would be scoring less marks in written examination and shall consequentially negate the endeavour of the Government to ensure availability of meritorious candidates to be appointed as Teachers in the Primary Schools and the direction of the Hon'ble Supreme Court in para - 33 of ***Anand Kumar Yadav (supra)*** is very clear that the Shiksha Mitras have been given certain benefits but that does not mean that they would not secure minimum qualifying marks as fixed on 7.1.2019. He lastly submitted that reasons have been given in the counter affidavit regarding issuance of Government Order dated 7.1.2019 and these aspects were not considered by the learned Writ Court while allowing the writ petitions.

(39) Learned Senior Advocate, Sri Prashant Chandra, appearing for the appellants in Special Appeal No. 165 (D) of 2019 has submitted that the learned Writ Court has erred in treating the process of attaining of eligibility and qualifying the ATRE as recruitment of Teachers. The exercise of holding the ATRE is just for attaining of eligibility (a stage which has not yet been initiated). According to Shri Chandra, the learned Writ Court has misconstrued the eligibility as recruitment. He relying on the decision of the Apex Court in the case of ***Jharkhand Public Service Commission v. Manoj Kumar Gupta and other, Civil Appeal No.9441 of 2019,*** vide judgment and order dated 18.12.2019, wherein the Apex Court has held that eligibility tests are not meant for selection to any post but is conducted to determine the eligibility of the candidates for appointment as Lecturers in Universities and Colleges of the State of Jharkhand, has submitted that the learned Writ Court has mixed up the issue of ***eligibility and recruitment.*** The recruitment process under the 1981 Rules commences with the issuance of recruitment notification, a stage which has not yet come. Only guidelines for ATRE 2019 were issued on 1.12.2018 and they can by no stretch of imagination be said to be an advertisement for recruitment. They don't have any particulars of the actual recruitment process, such as district wise vacancies, manner of eligibility and recruitment etc. He further submitted that in the case of ***Jharkhand Public Service Commission v. Manoj Kumar Gupta (supra),*** the Apex Court has held that the State is free to determine the cut-off marks even after the examination has been held and the same does not amount to change in the rules of the game.

(40) He has drawn our attention to the recent decision of the Apex Court in the case of ***Municipal Corporation of Delhi v. Surendra Singh and others [(2019) 8 SCC 67],*** wherein the Apex Court while dealing with an identical situation of recruitment of Teachers, where cut-off marks was not prescribed in the advertisement, but later prescribed, after examination has been conducted, held that if the employer fixes the cut-off position, the same is not to be tinkered with unless it is totally irrational or tainted with *mala fides.*

(41) He further submitted that reducing the qualifying mark shall not only compromise on the merit, but also extend an unfair advantage to the Shiksha Mitras, somehow grabbing which is the sole intent behind the present lis. Therefore, any reduction in cut-off shall be detrimental to public interest as it will lead to the eventual

appointment of Shiksha Mitras who, admittedly, are not sufficiently meritorious to qualify the ATRE at the qualifying marks determined by the Government. The children of India have a fundamental right to be taught by a duly qualified Teacher and the nation as a whole shall suffer if the minimum qualification is done away with.

(42) He next submitted that once the Shiksha Mitras attain the minimum qualification, they shall form a class of persons and indisputably, the benefit under the ***Anand Kumar Yadav case (supra)*** shall be extended to them at that stage. Until they do, there is no scope for any relaxation in a condition which has been uniformly applied to all candidates by the State Government in exercise of its powers under law.

(43) He also pointed out that the learned Writ Court has erred in holding that as the 1981 Rules did not envisage the recruitment of B.Ed. candidates to the post of Assistant Teacher (and provided for their appointment only to the post of Trainee Teacher), and as the Appendix - I did not provide a mechanism to lay down the procedure for calculating the quality point marks of B.Ed. candidates, hence the participation of the B.Ed. candidates in the ATRE - 2019 was bad.

(44) Lastly, he submitted that 1981 Rules have been amended well-in-time, prior to commencement of recruitment process to provide for recruitment of B.Ed. candidates directly to the post of Assistant Teacher, subject to them undergoing a post-appointment training, strictly in accordance with law and as prescribed by the NCTE. *These changes have been brought about by the Twenty-Third amendment dated 29.1.2019, Twenty-fourth amendment dated 7.3.2019 and Twenty-fifth amendment dated 14.6.2019.* By these amendments, the concept of 'trainee teacher' has entirely been done away with in accordance with the amendment issued by the NCTE and Appendix - I has also been amended to set-out the manner of calculating the quality point marks of B.Ed. candidates. With these arguments, he submitted that the reasoning assigned by the learned Writ Court while quashing the Government Order dated 7.1.2019 is contrary to the law laid down by the Apex Court in the cases of ***Municipal Corporation of Delhi v. Surender Singh and others [(2019) 8 SCC 67], Jharkhand Public Service Commission v. Manoj Kumar Gupta, Civil Appeal No.9441 of 2019 and Kul Bhushan Mishra and others v. State of U.P. and others [(2019) 2 ADJ 442]*** and prayed that Special Appeal No.165 (D) of 2019 be allowed by setting aside the impugned order.

(45) Sri S. K. Kalia, learned Senior Advocate appearing for the appellants in Special Appeal No.157 of 2019 has submitted that the learned Writ Court was of the view that Shiksha Mitras who appeared in the ATRE of 2018 and 2019 constitute one class and as such, fixation of different qualifying marks in the two examinations (ATRE - 2018 and ATRE - 2019) violates the principle of equality as intelligible differentia for classification between the two categories who appeared in the years 2018 and 2019 and prescription of qualifying marks in the two examinations violates the principle of equality as there is no reasonable nexus between the intelligible differentia and object sought to be achieved for classification. He submitted that the submission on behalf of the writ petitioners is absolutely untenable in the eyes of law

because the candidates who appeared in 2018 (first ATRE - 2018) examination in pursuance of the Government Order dated 9.1.2018 and those who appeared in 2019 (second ATRE - 2019) examination in pursuance of the Government Order dated 1.12.2018 do not constitute one class. In both the Government Orders, in clause 1 (kha), it has been clearly mentioned that the said examination is valid only for the recruitment of that particular year.

(46) His submission is that as per the judgment of Apex Court in the case of ***Anand Kumar Yadav (supra)***, 'Shiksha Mitras' were given an opportunity to appear in two consecutive examinations for recruitment in accordance with the advertisements dated 9.1.2018 (ATRE - 2018) and 1.12.2018 (ATRE - 2019), and as such, conditions of advertisements of both examinations have become relevant and candidates who appeared in pursuance of the said advertisement had to abide by the conditions of the advertisement.

(47) He next submitted that in furtherance and compliance of the judgment of the Apex Court, the State Government amended (Twentieth) the 1981 Rules vide notification dated 9.11.2017 and both the Government Orders provide age relaxation to the Shiksha Mitras upto the age of 60 years to appear in the examination and as such, there is no different treatment to the Shiksha Mitras in the examination. The appellants of Special Appeal No.157 of 2019 are possessing all requisite qualifications provided in the Government Order dated 1.12.2018 and for appointment on the post of Assistant Teacher, they are Graduates having B.T.C. Training Certificate and have also passed the T.E.T. and they were fully eligible in accordance with the Rules and as per Government Order and the advertisement and as such, they appeared in the examination.

(48) Similarly, candidates having B.Ed. degree which was introduced in the eligibility conditions in the Government Order dated 1.12.2018 [clause 4 (2)], in pursuance of the notification of **NCTE** dated 28.6.2018, also appeared in the said examination and about 4,10,000 candidates appeared in the said examination which was held on 6.1.2019. He has drawn our attention towards paras 8 and 9 of the counter affidavit of the State Government and submitted that the State Government had justified its decision to prescribe higher cut-off marks in 2019 ATRE examination because the pattern of examinations of ATRE 2018 and ATRE 2019 was different. In 2018 examination, the candidates had to give short answers to the questions and in 2019 examination, it was objective based on OMR sheets and as such, the same was high scoring and if the findings of the learned Writ Court that both the examinations should be conducted in the same manner is to be upheld, then it vitiates the examination of 2019 itself and the reasoning is absolutely untenable.

(49) He also pointed out that the State Government also mentioned in its counter affidavit while justifying the higher cut-off marks that in 2018 ATRE examination only 1,07,000 candidates appeared against 68,500 vacancies whereas in 2019 ATRE examination, 4,10,000 candidates appeared against 69,000 vacancies and as such, it was absolutely justified on the part of the State Government to take these factors into account for determining the qualifying marks.

(50) Lastly, he has submitted that inclusion of B.Ed. candidates in the field of eligibility in 2019 examination was not challenged and was not in issue before the learned Writ Court and as such, the observations made in the impugned judgment are just ***obiter dicta*** and cannot

be held to hold that examination was being conducted only for Shiksha Mitras because B.Ed. candidates could not be considered. The appellants who were not the Shiksha Mitras and who were possessing the relevant qualification as provided in the 1981 Rules and in the Government Order were eligible to appear and they appeared without any challenge. Similarly, the B.Ed. candidates have appeared without any challenge and such finding based on the said fact of classification and discrimination is absolutely unfounded. Fixation of qualifying marks for passing the examination is within the domain of the State Government under the 1981 Rules and the learned Writ Court could not have fixed the qualifying marks for declaration of result as has been done by the learned Writ Court and therefore, the judgment is not sustainable in the eyes of law and prayed that the same be set aside with a direction that the result of examination be declared as per Government Order dated 7.1.2019.

(51) Sri J. N. Mathur, learned Senior Advocate appearing for the appellants in Special Appeal No.158 of 2019 has submitted that the Apex Court in the case of ***Anand Kumar Yadav (supra)*** had left open for the State Government to take a decision with respect to granting of some kind of weightage in marks to the Shiksha Mitras for their experience and further provided that they shall be eligible to appear in two consecutive selection processes for the post of Assistant Teacher wherein the State Government shall take a decision regarding age relaxation to the Shiksha Mitras.

(52) He has also pointed out that the **ATRE - 2019** was based on a different pattern as it only had multiple choice questions where the candidates had to select the correct answer out of four options. In contrast, the ATRE - 2018 had short answer type questions where the candidates had to write a couple of sentences on the topics given, therefore, while the ATRE - 2019 was objective in pattern and style to be completed in 2 1/2 hours, **ATRE - 2018** was subjective in pattern to be completed in 3 hours. The State Government, taking into consideration the aforesaid contrast in the pattern of examination and the substantial increase in the number of candidates participating in the ATRE - 2019, took a conscious decision to fix the minimum qualifying marks at 65% for unreserved category and 60% for reserved category candidates vide Government Order dated 7.1.2019. He has drawn our attention to the rejoinder affidavit wherein the respondents had admitted before the learned Writ Court that the pattern of examination had changed in the ATRE - 2019, but the said change in the pattern of examination was never assailed by any candidate and all writ petitioners had appeared in the ATRE - 2019 examination held on 6.1.2019 without any protest or demur. He submitted that no prejudice was caused to the original writ petitioners by issuance of Government Order dated 7.1.2019 which was applicable to all candidates who had participated in the ATRE - 2019 examination.

(53) Per contra, Sri H. N. Singh, learned Senior Advocate assisted by Sri Agnihotri Kumar Tripathi, Sri Upendra Nath Mishra, learned Senior Counsel assisted by Sri Amit Kumar Singh Bhadauriya, and Dr. L. P. Mishra with Sri Avadesh Shukla, learned Counsels in support of the impugned judgment and order passed by the learned Writ Court, have submitted that since the Government

Order dated 7.1.2019 was found to be hit by the vice of unreasonable classification and no reason has been given for introducing such sharp increase in the minimum qualification mark, the learned Writ Court has rightly quashed the same holding that the same is violative of Article 14 of the Constitution as it makes an unreasonable classification by giving different treatment to two groups of identically situated Shiksha Mitras appearing in two consecutive ATRE examinations and there is no valid reason and justification for increasing the minimum qualifying marks, the State Government issued Government Order dated 7.1.2019 just to nullify the benefit of weightage given by the Apex Court in the case of ***Anand Kumar Yadav (supra)***. They further submitted that no explanation has been given as to how 'participation of B.Ed. trained candidates' in ATRE - 2019 for appointment on the post of Assistant Teacher has been made directly, instead of Trainee Teacher, though minimum qualification for participation of B.Ed. candidates directly for Assistant Teachers was suitably amended only by Twenty-Third and Twenty-Fourth amendments of the Rules on 24.1.2019 and 7.3.2019 respectively.

(54) In respect of unreasonable classification, they submitted that vide Twenty-Second amendment in the 1981 Rules on 15.3.2018, second proviso to Rule 14(3)(a) read with Appendix - I for creating a statutory legal right in favour of Shiksha Mitra, for getting weightage of 2.5 marks per year subject to a maximum of 25 marks towards their service experience and the same was applicable only on those Shiksha Mitra, who had successfully acquired T.E.T. qualification and they were approximately 50,000 in number out of 1,37,500 Shiksha Mitras and they constitute a homogeneous class in itself as they were entitled to be given 'two consecutive opportunities of recruitment' as Assistant Teacher. All these T.E.T. qualified Shiksha Mitras were entitled to get the same treatment and benefits without any difference. The State Government issued an advertisement vide Government Order dated 9.1.2018 in respect of 68,500 vacancies. In the said examination, as per clause 7 (1) and (2) minimum qualifying marks for ATRE - 2018 was 45% for general category and 40% for reserve category. Result of ATRE - 2018 was declared on 13.8.2018 in which 41556 candidates were declared passed and pursuant to the result of re-evaluation being declared 4500 and odd candidates were also declared passed. In ATRE - 2018 examination, only half of Shiksha Mitras would have been selected and appointed as Assistant Teachers and the remaining half would have again been compelled to appear in the second ATRE - 2019 and an advertisement was published on 1.12.2018, the examination of which was held on 6.1.2019 and immediately on the next day, the impugned Government Order dated 7.1.2019 was issued by which the minimum qualifying marks were arbitrarily increased to 65% for unreserved category candidates and 60% for reserved category candidates just to deprive the Shiksha Mitras to get the benefit of weightage of 25 marks for their experience at the time of their selection. Vide Government Order dated 7.1.2019, the Government treated the Shiksha Mitras who had appeared in the ATRE - 2019 examination as different class, whereas in terms of the order passed by the Apex Court, all the T.E.T. qualified Shiksha Mitras were entitled to apply for two consecutive recruitments after getting the benefit of weightage and thus, the State

Government has resorted to hostile discrimination and unreasonable classification amongst similarly situated Shiksha Mitras which was rightly struck down by the learned Writ Court.

(55) It is further submitted that apart from changing minimum qualification for the post of 'Assistant Teacher', the procedure for appointment of 'trainee teacher', contained in Rule 14(1)(c) and 14(1)(d), was deleted, though the provisions of 'trainee teacher' contained in Rule 2(u) and 8(2)(b) in the 1981 Rules were still maintained. Therefore, the B.Ed. qualification, despite Twenty-Third amendment, could not have been included in the process of evaluation for the post of 'Assistant Teacher' under Appendix - I. The rules of selection cannot be altered or amended, after the commencement of selection process and the rules regarding qualification for appointment, if altered or amended, during the continuation of the process of selection, would not affect the same.

(56) They further submitted that retrospective amendment in the 1981 Rules has been made by the State Government in violation of Section 19 of the Act only to justify illegal participation of B.Ed. in ATRE - 2019. Twenty-Third amendment of the 1981 Rules was introduced on 24.1.2019 for minimum qualification of the candidates participating in the ATRE - 2019 with inclusion of B.Ed. candidates with six months' training, that too, after holding the examination under Rule 8(2)(a) with retrospective effect from 1.1.2018. Twenty-Fourth amendment of the 1981 Rules was introduced on 7.3.2019 with effect from 28.6.2018, i.e., the date of NCTE notification and not with effect from 1.1.2018. Both Twenty-Third and Twenty-Fourth amendments of the 1981 Rules were brought with retrospective effect by the State Government to protect the participation of B.Ed. candidates in ATRE - 2019 examination. Twenty-Fifth amendment was introduced on 14.6.2019 whereby Appendix - I was amended (so as to include B.Ed. candidates and accordingly, Appendix - II modified).

(57) They have further submitted that all the three amendments cannot apply on ATRE - 2019 examination in view of the specific provisions contained in para - 4(1) of the statutory guidelines dated 1.12.2018 prepared under Rule 2(y) of the 1981 Rules which says that the ATRE - 2019 examination shall be held only as per Twenty-Second amendment of the 1981 Rules as these three amendments with retrospective effect are evidently beyond the Rule making powers of the State, contained in Section 19 of the 1972 Act as it does not confer any power of retrospective amendment in the 1981 Rules.

(58) Lastly, they submitted that fixation of minimum qualifying marks for ATRE - 2019 was merely a mechanical and arbitrary exercise of power, without any application of mind. Therefore, the learned Writ Court considered all these aspects of the matter and quashed the Government Order dated 7.1.2019 as the State Government has no explanation for conscious and deliberate use of the word 'minimum' by wrongly interpreting in Rule 2(x) of the 1981 Rules. With these submissions, they pray for dismissal of Special Appeals.

(59) Having heard the learned Senior Counsels for the parties and with their assistance perused the materials available

on record of the case, we find merit in this batch of appeals and in our opinion, all these appeals deserve to be allowed.

(60) From perusal of the dictum of ***Anand Kumar Yadav (supra)***, it is apparent that the Apex Court was clear in its directive that *'mandatory qualifications'* for appointment as Assistant Teacher prescribed under law cannot be dispensed with in any case and for anyone and the Shiksha Mitras must obtain the prescribed minimum qualification on their own merit, in the same manner as any other candidate and no special rights, relaxation or benefit can be claimed by them until they possess the prescribed minimum qualification. Only once a Shiksha Mitra acquires the ***'requisite qualification in terms of the advertisement for recruitment'***, he/she may be extend certain benefits like ***'weightage', 'age relaxation'*** and ***recruitment for next two consecutive recruitments*** in view of their experience. In ***Kul Bhushan Misra's case (supra)***, the Division Bench found that the Shiksha Mitras cannot claim the benefits under the ***Anand Kumar Yadav's case (supra)*** before they hold the prescribed minimum qualification and qualify the ATRE and come within the zone of eligibility for being considered for appointment as Assistant Teacher. The Division Bench was of the view that weightage was not contemplated to be added to the marks obtained by a person in the ATRE.

(61) The law laid down by the Apex Court in the case of ***Anand Kumar Yadav (supra)***, as discussed in the preceding paragraphs, it is crystal clear that the benefit would be available only at the time of recruitment, once they hold the prescribed minimum qualifications and their names are published in the merit list prepared under Rule 14 (2) of the 1981 Rules. There is no doubt that once Shiksha Mitras acquire requisite qualifications in terms of the advertisement for recruitment they may be extended benefit of weightage of marks for next two consecutive recruitments in view of their experience. The Apex Court nowhere provided that the Shiksha Mitras shall constitute a homogeneous class apart from the other fully qualified candidates participating in the selection process.

(62) During the pendency of these appeals, the Apex Court vide its order dated 16.1.2020 in the case of ***Bhola Prasad Shukla and others v. Union of India and others, Petition(s) for Special Leave to Appeal (C) No (s). 14621/2019,*** considered the matter of ***Anand Kumar Yadav (supra)*** and further clarified that no special benefit is available to the Shiksha Mitras until they obtain minimum qualifications prescribed under law and only those who are otherwise qualified shall be considered for such selection after extending to them the benefit as contemplated in para 33 of the decision in ***Anand Kumar Yadav (supra)***. In ***Bhola Prasad Shukla (supra)*** the Apex Court repelled the entitlement of Shiksha Mitras to be paid equivalent to the regularly appointed Teachers and was pleased to direct the State of U.P. to complete all requirements to be made in furtherance of the decision of ***Anand Kumar Yadav (supra)*** within six months from 16.1.2020. Relevant part of the order passed by the Apex Court on 16.1.2020 reads as under:-

"Thus, on two counts, benefit was extended to the present incumbents who are working as Shiksha Mitras. In the recruitment process undertaken by the Sate, such incumbents would be entitled to age relaxation as well as some weightage for

experience as Sikash Mitras. What weightage ought to be given was completely left to the authorities. However, considering the exigencies of the situation and particularly the fact that primary education in the State ought not to suffer, the State was given liberty to take services of present incumbents on same terms on which the persons were working prior to their absorption.

In keeping with the directions issued by this Court, a circular was issued by the State Government on 20.09.2017. Para 4 of the Circular adverted to the decision taken at the government level and said para 4 was as under:-

"4. In this regard, I have been directed to say that in compliance of order dated 25.07.2017 passed by the Hon'ble Supreme Court in SLP (C) No.32599/2015, State of U.P. & Ors. vs. Anand Kr. Yadav & Ors, the following decision have been taken after consideration on the present facts on the government level:-

(1) By order dated 25.07.2017 passed by the Hon'ble Supreme Court in SLP (C) No.32599/2015, State of U.P. & Ors. vs. Anand Kr. Yadav & Ors., the retrenched Shiksha Mitras be paid the pay of Assistant Teacher till the 31.07.2017 by appointing them from the date 01.08.2017 in the Councils Primary Schools for the education purpose.

(2) In compliance of order dated 25.07.2017 of the Hon'ble Supreme Court, issued government order No.225379-5-14-282/98, dated 19.06.2014/79-5-15-3031/15 TC dated 22.12.2015 for absorption of previous Shiksha Mitras to the Council Primary Schools on the post of Assistant Teachers and in this regard, issued other government orders are set aside.

(3) In compliance of order dated 25.07.2017 of the Hon'ble Supreme Court in SLP (C) No.32599/2015, employed and working total 1,65,157 Shiksha Mitras in the Council Primary Schools be paid the fixed pay of Rs.10,000/- per months till 41 months, from 01.08.2017."

Thus a decision was taken to continue 1,65,157 Shiksha Mitras who were working in Primary Schools, for 41 months at fixed pay of Rs.10,000/- per month.

It was submitted by Mr. V. Shekhar and Dr. Manish Singhvi, learned Senior Advocates as well as by other learned counsel that recommendation was made by Project Approval Board on 15.03.2017 recommending, inter alia, salary and emoluments in the sum of Rs.38,870/- for Primary Teachers appointed on Contractual Basis. The submission was that Shiksha Mitras who are being continued under the present dispensation ought to be paid the salary and emoluments in the sum as recommended by the Project Approval Board.

The basic question which engaged the attention of this Court was whether persons who do not have the requisite qualifications, could be appointed as Teachers. The premise, therefore, was clear that the persons who were appointed for Shiksha Mitras did not have the requisite qualifications. The only sequitor therefore, could be that such persons would not be entitled to retain their posts. However, considering the fact that large number of persons were appointed as Shiksha Mitras and the State would take some reasonable time to switch over and make regular appointments, the liberty was given to the State to continue the services of the present incumbents on the same terms.

Since the Shiksha Mitras were not regularly appointed and qualified Teachers, it would not be proper to extend to them the same pay scales as is now being canvassed

or projected. However, considering the entirety of the matter, in our view, the ends of justice would be met, directions as stated hereinafter are called for:

We have been given to understand that since the decision of this Court in State of U.P. Vs. Anand Kr. Yadav, selection process was undertaken to fill up approximately 69,000 vacancies in the Primary Schools in the State, in which selection process about 41,500 teachers were selected.

The record is not clear whether any Shiksha Mitras availing the benefit extended by this Court, were selected or not. But considering the large number of Shiksha Mitras, the State must undertake further selection process(s) as early as possible so that all the qualified Shiksha Mitras who are otherwise aspiring to be regularly selected teachers may have an opportunity available to complete in the process subject to the benefits already extended to them.

We, therefore, direct the State Government to initiate the process for selection, after assessing the actual number of vacancies, as early as possible and preferably six weeks from today and conclude the selection process within six months thereafter.

All Shiksha Mitras who are otherwise qualified shall be considered for such selection after extending to them the benefit as contemplated in Para 33 of the decision in (2018) 13 SCC 560.

It shall open to the State Government to consider and devise a weightage formula. We may, by way of example, suggest that for every four years of experience, the State may consider extending the benefit of one per cent. This is only by way of a suggestion. The matter is completely left to the discretion of the State and its authorities.

With the aforesaid directions, these SLPs are disposed of.

All applications for intervention/impleadment are also disposed of in same terms."

(63) To extend the benefit to all the Shiksha Mitras as per para 33 of the decision in ***Anand Kumar Yadav (supra)***, the State Government issued a Circular on 20.9.2017. Para - 4 of the Circular has been quoted in the judgment of Apex Court in the case of ***Bhola Prasad Shukla & others Vs Union of India & Ors. (supra)*** which we have reproduced in the preceding paragraphs. The State Government thereafter took a decision and introduced the relevant provision regarding benefit of grant of weightage to the Shiksha Mitras in the 1981 Rules vide Twentieth Amendment, which provides that Shiksha Mitras shall get extra marks for their past experience at the rate of 2.5 marks per completed teaching year upto maximum 25 marks whichever is lesser.

(64) By Twentieth amendment, 1981 Rules were amended. The weightage of maximum 25 marks on the basis of teaching experience of 10 years is not liable to be accorded at the stage of computation of marks obtained by a candidate in the Assistant Teacher Recruitment Examination as held by a Division Bench of this Court in the case of ***Kul Bhuahan Mishra (supra).***

(65) From perusal of 1981 Rules, as amended, makes it crystal clear that ATRE is only a qualifying examination and not a part of the recruitment process. The benefit of ***Anand Kumar Yadav (supra)*** shall be available to the Shiksha Mitras only during the process of recruitment which will start once they qualify ATRE by scoring the

prescribed qualifying marks and until they do so, they cannot stake a claim to such weightage. The statutory guidelines for conducting **second ATRE - 2019** issued on 1.12.2018 makes it clear that the ATRE is only a minimum qualification and by qualifying ATRE, no candidate shall stake a claim for appointment on the post of Assistant Teacher.

(66) The exercise of holding the ATRE - 2019 is just for attaining of eligibility in order to be able to apply and to be considered for recruitment, a stage which has not yet been initiate because after declaration of the result ATRE - 2019, on the basis of minimum marks, as mentioned in the Government Order dated 7.1.2019, the result would be declared.

(67) The Apex Court in the case of ***Jharkhand Public Service Commission Vs. Manoj Kumar Gupta (supra)*** has held that eligibility tests are not meant for selection to any post but is conducted to determine the eligibility of the candidates for appointment as Lecturers. Relying on the aforesaid principles, we are of the view that the guidelines for conducting ATRE - 2019 issued under Rule 2 (y) of 1981 Rules on 1.12.2018 are not for advertisement of recruitment, i.e., only for qualification for recruitment. Once the Shiksha Mitras attain the minimum qualification, they shall form a class of persons and the benefit of judgment of ***Anand Kumar Yadav (supra)*** shall be extended to them, at that stage. At this stage, there is no scope for relaxing any condition which has been uniformly applied to all candidates.

(68) In exercise of powers under law, guidelines were issued on 1.12.2018 for qualifying the ATRE - 2019 examination in which no cut-off marks were notified. Accordingly, Writ Petition No.27461 of 2018 was filed for fixation of cut-off marks and the State Government has proceeded to fix cut-off marks, vide Government Order dated 7.1.2019, taking relevant factors into consideration and in exercise of powers conferred under the Act and Rule 2 (i)(x) of the 1981 Rules. As there was substantial increase in the number of candidates who appeared in ATRE - 2019 examination on account of NCTE notification dated 28.6.2018 and the State Government, in exercise of powers conferred under 1981 Rules, modified the pattern of examination from subjective to objective, took a conscious decision that only students who qualify for the ATRE - 2019 examination vide Government Order dated 7.1.2019 shall have sufficiently meritorious to be appointed on the post of Assistant Teacher in the State.

(69) The finding of the learned Writ Court that minimum qualifying marks were neither prescribed in the Government Order nor in the advertisement and as such, it cannot be provided subsequently is absolutely untenable in the teeth of Rule 2 (x) of 1981 Rules which empowers the State Government to determine the minimum marks from time to time. The aforesaid Rule does not provide that minimum qualifying marks are to be provided before the examination starts. On the other hand, without fixation of qualifying marks result cannot be declared and one cannot be said to have been passed the examination without scoring the qualifying marks. Further, Rule 2 (x) is not under challenge and as such, the Government was fully competent to prescribe the cut-off marks for passing 'ARTE'.

(70) In the previous examination **(first ATRE - 2018),** the State Government had prescribed the qualifying marks as is evident from Clause 7 (1) and (2) of

instructions dated 1.12.2018 and the order was issued by the 'Shiksha Anubhag 11' of Government which business is now performed by the 'Shiksha Anubhag 4' and this aspect has not been considered by the learned Writ Court while assigning the reasoning in the impugned judgment, wherein the learned Writ Court observed that the order dated 7.1.2019 prescribing qualifying marks for the 'ARTE' has not been issued under any provision of RTE Act and is also not issued by the competent section of the Education Department of the Government, i.e., 'Shiksha Anubhag - 5', the same having been issued by 'Shiksha Anubhag - 4', and as such, the same cannot be treated the order of Government is nothing but a misconceived notion because in the **first ATRE** examination of 2018, guidelines were issued by 'Shiksha Anubhag - 11' which business has now been allocated to 'Shiksha Anubhag - 4' vide Government Order dated 6.6.2018. Even otherwise, the order of Government is referable to Article 166 of the Constitution and direct compliance of the same is not mandatory and it is only directory and any short-coming in that does not make the order nullity. The order dated 7.1.2019 has been issued by the Competent Section (Basic Education Section - 4) as such, there is no infirmity in any manner and thus we reject the submission of writ petitioners.

(71) In ***Anand Kumar Yadav (supra)***, the Hon'ble Supreme Court merely provided that the Shiksha Mitras shall be given an opportunity to participate in the selection process at hand in two consecutive selections, irrespective of age while being given benefit of age relaxation as determined by the State Government, in an open and transparent selection process along with other duly qualified candidates and it nowhere provided that the Shiksha Mitras shall constitute a homogeneous class apart from other duly qualified candidates participating in the selection process. The Hon'ble Supreme Court while keeping in mind the interest of the school children held that the regularization of unqualified Shiksha Mitras on the post of Assistant Teacher was illegal as the school children whose interests, though were not duly represented, had a right to obtain quality education from duly qualified teachers under the provisions of Right to Education Act and gave due importance to the merit of the candidates who are ultimately going to be appointed on the post of Assistant Teacher as the ultimate losers would be the small primary school children if the merit is compromised in the selection process.

(72) As a common parlance, qualifying marks are prescribed after the examination is conducted as the Recruiting Authority is in a position to assess how the candidates have performed and determine the benchmark keeping in mind the number of vacancies. The State Government rightly in the advertisement dated 1.12.2018 did not declare the cut-off marks for qualifying the ATRE - 2019.

(73) Thus, the arguments of the writ petitioners and finding recorded by the learned Writ Court that the increase in cut-off marks from 45% and 40% to 65% and 60% by the Government Order dated 7.1.2019 is nullifying the beneficial direction of the Hon'ble Supreme Court in ***Anand Kumar Yadav (supra)*** has no legs to stand, and is pre-mature as the benefit is available only at the time of recruitment, once they hold the prescribed minimum qualifications and their names are published in the merit list prepared under Rule 14 (2) of the 1981 Rules.

(74) In respect of eligibility of B.Ed., candidates, there was no pleading but it

was extensively argued by the respondents (original writ petitioners) that B.Ed. candidates are ineligible and their participation in the ATRE - 2019 was illegal and learned Writ Court in the impugned judgment has very categorically observed that there is no challenge in any of the writ petitions for ***inclusion of B.Ed. candidates*** but considered the issue and has held that there was no quality point marks provided for the candidates who are having B.Ed. qualification, therefore, their inclusion in the examination was unwarranted. In order to appreciate the aforesaid, we are reproducing the relevant paragraphs of the impugned judgement here-in-below:-

122. It is true that pursuant to notification dated 28.06.2018 of National Council of Teachers Education (N.C.T.E.), the B.Ed. candidates may very well appear in the examination of A.T.R.E. but those persons will have to complete six months bridge course in elementary education within two years of such appointment as Primary Teacher. Meaning thereby, the Assistant Teachers who are having B.Ed. degree and does not undergo six months bridge course in elementary education recognized by N.C.T.E. within two years of the appointment shall no longer remain Assistant Teacher, however, who are possessing B.T.C. qualification need not to undergo such exercise. The aforesaid fact make the difference between the status of the teachers having B.T.C. qualification and having B.Ed. qualification. Earlier, the persons having B.Ed. qualification could have been appointed on the post of 'Trainee Teachers' but pursuant to the notification dated 28.06.2018 issued by the N.C.T.C. those teachers may be appointed as Primary Teachers. Such type of persons were not permitted in earlier examination i.e. A.T.R.E.-2018 but have been permitted in the present examination i.e. A.T.R.E-2019 on the basis of decision of the State Government. Since there is no challenge for inclusion of 'B.Ed. candidates etc., therefore, this Court, however, is not indulging in the said issue, but one query of the Court has not been satisfied by any of the counsel for the opposite parties as to how the quality point marks of the candidates having B.Ed. qualification may be calculated on the basis of Appendix-I inasmuch as those candidates may not be getting any marks for item No.4 i.e. marks for B.T.C. qualification and item No.6 i.e. marks for weightage which can only be provided to the Shiksha Mitras. The complete scenario of the examination in question creates unexplained confusion, therefore, the same may be looked into in the fitness of things of the present issue.

153. Perusal of the aforesaid legal provision makes it clear that since there is a statutory prescription in the Rule for providing weightage, therefore, said statutory prescription may not be ignored and that weightage may only be given to Shiksha Mitras. Rule 14 (3) (b) provides prescription in respect of B.Ed. candidates etc. and whose merit list shall be arranged in accordance with quality points as per Appendix-II and admittedly, in the present selection the quality points shall be determined as per Appendix-I, therefore, it appears that in the present selection inclusion of B.Ed. candidates is unwarranted, however no one has assailed the inclusion of B.Ed. candidates by means of batch of these writ petitions.

154. It is true that there is no challenge in any of the writ petitions that the inclusion of B.Ed. candidates is unwarranted and uncalled for and they may not be selected getting quality point marks as per Appendix-I, but circumstances under

which the aforesaid anomaly has been committed by the State Government has nowhere been explained in the counter affidavit or by way of argument.

168. I also find favour in the submission of Sri U.N. Misra that it cannot be comprehended as to what is the object of enhancing minimum qualifying marks from 45% to 65% for Assistant Teacher Recruitment Examination when it is only a qualifying examination. Mr. U.N. Misra has rightly submitted that if the averment of the counter affidavit is believed to be correct, the said enhancement has been made to select the best available candidates, then who are the best candidates, as per State-respondent. Since the inclusion of B.Ed. candidates have been made in the present examination, therefore, it appears that the enhancement has been made to oust the Shiksha Mitras from the selection in question and to select the B.Ed. candidates. If it is the intention of the State-respondent to enhance the minimum qualifying marks, then it would be violative to the rules itself which categorically provides that the Shiksha Mitras would be getting 25 marks as weightage.

178. Besides, the counsel for the State-respondent could not convince as to how the quality points marks of B.Ed. candidates would be determined / calculated as per Appendix -I when these B.Ed. candidates would not be getting any marks for item no. 4 [marks of B.T.C.] and item no. 6 [weightage of 25 marks]. If these B.Ed. candidates are given quality point marks as per Appendix -II, they can easily get marks for all the items but quality points marks for this examination would be calculated as per Appendix-I.

179. This Court is unable to comprehend the rationale behind it but since this particular point has not been directly assailed, therefore, no order on this point needs to be issued.

180. However, it clearly reveals that neither the Board of Basic Education nor the State Government has carried out proper exercise before conducting selection in question permitting B.Ed. candidates in the present selection in question which increased the number of aspirants drastically without deciding the method for calculating their quality points marks, without determining the vacancies for them as B.Ed. candidates are different from B.T.C. candidates, enhancing the minimum qualifying marks for the Assistant Teacher Recruitment Examination-2019 by way of G.O. dated 7.1.2019 and conducting Assistant Teacher Recruitment Examination-2019 differently from Assistant Teacher Recruitment Examination-2018 whereas the State Government was to conduct two examinations in a same manner as per dictum of Hon'ble Apex Court. This unexplained anomaly may convince this Court to quash the entire selection process but keeping in view the fact that large number of candidates have already appeared in selection process, therefore, this Court is only examining/ testing the fitness of Government Order dated 7.1.2019."

(75) The minimum qualification for appointment to the post of Assistant Teacher was prescribed by the NCTE in exercise of its powers under the RTE Act vide notification dated 23.8.2010 which provides that a person with B.Ed. qualification shall also be eligible for appointment for Class I to V provided he/she undergoes, after appointment an NCTE recognized six months special programme in elementary education. This benefit was extended upto 1.1.2012 by the NCTE. Relevant paragraph of the notification reads as under:-.

"3 Training to be undergone - A person --

(a) With B.A/B.Sc. with at least 50% marks and B.Ed. qualification shall also be eligible for appointment for class I to V upto 1st

January, 2012, provided he undergoes, after appointment, an NCTE recognized 6-months special programme in Elementary Education."

(76) Thereafter, the State of Uttar Pradesh vide its letter dated 26.7.2012 submitted a proposal to the Central Government for relaxation of the conditions referred to in clause 3(i)(a) and accordingly vide its notification dated 10.9.2012 the Central Government granted relaxation upto 31.3.2014 subject to *inter alia* the conditions that (i) the State Government shall conduct the TET as specified in the notification dated 23.8.2010, as amended from time to time and those persons who passed the TET shall be considered for appointment as a teacher and (ii) the State Government shall amend the Recruitment Rules so as to provide for minimum qualifications required for appointment of teaches laid down under the said notification as amended from time to time.

(77) After relaxation granted by the Central Government vide notification dated 10.9.2012, the NCTE issued a notification dated 28.6.2018 amending the master notification dated 23.8.2010 formally including B.Ed. qualified candidates as being eligible for appointment as a Teacher in Classes I to V, subject to them undergoing six months bridge course in elementary education recognized by the NCTE, post-appointment and within two years thereof. Relevant portion of the notification dated 28.6.2018 reads as under:-

"(1) In the said notification, in para 1 in sub-para (i), in clause (a) after the words the brackets "Graduation and two year Diploma in Elementary Education (by whatever name known), the following shall be inserted,

OR

"Graduation with at least 50% marks ***and Bachelor of Education (B.Ed.)"***

2. In the said notification in para 3, sub-para (a), the following sub-para shall be substituted namely:-

"(a) ***who has acquired the qualification of Bachelor of Education from any NCTE recognized institution shall be considered for appointment as a teacher in classes I to V provided the person so appointed as a teacher shall mandatorily undergo a six month Bridge Course in Elementary Education recognized by the NCTE, within two years of such appointment as primary teacher."***

(78) The Hon'ble Apex Court has laid down in a catena of judgments that the State Government can prescribe any qualification for teaching posts over and above the minimum qualification prescribed by NCTE. ***In Pardeep Kumar and Ors. Vs. State of Haryana and Ors. [2017 (1) SCT 799 (P&H)]***, the Hon'ble Court held:-

"15. It is self-evident from the NCTE notification dated 29.07.2011 that the qualifications laid down by it for appointment of a Teacher or that of a Principal are "minimum qualifications". NCTE has recommended Senior Secondary i.e. 10+2 with two years' Diploma in Elementary Education as the minimum qualification for the post of Teacher for Classes I to V. As an alternative qualification, it has also recommended "Graduation with two year Diploma in Elementary Education" as the minimum qualification. The State Government, however, with a view to improve the quality education, has enhanced the minimum qualification from 10+2 to Bachelor of Fine Arts/B.A. instead of 10+2 along with two-years' Diploma in Elementary Education. Such higher qualification neither is in conflict with nor does it offend the recommendations made by NCTE for a

minimum qualification. The expression "minimum" leaves no room to doubt that the NCTE did not want any State Government to prescribe qualification for teaching posts lower than those recommended by it. None of the notifications issued by NCTE says or can be construed as an embargo on the powers of the State Government to prescribe a qualification higher than the one recommended by it. There is no judicial pronouncement as claimed by the petitioners' counsel that states that the States are incompetent to prescribe qualification higher than the "minimum" prescribed by NCTE. The first and second questions are thus answered against the petitioners."

(79) In ***State of U.P. and others v. Bhupendra Nath Tripathi and others [2010 (5) ESC 630],*** the Hon'ble Apex Court held:

"The State in its discretion is entitled to prescribe such qualifications as it may consider appropriate for candidates seeking admission into BTC course so long as the qualifications so prescribed are not lower than those prescribed by or under the NCTE Act. The State can always prescribe higher qualification."

(80) The Hon'ble Apex Court has approved the holding of an eligibility examination by the State of U.P. in the case of ***State of Uttar Pradesh vs. Shiv Kumar Pathak [(2018) 12 SCC 595]*** settling the position that TET qualified candidates who wish to apply for appointment of teacher must necessarily qualify the State Teacher Eligibility Test as well, in the following words:

"Appropriate Government may in its own wisdom decide as to the eligible candidates on the basis of having qualified the Central Teachers Eligibility Test. However, education being the subject matter of concurrent list of the power to frame appropriate legislation/regulations/rules works with the appropriate legislature of the State Government and as such State Government is well within as rights to prescribe the qualification of eligibility in the form that the candidates wanting to apply for the said post must necessarily qualify the Teachers Eligibility Test of said State. There would be no illegality (sic) in the same and merely because a state government had failed to conduct the State Teachers Eligibility Test (STET) in a given year would not amount to taking a decision not to hold the exams and to hold the candidates having qualified Central Teacher Eligibility Test as eligible."

(81) By virtue of the amendment in the NCTE notification dated 23.8.2010 on 28.6.2018, the appellants of Special Appeal No.165 (D) of 2019 participated in the TET examination on 18.11.2018 and qualified the same and therefore becoming eligible for appearing in the ATRE 2019, the writ petitioners knowing well about the amendment in the notification dated 23.8.2010 by NCTE notification dated 28.6.2018, they never challenged the validity of the said notification and thus, the notification issued by the NCTE being under a Central Enactment which is referable to Entry 66 of list I of the Seventh Schedule is binding upon the State Government and even a legislative exercise done by the State in the matter of laying down of standards in education would have to yield to the notifications of the NCTE inasmuch as the exercise of power by the State Government is referable to Entry 25 of List III of the Seventh Schedule, which besides being in the concurrent list is, subject to Entry 63, 64, 65 and 66 of List - I. The State Government rightly followed

the mandate issued by the NCTE and permitted the B.Ed. candidates to appear in the second ATRE - 2019.

(82) In the guidelines dated 1.12.2018 issued for ATRE - 2019, it was specifically provided that candidates who are eligible under the NCTE notifications as amended from time to time, including vide notification dated 28.6.2018, shall be permitted to appear in the ATRE - 2019. The learned Senior Counsel for private respondents (original writ petitioners) has drawn our attention only to clause 4 (1) whereas as per clause 4 (2) they are eligible to appear in ATRE - 2019 examination. Clause 4 (2) is relevant which reads as under:-

4. आवेदन के लिए न्यूनतम अर्हता, आयु एवं निवास

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(2) राष्ट्रीय अध्यापक परीक्षा परिषद्, नई दिल्ली द्वारा न्यूनतम अर्हता कक्षा 1 से 5 के सम्बन्ध में नितगित अधिसूचना दिनांक 23.08.2010, 29.07. 2011, 12.11.2014, 28.11.2014 (अपेंडिस्क – 2 की प्रस्तावना 1.2 में उल्लिखित) **तथा दिनांक 28.06. 2018** में निर्धारित अर्हताधारी ष्सहायक अध्यापक भर्ती परीक्षा 2019ष् में आवेदन करने के लिए पात्रा होंगे ।

(83) Law on the subject is well settled. The Apex Court in the case of ***State of Uttar Pradesh v. Shiv Kumar Pathak (supra)*** has held that the NCTE is the Academic Authority and the State Government is under an obligation to act as per the notifications issued by the NCTE and not give effect to any contrary Rule, as follows:-

"There is no manner of doubt that the NCTE, acting as an "academic authority' under Section 23 of the RTE Act, under the Notification dated 31st March, 2010 issued by the Central Government as well as under Sections 12 and 12A of the NCTE Act, was competent to issue Notifications dated 23 rd August, 2010 and 11th February, 2011. The State Government was under obligation to act as per the said notifications and not to give effect to any contrary rule."

(84) A Division Bench of this Court in the case of ***Harsh Kumar and others v. State of U.P. and others [(2014) 2 ADJ 703],*** held that the action of the State in not permitting the B.Ed. candidates to participate in the TET examination to be considered for appointment as Assistant Teacher in basic education despite NCTE having notified B.Ed. candidates as eligible was illegal, arbitrary and unconstitutional. Relevant paragraphs 10, 11, 12 and 13 of the aforesaid judgment read as under:-

10.Thus, the point to be noted is that after the enforcement of the Act of 2009 and the issuance of the notification of 23 August 2010, the qualifications which have been prescribed for appointment of primary teachers must necessarily be those that are stipulated in the notification dated 23 August 2010, as amended by the notification dated 27 August 2011.

11. Undoubtedly, the Rules of 1981 do prescribe the essential qualification for appointment of Assistant Teachers in Junior Basic Schools where education is imparted from Classes I to V. The relevant qualifications which are prescribed in Rule 8 are as follows:

"(ii) Assistant Master and Assistant Mistress of Junior Basic School A Bachelor's Degree from a University established by law in India or a Degree recognised by the Government as equivalent thereto together with the training qualification consisting of a Basic

Teacher's Certificate, Vishist Basic Teachers Certificate (B.T.C.) two years BTC Urdu Special Training Course, Hindustani Teacher's Certificate, Junior Teacher's Certificate, Certificate of Teaching or any other training training course recognised by the Government as equivalent there:

Provided that the essential qualification for a candidate who has passed the required training course shall be the same which was prescribed for admission to the said training course."

12. The qualifications, which have been prescribed by the NCTE in the notification dated 29 July 2011 include Senior Secondary with at least 50% marks together with a 2-year Diploma in Education (Special Education). Once, these qualifications have been prescribed by the NCTE, this would necessarily be binding and it is not open to the State Government to exclude (from the zone of eligibility) the persons who are otherwise qualified in terms of the notification dated 23 August 2010 as amended on 29 July 2011.

13. In this view of the matter, we are of the opinion that the learned Single Judge was in error in coming to the conclusion that since the recruitment was in pursuance of a special drive, the Government was justified in confining the eligibility qualifications only to those who held the BTC qualifications for the reason that such candidates could not be adjusted earlier for want of TET qualification. The passing of the TET was introduced as a mandatory requirement by the notification dated 23 August 2010 issued by the NCTE. Persons who did not fulfill the eligibility conditions prescribed in the notification dated 23 August 2010, as amended on 29 July 2011, were not qualified for consideration for appointment as primary school teachers. Hence, there was no occasion for the State to contend or for that matter the learned Single Judge to accept the submission that in order to adjust such BTC qualified candidates, the present advertisement had been issued. The learned Single Judge held that the appellants could not claim equivalence with those candidates who possess BTC qualification. This, in our view, begs the question because once the Diploma in Education (Special Education) is held to be a qualification which is recognised for appointment of Assistant Teachers for teaching Classes I to V, it would be impermissible for the State Government to exclude them from being considered for appointment. In a special drive or otherwise, it is not open to the State Government to exclude one class of teachers who fulfill the qualifications for eligibility prescribed by the NCTE. Any such action would be impermissible for the simple reason that the exclusive power to prescribe eligibility qualifications for such teachers is vested in the NCTE. Once the NCTE has spoken on the subject, as it has through its notification, those qualifications must govern the eligibility requirement. Jurisdiction and power of the NCTE to do so is now settled beyond any doubt, as noted by the Supreme Court.

(85) The 1981 Rules have been amended well in time, and prior to commencement of the recruitment process to provide for recruitment of B.Ed. candidates directly to the post of Assistant Teacher, subject to them undergoing a post appointment training, strictly in accordance with and as prescribed by the NCTE. These changes have been brought about by the **Twenty-Third** amendment dated 29.01.2019; **Twenty-Fourth** amendment dated 07.03.2019 and the **Twenty-Fifth** amendment dated 14.06.2019. Vide these amendments, the concept of 'trainee

teacher' has entirely been done away with in accordance with the amendment issued by the NCTE, and the Appendix - I has also been amended to set-out the manner of calculating the quality point marks of B.Ed. candidates.

(86) The ***Twenty-Third*** amendment of the 1981 Rules was carried out in the wake of NCTE notification dated 28.6.2018 on 24.1.2019 whereby minimum qualification of the candidates participating in ATRE - 2019 was amended with inclusion of B.Ed. candidates with six months training (that too after holding the ATRE examination) in Rule 8(ii) (a) with retrospective effect from 1.1.2018. Secondly, provisions of Rule 14 ((i) (c) and 14 (i) (d) regarding trainee teacher were deleted. On 7.3.2019 ***Twenty-Fourth*** amendment of the 1981 Rules was introduced, whereby retrospective effect to the charge of minimum qualification regarding B.Ed. was implemented with effect from 28.6.2018 i.e., date of NCTE notification and not with effect from 1.1.2018. Both ***Twenty-Third and Twenty-Fourth*** amendment of the 1981 Rules, though brought with retrospective effect by the State to permit the participants of B.Ed. candidates in ATRE - 2019 and due to these reasons the Shiksha Mitras never challenged the participation of B.Ed. candidates in ATRE - 2019 examination which was held on 6.1.2019. From perusal of Rule 14 as amended by ***Twenty-Third*** amendment makes it clear that the ATRE is only a qualifying examination and not a part of the recruitment process. Once abovementioned qualifications have been prescribed by the NCTE in its notification dated 28.06.2018 and the same is binding on the State Government and therefore B.Ed./BTC candidates were permitted to appear in ATRE - 2019 by clause 7 (1) and 7 (2) of the guidelines dated 1.12.2018 and they have been rightly included within the zone of eligibility to participate in the qualifying examination held on 6.1.2019. By subsequent amendment of 1981 Rules with effect from 1.1.2018 and with effect from 28.6.2018 were made by the State Government to give effect to the NCTE notification issued on 28.6.2018 as the State Government was under obligation to act as per the said notification and to fully implement the same and not to give effect to any contrary rule as held by the Hon'ble Supreme Court and Division Bench of this Court.

(87) The educational qualifications fixed by the NCTE for appointment as Assistant Teachers are binding on the recruitment made by the State Governments. The participation of B.Ed. candidates was never challenged before the learned Writ Court and the observations made in the impugned order dated 29.3.2020 pertaining to participation of B.Ed. candidates in the selection process are merely the obiter dicta having no bearing on the issue raised before the learned Writ Court regarding the legality and validity of the Government Order dated 7.1.2019 whereby the minimum qualifying marks had been fixed for ATRE - 2019 examination.

(88) In view of law laid down by the Apex Court in the case of ***State of Rajasthan v. Sanyam Lodha [(2011) 13 SCC 262]***, inclusion of B.Ed. candidates was never challenged by the writ petitioners and as such, since particular Rule had not been challenged, the prayer of reading down the said provision could not be made. The Apex Court in the case of ***Shiv Kumar Pathak (supra)*** wherein it has been held that the eligibility conditions for appointment of Assistant Teachers as laid

down by the NCTE are binding on the State Government as the NCTE is the competent authority for fixing such educational qualifications for appointment of Assistant Teachers under Section 23 of the RTE Act as well as under Sections 12 and 12-A of the NCTE Act, 1993.

(89) The Apex Court in the case of ***State of U.P. vs. Shiv Kumar Pathak (supra),*** has held that the eligibility conditions for appointment of Assistant Teachers as laid down by the NCTE are binding on the State Government as the NCTE is the competent authority for fixing such educational qualifications and therefore, the B.Ed. candidates had been included by the State Government in clause 4 (2) of statutory guidelines dated 1.12.2018. In the aforesaid clause, it is very categorically stated that the notification dated 28.6.2018 issued by the NCTE whereby B.Ed. candidates were made eligible for appointment as Teacher in Primary Schools for teaching classes I to V provided the person so appointed as an Assistant Teacher shall mandatorily undergo six months' Bridge Course in Elementary Education recognized by the NCTE within two years after such appointment as Assistant Teachers.

(90) The Division Bench of this Court in ***Harsh Kumar v. State of U.P. and others (supra)***, has reiterated the same principles as laid down by the Apex Court in ***State of U.P. v. Shiv Kumar Pathak (supra).***

(91) Para 4 of the Government Order dated 1.12.2018 provides for minimum qualification for appearing in the said examination in ATRE - 2019 and it provides that candidates possessing qualifications as provided in Rule 8 of 1981 Rules and having passed Teachers Eligibility Test, would be eligible to appear in the said examination and Clause 2 of Para - 4 of the Government Order provides the minimum qualification as provided in the notifications of the NCTE would be eligible to apply in the said examination. Thus the candidates possessing Bachelor Degree together with the B.T.C. Training and had passed TET examination or had B.Ed. degree to their credit were eligible for applying in the ATRE - 2019. The learned Writ Court erred in referring to the 1981 Rules, as the rules come into operation only at the stage of recruitment, which has not commencement as yet. The learned Single Judge erred in holding that as the Rules 1981 did not envisage the recruitment of B.Ed. candidates to the post of Assistant Teacher (and provided for their appointment only to the post of Trainee Teacher), and as the Appendix - I did not provide a mechanism to lay down the procedure for calculating the quality point marks of B.Ed. candidates, hence the participation of the B.Ed. candidates in the ATRE - 2019 was bad.

(92) Thus, we are of the view that once the B.Ed. candidates were made eligible to be considered for appointment to the post of Assistant Teacher, subject to them acquiring the minimum qualification, the State Government was bound to permit them to participate in the ARTE - 2019 passing which is the minimum qualification to be considered for appointment to the post of Assistant Teacher. Accordingly, the State Government carried out the necessary amendments to the 1981 Rules to align them with the NCTE notification, prior to commencement of the recruitment process.

(93) Sri J. N. Mathur, learned Senior Counsel, heavily relied on the decision of

the Apex Court in ***Ayaaubkhan Noorkhan Pathan v. State of Maharashtra, [(2013) 4 SCC 465]*** wherein it has been held that a 'Person Aggrieved' does not include a person who suffers from a psychological or an imaginary injury; a 'person aggrieved' must therefore be one whose right or interest has been adversely effected or jeopardized and rightly submitted that the writ petitioners before the Writ Court were not persons falling in the category of a 'person aggrieved' and any micro-classification within the class of examinees is not sustainable in the eyes of law as in an open competition all examinees are to be treated as equals and argued that the issuance of Government Order dated 7.1.2019 does not amount to changing the rules of game.

(94) The principle that the Rules of the game cannot be changed once the game has started was not at all attracted in this matter since there was no change in the minimum qualifying marks fixed for the first time at 65% and 60% vide Government Order dated 7.1.2019 for ATRE - 2019 whereas the minimum qualifying marks fixed in the Government Order dated 9.1.2018 were meant exclusively for the ATRE - 2018 only.

(95) The Apex Court in the case of ***Municipal Corporation of Delhi vs. Surendra Singh and others (supra),*** while adjudicating a similar controversy pertaining to the fixation of minimum qualifying marks for selection of the most meritorious candidates, has held as legal and valid the action of the competent authority of fixation of minimum qualifying marks which were fixed after the examination was held but prior to the declaration of result. In the case in hand, the competent authority was given power under Rule 2 (x) of the 1981 Rules to fix minimum qualifying marks and the same ought not to have been interfered with as the fixation of benchmark for selection of most meritorious candidates is the prerogative of the employer and in no way amounts to changing the rules of game.

(96) Much reliance has been placed by the learned Senior Counsel for the private respondents-Shiksha Mitras in the case of ***K. Manjusree v. State of A.P. and another [2008 (3) SCC 512],*** wherein the question was whether correct criterion was adopted in making recruitment for posts of District & Sessions Judge which was granted by the A. P. State Higher Judicial Service Rules, 1958. The Rules prescribed quota for direct recruitment, educational qualifications,, etc. but did not prescribe any criterion for selection. There were however Resolutions dated 24.7.2001 and 21.2.2002 which prescribed criteria for selection of candidates. According to prescribed criterion, there were 75 marks for written examination and 25 for interview. It was decided vide Resolutions dated 30.11.2004 that existing criterion would be followed but while holding written examination, 100 marks were prescribed instead of 75. The High Court made two changes on administrative side after written examination and interviews were over. First, marks for written examination were proportionately scaled down so as to maintain ratio between written examination and interview as 3:1 (75:25) instead of 4:1 (100:25). This was done because original criterion prescribed 75:25 ratio. Secondly, it introduced minimum qualifying marks for interview also. This resulted in reshuffling of selection list. The Apex Court considered the effect of these recruitments and concluded that the Resolutions dated

24.7.2001 and 21.2.2002 provided qualifying marks for written examinations only but not for interview. Considering the aforesaid facts and circumstances, the Apex Court has held that the introduction of requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played, which is clearly impermissible.

(97) In respect of question, as to whether the Government Order dated 7.1.2019, whereby the minimum qualifying marks were fixed for all the candidates, who were participated in the examination of ATRE - 2019 on 6.1.2019 amounts to changing the rules of the game, the principle that the Rules of the game cannot be changed once the game has started was not at all attracted in the present facts and circumstances of the case because the minimum qualifying marks which had been fixed for the first time by the Government on 7.1.2019 will apply to all candidates who had participated in the ATRE qualifying examination - 2019 on 6.1.2019. In Rule 14 (1) (b) of the 1981 Rules, it has been provided that a separate Assistant Teacher Recruitment Examination shall be conducted by the Government for every time vacancies are notified for recruitment on the post of Assistant Master or Assistant Mistress of Junior Basic School concerned. Rule 2 (x) of the 1981 Rules empowers the State Government to fix the qualifying marks of the ATRE from time to time. It has nowhere been provided that once the minimum qualifying marks have been fixed for the first ATRE, they shall be carried forward or be applicable for eternity on all future selection processes. The said argument of the Shiksha Mitras is contrary to the terms and conditions of statutory guidelines dated 1.12.2018.

(98) The Apex Court in the case of ***Jharkhand Public Service Commission v. Manoj Kumar Gupta (supra)*** has held that the State Government is free to determine the cut-off marks even after the examination has been held and the same does not amount to any change in the rules of the game. It is also held that eligibility tests are not meant for selection to any post but is conducted to determine the eligibility of the candidates for appointment as Lecturers. The relevant paragraphs of the judgment read as under:-

"The Jharkhand Public Service Commission (JPSC) issued an advertisement on 19.07.2006 inviting applications from candidates desirous of competing in the Jharkhand Eligibility Test (JET). This test is not meant for selection to any post but is Signature Not Verified Digitally signed by SARITA PUROHIT Date: 2019.12.19 conducted to determine the eligibility of the candidates for 12:36:18 IST Reason: appointment as lecturers in universities and colleges of the State of Jharkhand. This test called the State Level Eligibility Test (SLET) is conducted as per the guidelines laid down by the University Grants Commission (UGC).

2. The test consists of three papers - the first two papers are multiple choice questions to be answered on an Optical Mark Reader (OMR). One test is of a general subject and one test is of the subject for which the candidate applies. The third paper is a descriptive type question paper dealing only with the subject selected by the candidate. *Relevant portion of the advertisement reads as follows:*

"A candidate who does not appear in Paper I will not be permitted to appear in Paper II and Paper III. Paper III will be evaluated only for those candidates who are able to secure the minimum qualifying marks in Paper I and Paper II as per the table given in the following: CATEGORY MINIMUM QUALIFYING MARKS PAPERI PAPERII PAPERI + PAPERII GENERAL/OBC 40 40 100 (50%) PH/VH 35 35 90 (45%) SC/ST 35 35 80 (40%)

3. The writ petitioner obtained 50% marks in Papers I and II but he did not do as well in Paper III. The JPSC fixed a cut off percentage of 60 for Paper III which the writ petitioner did not attain and as such he was declared not successful and, therefore, ineligible to be considered for appointment as lecturer.

4. Aggrieved by the said action, the writ petitioner filed a writ petition before the High Court which allowed the same. The appeal filed by the JPSC before the writ court was also allowed mainly on the ground that the Public Service Commission could not have fixed qualifying marks of 60% and this amounted to changing the rules of the game after the advertisement had been issued and process of selection had started. It held that once the candidate had obtained 50% marks, the candidate could not be disqualified and the JPSC was not bound by the instructions of the UGC in this regard. The High Court also directed that the case of the writ petitioner would be considered on the basis of performance. The High Court held that no cut off marks had been provided for Paper III.

7. As far as the finding of the High Court that the rules of the game were changed after the selection process had started, we are of the considered view that this is not the case as far as the present case is concerned. ***There were no minimum marks provided for Paper III in the advertisement. This could be done by the moderation committee even at a later stage. This is not a change brought about but an additional aspect brought in while determining the merit of the candidates who are found fit to be eligible for consideration for appointment of Lecturers.***

8. In view of the above, we are of the considered opinion that the High Court erred in holding that the JPSC could not fix the minimum marks for Paper III. Hence, we set aside the judgment of the High Court dated 09.11.2016.

(99) In the case in hand, Rule 2 (1) (x) of 1981 Rules empowers the State Government to fix minimum qualifying marks of ATRE from time to time and admittedly, no minimum marks were provided in the instructions dated 1.12.2018 and therefore, the State Government in exercise of the aforesaid power issued Government Order on 7.1.2019 prescribing minimum qualifying marks for ATRE - 2019 examination as 65% for general category candidates and 60% for reserved category candidates which is just and proper and this in nowhere amounts to changing the rules of the game. The judgment of ***K. Manjusree (supra)*** is distinguishable on facts.

(100) The Hon'ble Supreme Court in the case of ***Anand Kumar Yadav (supra)***, merely provided that the Shiksha Mitras shall be given an opportunity to participate in the selection process at hand in two consecutive selections, in an open and transparent selection process alongwith other duly qualified candidates and it nowhere provided that the Shiksha Mitras shall constitute a homogeneous clause apart

from other duly qualified candidates participating in the selection process. The first ATRE - 2018 had been concluded somewhere in August, 2018 and selections made on 68,500 vacancies notified vide Government Order/statutory guidelines issued under Rule 2 (y) of 1981 Rules. Thereafter, the State Government notified fresh vacancies for appointment vide notification dated 1.12.2018, known as second ATRE - 2019. The ATRE - 2018 and ATRE - 2019 were two separate selection processes and were conducted under different Rules as the Twentieth amendment was applicable as per Government Order dated 9.1.2018 on the ATRE - 2018 examination and the Twenty-Second amendment was applicable as per Government Order dated 1.12.2018 on the ATRE - 2019 examination. It is also not in dispute that in ATRE - 2018 examination, only 1,07,000 candidates appeared against 68,500 vacancies whereas in ATRE - 2019 examination, 4,10,000 candidates appeared against 69,000 vacancies. As per clauses of the aforesaid ATRE, which we have quoted, it is very clear that examination of ATRE - 2018 and ATRE - 2019 is valid only for a particular year. The ATRE - 2019 examination was based on a different pattern as it only had multiple choice questions and there was no condition like clause 7 (1) and 7 (2) of ATRE - 2018 regarding minimum marks and thereafter, after examination of ATRE - 2019 was held on 6.1.2019, the State Government under Rule 2 (x) of 1981 Rules took a conscious decision and issued Government Order dated 7.1.2019 to fix 65% minimum qualifying marks for General Category and 60% for reserved category candidates.

(101) The minimum qualifying marks which had been fixed vide Government Order dated 7.1.2019 were made uniformly applicable on all duly qualified candidates participating in the selection at hand, irrespective of whether such candidates possessed a BTC degree, B.Ed. degree or were Shiksha Mitras. The minimum qualifying marks were made uniformly applicable to all the examinees sitting for ATRE - 2019 and thus, we are of the view that Hon'ble Supreme Court in the case of ***Anand Kumar Yadav (supra)*** had never directed that Shiksha Mitras shall constitute one homogeneous clause for the purpose of recruitment nor it had caused any prejudice to the Shiksha Mitras because the same was applicable to all candidates who had participated in the ATRE - 2019 examination.

(102) The Apex Court in the case of ***Municipal Corporation of India vs. Surender Singh and others (supra)***, while adjudicating a similar controversy pertaining to the fixation of minimum qualifying marks for selection of the most meritorious has been pleased to uphold as legal and valid the action of the competent authority for fixing the minimum qualifying marks which were fixed after examination was held, but prior to the declaration of the result, since the advertisement did not specify any qualifying marks for the examination in question, and the candidates had participated in the examination knowing fully well that no qualifying marks have been fixed in the advertisement and the same will be fixed prior to declaration of the result.

(103) The power of the Government to prescribe the qualifying marks of passing the examination even after the advertisement and the examination in exercise of power conferred under Rule 2 (x) of 1981 Rules is supported by the

judgment of the Apex Court in ***Municipal Corporation of Delhi vs. Surendra Singh and others (supra)*** and ***Jharkhand Pubic Service Commission vs. Manoj Kumar Gupta and others (supra).*** From the aforesaid, we are of the view that the decision of the Government for fixing of the minimum qualifying marks cannot be faulted.

(104) The examination conducted in 2019 for second ATRE - 2019 does not discriminate between the Shiksha Mitras who appeared in 2018 and The Shiksha Mitras who appeared in 2018 and 2019 do not constitute one class for the purposes of passing the examinations of 2018 and 2019 as the standards of both the examinations was different and they have to pass the examination as per the advertisement and the Rules regulating both the examinations.

(105) For the reasons aforementioned, it cannot be said that the Government Order dated 7.1.2019 is violative of Article 14 of the Constitution of India nor it makes an unreasonable classification or is nullifying the judgment of the Apex Court in the case of ***Anand Kumar Yadav (supra)***. Accordingly, we set aside the impugned order 29.3.2019 passed in Writ Petition No.1188 (SS) of 2019 and other connected matters filed by Shiksha Mitras and dismiss the said writ petitions by allowing all the Special Appeals and direct the State of U.P. to declare the result of examination which was held on 6.1.2019 in terms of the Government Order dated 7.1.2019 at the earliest as directed by the Apex Court in the case of ***Bhola Prasad Shukla v. Union of India and others (supra)***. All applications for intervention/ impleadment/civil miscellaneous applications are also disposed of in same terms.

(106) No costs.

(2020)03-05ILR A932
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE

THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 164 of 2020

Naresh Pal ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Vinod Kumar Singh

Counsel for the Respondents:
Sri A.K. Roy, Sri Satya Prakash Singh

(A) Intra Court Appeal - no interference is warranted unless palpable infirmities or perversities are noticed on a plain reading of the judgment or order

Special Appeal Rejected. (E-10)

(Delivered by Hon'ble Biswanath Somadder, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. This Special Appeal arises in respect of a judgment and order dated 28th January, 2020, passed by a learned Single Judge in Writ-A No. 73517 of 2011 (Naresh Pal v. State of U.P. and others). By the impugned judgment and order the writ petition was allowed with certain directions.

2. This Special Appeal has been preferred by the writ petitioner.

3. For convenience, the operative portion of the impugned judgment and order is set out hereinbelow:-

"Accordingly, while this petition is allowed and the impugned order dated 22 October 2011 is set aside, the Court further provides that the order of 17 October 2011 shall also resultantly stand set aside since its continuance in light of what has been recorded above would perpetuate an illegality. The setting aside of the order of 17 October 2011 shall however not empower the respondents to recover salaries and other emoluments which the petitioner has drawn in the meanwhile pursuant to the work discharged and performed on the promotional post. The Committee of Management shall now proceed to draw a list of all eligible teachers and forward the same to the concerned Regional Level Committee bearing in mind the mandate of Rule 14 within a period of two weeks from today. The Joint Director of Education shall ensure that the requisite papers are placed before the concerned Regional Level Committee and a final decision taken with respect to the grant of promotion within a period of two months therefrom. "

4. In order to appreciate the controversy, the necessary statutory framework for recruitment by promotion in an institution recognised under the Intermediate Education Act, 1921 may be adverted to.

5. The Uttar Pradesh Secondary Education Services Selection Board Act, 19821 was enacted to provide for establishment of a Secondary Education Service Selection Board for the selection of teachers in institutions recognised under the Intermediate Education Act, 1921.

6. Section 2(l) defines the 'year of recruitment' as follows:-

"(l) 'Year of recruitment' means a period of twelve months commencing from first day of July of a calendar year".

7. Chapter III of the Act deals with the procedure for selection by promotion. Section 12, which is a part of Chapter III, is in the following terms:-

"12. Procedure of selection by promotion.--(1) For each region, there shall be a Selection Committee, for making selection of candidates for promotion to the post of a teacher, comprising

(i) Regional Joint Director of Education: -- Chairman

(ii)Senior most Principal of Government

Inter College in the region: -- Member

(iii) Concerned District Inspector of Schools -- Member/Secretary

(2) The procedure of selection of candidates for promotion to the post of a teacher shall be such as may be prescribed."

8. Section 32 stipulates that the provisions contained in the Intermediate Education Act, 1921 and its regulations would continue to be in force insofar as they are not inconsistent with the provisions of the Act or Rules or Regulations made under it, inter alia, for the purpose of selection, appointment and promotion in the rank of a teacher.

9. In exercise of the rule making power under section 35 of the Act, 1982, the Uttar Pradesh Secondary Education Services Selection Board Rules, 19982 were made. The procedure for recruitment

by promotion is provided for under Rule 14 of the aforementioned Rules and the same is as follows:-

"14. Procedure for recruitment by promotion.--(1) Where any vacancy is to be filled by promotion, all teachers working in Trained graduates grade or Certificate of Teaching grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the Lecturers grade or the Trained graduates grade, as the case may be, without their having applied for the same.

Note.--For the purposes of this sub-rule, regular service rendered in any other recognized institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in sub-rule (1), and forward it to the Inspector with a copy of seniority list, service records, including the character rolls, and a statement in the pro forma given in Appendix 'A'. (4) Within three weeks of the receipt of the list from the Management under sub-rule (3), the Inspector shall verify the facts from the record of his office and forward the list to the Joint Director.

(5) The Joint Director shall consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and may call such additional information as it may consider necessary. The Joint Director shall place the records before the Selection Committee referred to in sub-section (1) of Section 12 and after the Committee's recommendation, shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Management.

(6) Within ten days of the receipt of the panel from the Joint Director under sub-rule (5), the Inspector shall send the name of the selected candidates to the Management of the institution which has notified the vacancy and the Management shall accordingly on authorization under its resolution issue the appointment order in the pro forma given in Appendix 'F' to the such candidate."

10. The provisions contained under section 12 of the Act, 1982, read with Rule 14 of the Rules, 1998, provide a complete procedure with regard to recruitment by promotion in an institution recognized under the Intermediate Education Act, 1921.

11. As per sub-rule (1) of Rule 14, all teachers working in the trained graduates grade or certificate of teaching grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates grade, as the case may be, without their having applied for the same. It is relevant to notice that the consideration for promotion in terms of the statutory rule is to be accorded to all teachers, who fulfill the prescribed eligibility criteria, and this entitlement for consideration for promotion is to be made without the teachers having applied for the same. The criterion for promotion, in terms of sub-rule (2), is seniority subject to the rejection of unfit.

12. Sub-rule (3) of Rule 14, aforesaid, enjoins upon the management to prepare a list of teachers referred to in sub-rule (1), and forward it to the Inspector with a copy of the seniority list, service records, including the character rolls and a

statement in the proforma given in Appendix 'A', to the Rules, 1998.

13. In terms of sub-rule (4), (5) and (6), upon receipt of the list from the management under sub-rule (3), the Inspector is required to verify the facts from the record of his office within a specified period and forward the list to the Joint Director whereupon the Joint Director is to consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and may call such additional information as may be considered necessary, and thereafter he is to place the record before the Selection Committee referred to in sub-section (1) of Section 12 and after the Committee's recommendation, the procedure with regard to forwarding of the panel of selected candidates to the Inspector and sending of names of the selected candidates to the management of the institution, upto the stage of issuance of appointment orders to the candidates, is provided for.

14. The scheme for recruitment by promotion, under the aforementioned statutory provisions, provides that consideration for recruitment by promotion is to be accorded to all teachers who fulfill the precribed eligibility criteria, without their having applied for the same. This clearly leads to an inference that all the teachers who fulfill the requisite eligibility criteria under sub-rule (1) of Rule 14 are entitled for consideration even if they have not applied for the same, and the list which is to be prepared by the management and forwarded to the Inspector in the prescribed proforma given it in Appendix 'A' to the Rules, 1998, for further processing, is to include the relevant records of all the teachers who fulfill the eligibility criteria under sub-rule (1) of Rule 14, irrespective of the fact, whether or not, they have applied for promotion.

15. The right of consideration under Rule 14, therefore, extends to all teachers fulfilling the prescribed eligibility criteria without any discretion in the matter to the Committee of Management, which is required to simply prepare a list of teachers fulfilling the eligibility criteria under sub-rule (1) and to forward it to the Inspector along with seniority list, service records, including the character rolls, and a statement in the prescribed proforma for further processing. Although, as per sub-rule (2), the criterion for promotion is seniority subject to the rejection of unfit, there is no contemplation under the rule for recommendation to be made by the Committee of Management based on the inter se seniority of the teachers who may be fulfilling the eligibility criteria.

16. In the facts of the present case, it is undisputed that the name of the petitioner alone was recommended by the concerned Committee of Management taking the view that he was the senior most teacher whereas Rule 14 of the Rules, 1998, enjoins upon the Committee of Management to forward the names of all eligible candidates, irrespective of their position in the seniority list. The right of consideration, in terms of Rule 14, having been extended to all teachers who possess the requisite qualification and have rendered qualifying service as prescribed, the direction issued by the learned Single Judge directing the Committee of Management to draw the list of all eligible teachers and forward the same to the Regional Level Committee as per the mandate of Rule 14 within a fixed time period, thus does not call for any interference.

17. We are really surprised as to why the writ petitioner is before us. The reason is, it will appear from the directions of the learned Single judge as quoted above that the principal prayer of the writ petitioner

has been allowed. The judgment and order is supported with cogent and justifiable reasons. In an Intra-Court Special Appeal, no interference is usually warranted unless palpable infirmities or perversities are noticed on a plain reading of the impugned judgment and order. In the facts and circumstances of the instant case, on a plain reading of the impugned judgment and order, we do not notice any such palpable infirmity or perversity. As such, we are not inclined to interfere with the impugned judgment and order dated 28th January, 2020.

18. At this stage, learned counsel for the appellant- petitioner has tried to contend that the petitioner is the senior most teacher having the prescribed eligibility, and in case the Regional Level Committee finally decides in his favour, he may be granted continuity and other consequential benefits on the promotional post.

19. Since the matter has been remitted for consideration afresh as per the procedure under Rule 14 of the Rules, 1998, we refrain from making any observation with regard to the rights of the appellant-petitioner vis-a-vis other teachers who may be entitled for consideration under the statutory provision, leaving it open to the appellant-writ petitioner to raise all contentions before the authority concerned.

20. We make it clear that the above observation does not touch upon merit of the claim of the appellant- writ petitioner and also the claims which may be set up by other contending parties.

21. The Special Appeal stands disposed of accordingly.

(2020)03-05ILR A936
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE

THE HON'BLE VIVEK VARMA, J.

Writ-A No. 416 of 2020

Sanjeev Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chandra Bhan Singh Chandel

Counsel for the Respondents:
C.S.C., Sri Suresh Kumar

A. Compassionate appointment - object is to allow the dependants of the deceased to overcome the financial crisis - reservation of vacancy of post for such appointment till such time when minor become major is contrary to the rules of such appointment

The fact that members of the family have survived for the last twenty three years raises a presumption that the immediate financial crisis caused by the death of earning member of the family has been tided over. The financial penury as existing in the year 1996 cannot be said to be existing now in the year 2020, except its emotional aspect. No appointment on compassionate ground at such belated stage can be granted. (para 21)

Writ Petition rejected. .(E-10

List of cases cited:

1. Sanjay Kumar Vs. St. of Bihar & ors. 2000 (10) SC 156

2. St. of J & K & ors. Vs. Sajad Ahmed Mir AIR 2006 SC 2743

3. Shiv Kumar Dubey Vs. St. of U.P. 2014 (2) ADJ 312

(Delivered by Hon'ble Vivek Varma, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. The father of the petitioner, Rajendra Singh was a Assistant Teacher in Primary School Nagala Sahjan, Patiyali District Etah (Kasganj), He died in harness on 18.09.1996, leaving behind his widow, one daughter and five sons. The mother of the petitioner, Smt. Ganga Shri, did not claim compassionate appointment. She made an application on 09.11.1999 to the then Basic Shiksha Adhikari, Etah that her sons are minor, therefore, the claim may be considered after her sons attain majority.

3. The petitioner submitted an application to the District Basic Education Officer for grant of compassionate appointment for the first time on 22.07.2004 along with an affidavit of his mother, which contained a recital to the effect that neither she nor her other children have any objection if the petitioner is given appointment. The application of the petitioner was forwarded by the District Basic Education Officer on 05.10.2004 to the Secretary, Basic Education, who in turn recommended to the same to the State Government for relaxation of time in giving appointment, which according to the petitioner is still pending for consideration.

4. Thereafter, on 23.09.2019, the petitioner again represented to the Director, Basic Education Lucknow for taking decision on the recommendation of the respondent no.2, which also remained pending.

5. The present writ petition has been filed for a direction to the respondent no.1 to take a decision upon the recommendation letter dated 11.08.2005 sent by the respondent no.2. He also prayed for mandamus commanding the respondents to appoint the petitioner on a suitable post.

6. Learned Counsel for the petitioner contended that the application for appointment under the dying in harness was moved by the mother of the petitioner within the time limit of 5 years and the claim of the petitioner has not been decided as yet. Therefore, a direction may be issued to the State Government to consider the same.

7. Per contra learned Standing Counsel for the State respondents submitted that the concept of compassionate appointment under the provisions of the U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 is to enable the bereaved family to tide over the immediate financial crises. Delay in making application for appointment on compassionate grounds raises a presumption that the immediate financial crises has been tided over.

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

9. The object of the U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules is to remove the hardship of the family, whose bread-earner expired during the course of his employment, leaving the family in sudden economic crises. The appointment to be made under the aforesaid Rules is an exception to the general Rules for selection and appointment and it is entirely based on humanitarian approach to financially

support dependents of the deceased Government Servant in the grip of a sudden penury caused by the death of the sole bread earner.

10. The rules which are relevant in present context are Rules 5 and 8. The Rule 5 is extracted herein below:-

*"**5. Recruitment of a member of the family of the deceased.**-- (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person--*

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and,

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time-limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

(3) Each appointment under sub-rule (1) should be under the condition that the person appointed under sub-rule (1) shall upkeep those other family members of the deceased Government servant who are incapable for their own maintenance and were dependant of the above said deceased Government servant immediately before his death.

***8.Relaxation from age and other requirements.**-- (1) The candidate seeking appointment under these rules must not be less than 18 years at the time of appointment.*

(2) The procedural requirements for selection; such as written test or interview by a selection committee or any other authority, shall be dispensed with, but it shall be open to the appointing authority to interview the candidate in order to satisfy itself that the candidate will be able to maintain the minimum standards work and efficiency expected on the post.

(3) An appointment under these rules shall be made against an existing vacancy only."

11. A perusal of Rules 5 (iii) shows that the case of compassionate appointment, would be considered in relaxation of the normal recruitment rules if such persons make applications for employment within five years from the date of the death of the government servant; provided that where the State Government is satisfied that the time- limit fixed for making the application for employment, causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary

for dealing with the case in a just and equitable manner.

12. Rule 8 provides for relaxation from age and other requirements. The said Rule provides that an appointment under the Rules 1974 shall be made against an existing vacancy only and that the candidate seeking appointment under these rules must not be less than 18 years at the time of appointment.

13. From the aforesaid Rules, it is clear that the application should have been preferred within a period of five years from the death of the employee and in any particular case where the State Government is satisfied that the time limit fixed for making the application for employment results in any undue hardship, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

14. In the case in hand, the claim for compassionate appointment is based on the fact that petitioner was minor at the time of the death of his father and further the application dated 22.07.2004 for relaxation of time in giving application remained pending.

15. The widow of her own accord waited for her son to attain majority and claimed compassionate appointment thereafter. Prior to this application she sought reservation of a post till her sons attains majority. It is settled position flowing from various decision of the Hon'ble Supreme Court that the whole object of granting compassionate employment is to enable the family to tide over the sudden crisis and to relieve the family of the financial destitution and to help it get over the emergency. None of the decisions of the Apex Court justify compassionate employment either as a matter of course and the only ground which can justify compassionate appointment is the sudden financial penury of the deceased's family caused by his death.

16. In ***Sanjay Kumar Vs. The State of Bihar & Ors,*** 2000 (10) SC 156 the Hon'ble Supreme Court considered the case for compassionate appointment made by a minor after he attained majority. The aforesaid decision emphasised that the appointment on compassionate grounds is given to tide over the immediate difficulties faced by the family of the deceased by observing as follows:

"We are unable to agree with the submissions of the learned senior counsel for the petitioner. This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the bread-earner who had left the family in penury and without any means of livelihood. In fact, such a view has been expressed in the very decision cited by the petitioner in Director of Education and another v. Pushpendra Kumar and others, (supra). It is also significant to notice that, on the date when the first application was made by the petitioner on 2.6.88, the petitioner was a minor and was not eligible for appointment. This is conceded by the petitioner. There cannot be reservation of a vacancy till such time, as the petitioner becomes a major after a number of years, unless there are some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."

17. To grant any relief to the petitioner at this stage would be contrary to the decisions of the Supreme Court where the cases of minors had been considered and rejected on the ground that there cannot

be a reservation of vacancy till such time as the minor becomes a major.

18. The Hon'ble Supreme Court in the case of ***State of J & K and others V. Sajad Ahmed Mir*** reported in AIR 2006 SC 2743 in paragraph 17 has held as under:

"17. In the case on hand, the father of the applicant died in March, 1987. The application was made by the applicant after four and half years in September, 1991 which was rejected in March, 1996. The writ petition was filed in June, 1999 which was dismissed by the learned single Judge in July, 2000. When the Division Bench decided the matter, more than fifteen years had passed from the date of death of the father of the applicant. The said fact was indeed a relevant and material fact which went to show that the family survived in spite of death of the employee. Moreover, in our opinion, the learned single Judge was also right in holding that though the order was passed in 1996, it was not challenged by the applicant immediately. He took chance of challenging the order in 1999 when there was inter-departmental communication in 1999. The Division Bench, in our view, hence ought not to have allowed the appeal."

19. The question of delay in filing application for appointment under the Dying-in-Harness Rules and the consequences of such delay on the right to be appointed on compassionate ground was considered by a Full Bench of this Court in the case of ***Shiv Kumar Dubey vs. State of U.P.***, 2014 (2) ADJ 312. For convenience, the entire paragraph 29 of the aforesaid Full Bench decision is reproduced:-

"29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment

would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

(vii) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;

(viii) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family." (emphasis supplied)

20. Thus, the law is settled that object to grant compassionate appointment is to allow the family to tide over the immediate financial penury caused by the death of sole bread earner. Such appointment is not a matter of right and is in the nature of concession, which is to be extended for a specific purpose only.

21. The fact that members of the family have survived for the last twenty three years raises a presumption that the immediate financial crises caused by the death of earning member of the family has been tided over. Lifting of the immediate financial penury denies the justification for making appointment on compassionate ground. The financial penury as existing in the year 1996 can not be said to be existing now in the year 2020, except its emotional aspect. No appointment on compassionate ground at such belated stage can be granted nor any direction can be issued to consider the claim of the petitioner.

22. In view of the above discussion, this Court is of the opinion that no direction is required to be passed to the State Government to consider the claim of the petitioner.

23. In the above conspectus, the petition fails and is dismissed. There shall be no order as to costs.

(2020)03-05ILR A941
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2019

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE SHAMIM AHMAD, J.

Special Appeal Defective No. 451 of 2011

Anand Ram Nagar ...Appellant
Versus
The Banaras State Bank Limited & Ors. ...Respondents

Counsel for the Appellant:
V.K. Singh, G.K. Singh, Girish Kumar Gupta

Counsel for the Respondents:
Vipin Sinha, Ashok Trivedi, S.C.

(A) Simultaneous proceedings - the criminal court came to the conclusion that the prosecution has failed to prove that the alleged incident has taken place and acquitted the person from such charges - the departmental proceedings initiated based on such alleged offence will also come to an end - finding of the criminal court will override the findings in departmental enquiry

Special Appeal Allowed. (E-10)

List of cases cited:

1. Suresh Pathrella Vs. Oriental Bank of Commerce AIR 2007 SC 199 *(distinguished)*

2. D.S. Bishnoi Vs. S.B.I. & ors. 2004 (1) AWC 640 *(distinguished)*

3. G.M. Tank Vs. St. of Guj. & ors. 2006 SCC (L&S) 1121 *(distinguished)*

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

1. Heard Sri V.K. Singh, Senior Counsel assisted by Sri Hritudhwaj Pratap Sahi, learned counsel for the appellant and Sri Ashok Trivedi, learned counsel for the respondents.

2. This special appeal has been filed by the petitioner/appellant against the judgement and order dated 22.12.2010 passed by learned Single Judge of this Court in Civil Misc. Writ Petition No. 6889 of 1992 (Anand Ram Nagar Vs. The Banaras State Bank Limited, Varanasi and another) by which the aforesaid writ petition was dismissed in part.

3. Briefly stated the facts of this case are that while petitioner/appellant Anand Ram Nagar was working as an Accountant in the Banaras State Bank Ltd., Varanasi and when strong room was opened on 24.01.1989, it was found that Rs. 1,00,000/- was short which led to filing of F.I.R. and after obtaining explanation from the petitioner/appellant, a charge-sheet was served on him containing charges of dereliction of duty. The petitioner/appellant submitted his reply denying the charge. However, upon due enquiry, he was found guilty and his services were terminated vide order dated 30.03.1990. Against the order dated 30.03.1990, he preferred a departmental appeal which was dismissed by order dated 16.07.1990. The application filed by the petitioner/appellant for review of the order dated 16.07.1990 was also rejected by order dated 22.10.1990. The aforesaid petition was filed by the petitioner challenging the aforesaid order. At the time of admission, an interim order was passed in favour of the petitioner/appellant staying the impugned orders in pursuance of which the petitioner/appellant continued in service and received salary. In the meantime, the petitioner/appellant was convicted by the criminal court vide judgement and order dated 24.07.1999 and consequently, second termination order dated 27.07.1999 was passed on account of his conviction in the criminal case. However, the appeal preferred by the petitioner/appellant against his conviction was allowed vide order dated 29.05.2000 and the petitioner/appellant was acquitted from all the charges.

4. Before the writ court, it was urged by the learned counsel for the petitioner/appellant that once the finding of the criminal court to the fact that money

was never found short in the strong room of the bank had attained finality, the very basis of the departmental proceedings initiated against the petitioner which culminated into termination of his services, ceased to exist. It was also urged by the learned counsel for the petitioner/appellant that Branch Manager who was also charge-sheeted in respect of the same incident, was let off by award of a minor punishment. It was next urged that the finding recorded by the criminal court shall override the finding recorded in the disciplinary enquiry. Before the writ court, it was lastly urged that since the petitioner/appellant had retired, the extreme punishment of dismissal on the facts of the case was not warranted at all.

5. Learned Single Judge however, dismissed the writ petition by the order impugned in this special appeal.

6. Paragraph Nos. 8 to 14 of the judgement and order of the learned Single Judge which are relevant for our purpose are being reproduced hereinbelow :-

8. The petitioner was the second senior most officer in the Branch and as the Branch Manager was busy in other work, he was deputed for closing strong room on 23.1.1989 and in pursuance thereof, he allegedly checked the cash book and signed in lieu thereof showing a closing balance of Rs.6,64,454.24. However, when the strong room was opened in the morning of 24.1.1989 for verification in front of an Inspector of the Reserved Bank of India, the cash was allegedly found short by Rs.one lac consisting of 10 packets of Rs.100/- denomination but there was no tempering of the lock. After seeking his explanation, it was prima-facie found that the petitioner had not verified the cash before closing it and as such the following charge was framed against him.

"Dereliction of duties which is an act detrimental to the interest of the bank [clause 3(i) of Officers Employees Conduct] Regulations, 1986"

9. However, before the Criminal Court, the petitioner was charged under section 406 and 409 IPC and convicted for an offence under section 409 IPC vide order dated 24.7.1999 but the appeal was allowed vide order dated 29.5.2000. It would be appropriate to quote section 409 IPC which is as under:-

"Criminal breach of trust by public servant, or by banker, merchant or agent- Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breech or trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

10. Apparently, the charge against the petitioner before the departmental enquiry and before the criminal court is entirely different. It is apparent that before the criminal court the petitioner was charged for criminal breach of trust. The nature of evidence to prove the respective charges is also entirely different. While proving criminal breach of trust, it is imperative to prove mensrea to cause loss to the Bank but in the departmental charge sheet only factum of negligence in exercise of his official duties has to be proved. Thus, assuming, that the criminal court has acquitted the petitioner with the finding that there was, in fact, no shortage but if the petitioner had not followed the standard operating procedure while verifying the cash and closing the strong room, he would still be guilty of dereliction of duty. It is admitted to the petitioner, during the departmental enquiry, that he did not

physically verify the position of the cash before signing the closing balance in the strong room, which is the standard normal procedure. Therefore, it cannot be said that if the petitioner has been acquitted on charge under section 409 IPC, he should be absolved of the charge framed by the Bank. The finding of the criminal court would not over ride the findings recorded in the departmental enquiry. The petitioner has relied upon a decision of the Apex Court rendered in the case of G.M. Tank Vs. State of Guarat and others [2006 SCC (L&S) 1121] to contend that the acquittal in the criminal trial would render the departmental findings unsustainable. No doubt if the two charges are identical, the findings of the criminal court would have predominance over those in the departmental proceedings, but that is not the case here. The facts in Tank's case (Supra) are entirely different. The incumbent in that case was charged for the offence of acquisition of moveable and immovable property disproportionate to his known sources of income. This was the also the precise charge before the criminal court under Prevention of Corruption Act, 1947.Therefore, the ratio rendered therein would not apply to the present case. To the contrary, it has consistently been held in several decisions, including in the case of Suresh Pathrella Vs. Oriental Bank of Commerce [AIR 2007 SC 199] that acquittal in a criminal case would be no bar for drawing up disciplinary proceedings against the delinquent officer. In this case, the allegation against the incumbent was that he had defrauded the customer and the Bank of Rs. Ten lacs but he was acquitted in the criminal case on the ground that no loss to the Bank had occurred. Nevertheless, the Supreme court held that it would be no ground to hold that he could not be punished in the departmental enquiry if it is found that he misconducted himself in not complying with the normal operating procedure. Therefore, the argument that merely because the petitioner has been acquitted in the criminal charge, the termination order ought to be set aside, cannot be sustained.

11. So far as the argument that it was only a minor dereliction coupled with the fact that the petitioner has already retired, the penalty of dismissal would be too harsh when compared with the minor punishment awarded to the Branch Manager. The case of the Branch Manager is entirely different and it cannot be compared with that of the petitioner who was the person responsible for physically verifying the cash before signing and closing the books. An Accountant in a Bank holds a position of trust and even a minor dereliction or negligence may not only cause immense harm to the Bank but even its reputation as being custodian of the people's wealth. The petitioner being the officer assigned to close cash and the strong room, should have first verified the information contained in the cash book with actual position of the strong room by physical verification before signing it. The Apex Court in the case of ***Suresh Pathrella (Supra)*** *itself has held that in the case of Bank employees, even if no loss is caused to the Bank, cannot be a ground to take a lenient view for proved misconduct especially when there was no malafide or violation of principles of natural justice. In such cases, consistent view of the Apex Court has been that the courts need not interfere. A Division bench in the case of D.S. Bishnoi Vs. State Bank of India and others [2004 (1) AWC 640] has held that highest degree of standards or devotion to duty and integrity are required to be maintained in order to maintain public confidence in the case of Banks and the*

courts should not interfere in findings of fact recorded by the Enquiry Officer. Merely because the petitioner has retired, the nature of misconduct cannot be watered down especially when the High Court is not permitted to re-appreciate the evidence which has been considered by the Enquiry Officer.

12. However, since the second termination order dated 27.7.1999 is based merely on the conviction of the petitioner which has been set aside in appeal, the order dated 27.7.1999 is bound to be quashed.

13. For the reasons above, this petition succeeds partly to the extent as aforesaid but is rejected for the other reliefs claimed.

14. In the circumstances of the case, no order as to cost.

7. It was contended by Sri V.K. Singh, learned counsel for the petitioner/appellant that once a criminal court came to the conclusion that no such incident as alleged in which cash in the strong room was found short, having taken place and it being settled down that acquittal in criminal trial would render departmental proceeding unsustainable, learned Single Judge erred in taking a view to the contrary and the reliance placed by him on ***Suresh Pathrella Vs. Oriental Bank of Commerce*** reported in ***AIR 2007 SC 199*** and ***D.S. Bishnoi Vs. State Bank of India and others*** reported in ***2004 (1) AWC 640,*** is wholly misconceived.

8. Per contra Sri Ashok Trivedi, learned counsel for the respondents made his submissions in support of the impugned order.

9. We have heard learned counsel for the parties and perused the material brought on record.

10. Record of this special appeal shows that while the petitioner/appellant was working as Accountant in the respondent-Bank when strong room was opened on 24.01.1989, it was found that Rs. 1,00,000/- was short which led to filing of a F.I.R. against the petitioner/appellant as well as the initiation of departmental proceedings.

11. After the petitioner/appellant was charge-sheeted, following charge was framed against the petitioner/appellant :-

"Dereliction of duties which is an act detrimental to the interest of the bank [clause 3(i) of Officers Employees Conduct] Regulations, 1986"

12. The petitioner/appellant submitted his reply in which he stated that keys of the cash chest continuously remained with the Branch Manager and the Chief Cashier and they are the persons who are responsible for checking of the whole amount of cash and so far as the petitioner/appellant was concerned, his job was only to check the day-to-day account upon the debit and credit scroll.

13. Copy of the charge-sheet was filed as Annexure No. 3 and his explanation was filed as Annexure No. 4 to the writ petition.

14. After the completion of enquiry, the enquiry report dated 25.08.1989 (Annexure No. 12 to the writ petition) was submitted by the Enquiry Officer in which he had found that the petitioner/appellant in dereliction of his duty had not checked the total amount of cash kept in the safe of the bank. Thereafter, the petitioner/appellant was served with a show-cause notice (Annexure No. 13 to the writ petition) issued by the respondent no. 4 by which he proposed to impose major punishment on

the petitioner/appellant dismissing him from services and disqualifying him from future employment.

15. In response to the show-cause notice, the petitioner/appellant submitted his reply on 30.12.1989 (Annexure No. 14 to the writ petition) and appeared before respondent no. 4. However, respondent no. 4 dismissed the petitioner/appellant from his services by order dated 30.03.1990 (Annexure No. 15 to the writ petition). The petitioner/appellant then preferred an appeal on 16.05.1990 (Annexure No. 16 to the writ petition) against the order dated 30.03.1990 which was also dismissed by the respondent no. 3 by order dated 16.07.1990 (Annexure No. 17 to the writ petition). Thereafter, the petitioner/appellant moved an application on 13.09.1990 (Annexure No. 18 to the writ petition) before the respondent no. 2 with a prayer to review the order dated 16.07.1990 which was also rejected by him by order dated 22.10.1990 (Annexure No. 19 to the writ petition). Thereafter, the petitioner/appellant made a representation (Annexure No. 20 to the writ petition) before the respondent no. 5, Board of Directors, The Banaras State Bank Limited, Laxa Road, Varanasi which was also rejected. During the pendency of the writ petition filed by the petitioner/appellant challenging the aforesaid orders, the petitioner/appellant was convicted by the criminal court which led into passing of second termination order dated 27.07.1999 which was based upon his conviction. The said termination order was also challenged by the petitioner/appellant by amending the writ petition. The conviction of the petitioner/appellant was set-aside by the appellate court with specific finding that the prosecution had failed to prove that any such incident on 24.01.1989, in which upon opening of the strong room, Rs. 1,00,000/- was found short, had taken place.

16. Since there is no dispute about the fact that the aforesaid finding recorded by the appellate court has attained finality, in our opinion, keeping in view the principles propounded by the Apex Court in ***G.M. Tank Vs. State of Gujarat and others [2006 SCC (L&S) 1121]***, learned Single Judge should have allowed the writ petition in toto quashing the impugned order of dismissal and the appellate order also apart from quashing the second termination order on the ground of acquittal of petitioner/appellant in appeal.

17. Learned Single Judge has held that since the charges in the departmental proceedings and the criminal prosecution were identical, the finding recorded by the criminal court would not prevail over the finding recorded in the departmental proceeding.

18. In our opinion, the view taken by the learned Single Judge is per se erroneous. The charges framed in the departmental proceedings as well as in the criminal court were based upon the same incident which had taken place on 24.01.1989. The wordings of the charges framed in the criminal court and the departmental proceedings may be different but unless it was proved that any such incident as alleged by the bank had taken place on 24.01.1989, the petitioner/appellant could not be punished departmentally or convicted. The appellate court has recorded a categorical finding that the prosecution had failed to prove that any such incident as alleged by the bank had taken place on 24.01.1989 and no such shortage of cash was ever detected. In view of the aforesaid findings recorded by the

appellate court which had attained finality, following the ratio of ***G.M. Tank (supra),*** that the acquittal in the criminal trial would render the departmental proceedings unsustainable, we are of the view that the impugned order can not be sustained. The two decisions which have been relied upon by the learned Single Judge namely ***Suresh Pathrella (supra)*** and ***D.S. Bishnoi (supra)*** for the purpose of upholding the validity of the impugned orders cannot be applied to the facts and circumstances of the present case. In the case of ***Suresh Pathrella (supra)***, the delinquent officer was proceeded departmentally on the allegation that he had defrauded a customer thereby causing a loss of Rs. 10,00,000/- to the bank. He was acquitted by the criminal court with a finding that no loss to the bank had occurred. There was no corresponding finding in the aforesaid case that the prosecution had failed to prove that the delinquent employee had defrauded the customer.

19. Once, the criminal court came to the conclusion that the prosecution had failed to prove that either any incident, as alleged, had taken place on 24.01.1989 or any amount was found short, the very foundation on the basis of which departmental proceedings were initiated against the petitioner/appellant in which he was found guilty of dereliction of duty, disappeared. If no such incident on the basis of which charge of dereliction of duty was framed and found proved against the petitioner/appellant in the departmental proceedings had taken place on 24.01.1989, the petitioner/appellant cannot be held guilty of dereliction of duty. Hence, we have no hesitation in holding that the finding recorded by the criminal court will override the finding recorded against the petitioner/appellant in the departmental enquiry.

20. Similarly, the principles enunciated in the case of ***D.S. Bishnoi (supra)*** that highest degree of standards or devotion to duty and integrity are required to be maintained in order to maintain public confidence in the case of banks and the courts should not interfere in findings of fact recorded by the Enquiry Officer. Merely because the petitioner has retired, the nature of misconduct cannot be watered down especially when the High Court is not permitted to re-appreciate the evidence which has been considered by the Enquiry Officer, is also not applicable to the facts and circumstances of the present case inasmuch as in the present case, the criminal court has recorded findings which are wholly irreconcilable with the findings recorded in the departmental enquiry with regard to the incident which was the basis of dismissal of the petitioner/appellant and his conviction by the trial court.

21. For the aforesaid reasons, this appeal is allowed and the impugned judgement and order dated 22.12.2010 passed by learned Single Judge of this Court in Civil Misc. Writ Petition No. 6889 of 1992 (Anand Ram Nagar Vs. The Banaras State Bank Limited, Varanasi and another) as well as the orders dated 30.03.1990, 16.07.1990 and 22.10.1990 passed by respondent nos. 4, 3 and 2 respectively, are hereby set-aside.

(2020)03-05ILR A947
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.02.2020

BEFORE

THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE KARUNESH SINGH PARWAR, J.

Special Appeal Defective No. 586 of 2019

Sharwan Kumar ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Divyanshu Sajay

Counsel for the Respondents:
C.S.C.

A. Service – Payment of salary - Code of Civil Procedure, 1908: Order II, Rule 2 - An issue, which had been decided in earlier litigation, arising again for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action, is not barred by principles of res-judicata or constructive res-judicata. (Para 13)

Writ Petition was dismissed taking into consideration principles of res-judicata/constructive res-judicata. In the present appeal, it was held that the resolution of the Board of Directors dated 06.06.2018, by which a decision was taken to make payment of arrears arising out of 6th Pay Commission recommendation w.e.f. 01.01.2006 to the employees of the IITUP and letter dated 21.12.2017, giving details of the burden of expenditure, were not there in the earlier round of litigation regarding payment of salary and increments.

This subsequent resolution gave rise to the fresh cause of action w.r.t. the payment of salary and arrears, in the light of sixth pay commission, which included the petitioner for the first time. (Para 9 to 14)

Appeal partly allowed. (E-4)

Precedent followed:

1. Hope Plantations Ltd. Vs. Taluk Land Board, Peermade & anr., (1999) 5 SCC 590 (Para 13)

Appeal against judgment and order dated 17.10.2019, passed in Writ Petition No. 34236 (SS) of 2018.

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard Sri Divyanshu Sahay, learned counsel for the petitioner, learned Additional Chief Standing Counsel for the State and Sri Himanshu Hemant Gupta, learned counsel appearing for the respondent Corporation.

2. This *intra court* appeal arises against judgment and order dated 17.10.2019 passed in Writ Petition No.34236 (SS) of 2018, *Sharwan Kumar vs. State of U.P. and others,* whereby learned Single Judge had dismissed the writ petition as not maintainable taking into consideration principles of res-judicata/constructive res-judicata enshrined in Order II, Rule 2 C.P.C.

3. The appellant/petitioner was an employee of the Institute of Tool Room Training U.P. (hereinafter referred to as the ITTUP) who retired on 30.4.2011. The petitioner had filed Writ Petition No.375 of 1985, *Sharwan Kumar vs. Institute of Tool Room Training, U.P. and others* before this Court praying for the following reliefs:-

"(i) issue a writ, order or direction in the nature of Mandamus commanding the opposite parties no.1 to 3 not to make any hostile discrimination between the petitioner and the opposite parties no.4 to 6 regarding grant of annual increments in the wage revision.

(ii) issue a writ, order or direction in the nature of Mandamus commanding the opposite parties no.1 to 3 to grant petitioner also at least five annual increments.

(iii) issue any other writ, order or direction which this Hon'ble Court may deem fit in the circumstances of the case, in favour of the petitioner.

(iv) award costs of this petition to the petitioner."

4. The aforesaid writ petition was disposed of with a direction to the respondents to decide the representation of the petitioner and when the representation of the petitioner was rejected, he filed Writ Petition No.9651 of 1988, *Sharwan Kumar vs. State of U.P. and others*, which was dismissed vide judgment and order of this Court dated 27.7.1999. Against the judgment and order dated 27.7.1999 the petitioner filed Special Appeal No.354 of 1999, which too was dismissed vide judgment and order dated 21.8.2008. Against judgment and order dated 21.8.2008, Civil Appeal No.8902 of 2010 In re: *Sharwan Kumar vs. State of U.P.* and others was filed by the petitioner before the Hon'ble Apex Court wherein the following order was passed:-

"This appeal by special leave is directed against the judgment and order dated 21.8.2008 passed by the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Special Appeal No.354 (SB) of 1999.

After hearing learned counsel for the parties, we do not find any reason to interfere with the impugned order. This appeal is, accordingly, dismissed.

However, learned counsel appearing for the appellant submitted that the salary of the appellant was with-held for about 10 years and it was released only after the contempt petition was filed, that too, without giving any increment and revision of pay. The respondents are directed to took into the matter and see that if the salary was not paid, as per the revised pay scale and increments have not been given, the same shall be calculated and released in favour of the appellant within a period of two months from today."

5. Hon'ble Apex Court vide order dated 29.7.2015 while dismissing the Civil Appeal directed the respondents to look into the matter and see if the salary has not been paid as per revised pay scale and increments have not been given, the same shall be calculated and released in favour of the appellant within a period of two months. Since the judgement and order dated 29.7.2015 was not complied with, the petitioner filed Contempt Petition (C) No.111 of 2016, *Sharwan Kumar vs. Mahesh Kumar Gupta and others* before the Hon'ble Apex Court which was disposed of vide order dated 27.11.2017. Relevant portion of order dated 27.11.2017 is reproduced as under:-

"We have seen the reply filed by the respondent no.3.

We are satisfied that the order has been substantially complied with. In case the petitioner is still aggrieved by the action taken, he can question it in the appropriate proceedings before the appropriate forum. The contempt petition is hereby dismissed with the aforesaid observations."

6. Vide order dated 27.11.2017, liberty was granted to the petitioner that in case he is still aggrieved by the action taken, he can question it in the appropriate proceedings. In the meantime, another Writ Petition (S/S) No.2766 of 2011, *Shrawan Kumar vs. State of U.P. and others* was filed challenging order dated 18.4.2011 passed by the ITTUP whereby the petitioner was superannuated at the age of 58 years instead of 60 years. In this petition, the petitioner further prayed for payment of salary on the basis of 5th and 6th Pay Commission. This writ petition was disposed of vide judgment and order dated 29.1.2014 with a direction to the Principal Secretary, Industrial Development Department as well as the Secretary of the Department of Technical Education to take a decision in the matter. Aggrieved by the said judgment and order dated 29.1.2014,

the petitioner filed Special Leave to Appeal (Civil) No.12015 of 2014, *Sharwan Kumar vs. State of U.P. and others,* which was dismissed as withdrawn. However, petitioner was given time to submit representation. The representation of the petitioner was rejected, hence he filed another Writ Petition No.217 (SS) of 2015, *Sharwan Kumar vs. State of U.P.* and others in which the following prayers were made:-

"i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 22.7.2014 passed by the opposite party no. 1and order dated 4.4.2014 passed by the opposite party no. 2 as contained in Annexure Nos. 1 and 2 respectively to this writ petition;

ii) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 18.4.2011 passed by the opposite party no.8 and subsequent order dated 30.4.2011 passed by an incompetent authority on behalf of opposite party no.8 as contained in Annexure Nos. 3 and 4 respectively to this writ petition ;

iii) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 23.5.2013 passed by opposite party no.8, order dated 2.7.2013 passed by the opposite party no.4, order dated 10.7.2013 passed by the opposite party no.8, order dated 29.7.2013 passed by the opposite party no.6 and order dated 12.8..2013 passed by opposite party no.8 as contained in Annexure 5,6,7,8 and 9 respectively to this writ petition;

iv) issue a writ, order or direction in the nature of mandamus directing the opposite parties to provide the benefits of retirement at the age of 60/62 years instead of 58 years;

v) issue a writ, order or direction in the nature of mandamus directing the opposite parties to sanction and pay the difference amount of encashment of leave forthwith, along with compound interest @ 18% per annum since the due date till the actual payment to the petitioner ;

vi) issue a writ, order or direction in the nature of mandamus directing the opposite parties to sanction and give the benefits of 5th and 6th Pay Commission report as paid to the other diploma level technical institutions ;

vii) issue a writ, order or direction in the nature of mandamus directing the opposite party no. 1 and 4 to take action against the opposite party nos. 7 and 8 for not completing the norms of AICTE and Board of Technical Education U.P., and to direct the opposite party no. 3 to take action against the opposite party nos. 5 and 6 for not complying the norms of AICTE and Board of Technical Education, U.P." .

7. In Writ Petition No.217 (SS) of 2015, a preliminary objection was taken by respondents/Corporation that the writ petition is not maintainable on the principles of res-judicata and constructive res-judicata. This Court while considering the preliminary objections, disposed of the said writ petition vide judgment and order dated 28.1.2016. While deciding the writ petition, finding was given by the learned writ court and held that it was not open for the petitioner to raise the said issue of entitlement to the revised pay-scale as recommended by 5th and 6th pay commission as the same were held to be barred by principles res-judicata or constructive res-judicata.

8. The petition filed before the learned Single Judge, the petitioner again prayed for the relief(s) which he had already prayed in the earlier round of litigations along with the prayer that he may be disbursed the arrears of salary along with the payment of leave encashment, annual increments, Assured Career Progression and dearness allowance in terms of G.O. dated 10.7.1998 read with G.O. dated 17.12.1998 and Office Order dated 28.1.2017 (Annexure-16) and G.O. dated 08.12.2008 read with G.O. dated 29.12.2016 and Resolution dated 06.06.2018 of ITTUP (Annexure-23) after giving benefit of the policy of Assured Career Progression notified by G.O. dated 02.12.2000; and dearness allowance payable in terms of G.O. dated 22.9.2005 but not paid since 01.01.2001. Learned Single Judge, vide judgment and order dated 17.10.2019, had given a detailed finding regarding the prayer made by the petitioner as well as his entire litigation history, which reads as under (para 18 to 23):-

"18. From a perusal of the pleadings on record and the arguments raised by the learned counsel for the contesting parties, it comes out that the petitioner had earlier filed writ petition in the year 1985 praying for being granted 5 annual increments. The said petition was disposed of with a direction to the respondents to consider the representation of the petitioner. On the representation being rejected, the petitioner challenged the said order by filing writ petition in the year 1988 namely Writ Petition No.9651 of 1988, which petition was dismissed vide judgment and order dated 27.7.1999. Though a copy of the said writ petition has not been brought on record yet from a perusal of the judgment and order dated 27.7.1999 it comes out that the reliefs that had been prayed for by the petitioner in the said writ petition were for grant of increments in the wage revision, 5 annual increments and promotion, meaning thereby that there was no prayer for being granted the 5th and 6th Pay Revision as has been prayed for in the instant petition. Upon the said petition having been dismissed vide judgment and order dated 27.7.1999, the petitioner filed Special Appeal No.354 of 1999 which special appeal was also dismissed vide judgment and order dated 21.8.2008. The petitioner raised a challenge to the said judgment by filing Civil Appeal No.8902 of 2010 before the Apex Court and the Apex Court vide order dated 29.7.2015 did not interfere with the judgment and order dated 21.8.2008 passed in the special appeal but considering the submission of the learned counsel for the appellant that his salary was withheld for about 10 years, directed the respondents to look into the matter and see that if the salary was not paid as per the revised pay scale and increments had not been given, the same would be calculated and released in favour of the appellant. Thus the order dated 29.7.2015 passed by the Apex court would have to be seen in the context of the reliefs that had been prayed for by the petitioner before the writ Court which were not for payment of the 5th and 6th pay revision but were for grant of annual increments in the wage revision, grant of 5 annual increments and for grant of promotion. When the compliance of the order passed by the Apex Court dated 29.7.2015 was not made, the petitioner filed Contempt Petition (C) No.111 of 2016 alleging contempt of the order dated 29.7.2015 passed by the Apex Court which could only have been to the extent of the reliefs that had been prayed for by the petitioner in the writ Court.

However, the petitioner cleverly worded the contempt petition and indicated in paragraphs 1 and 2 of the contempt petition that the alleged violation by the respondents is by not paying the revised pay scale and increments to the appellant. At the risk of repetition, it is to be noted that in the writ Court in the petition of 1985 and thereafter in the year 1988, there was no prayer for payment of revised pay scales as per the 5th and 6th Pay Revision. After the Apex Court issued notice of contempt, the matter remained pending before the Apex Court. The petitioner being perfectly aware that no relief had either been prayed for by him in the writ petition of 1985 or 1988 for payment of the pay scales as per the 5th and 6th Pay Revision, filed Writ Petition (S/S) No.2766 of 2011 before this Court praying for various reliefs including payment of salary on the basis of 5th and 6th Pay Revision. Why this fact is essential is that the petitioner was perfectly conscious of the fact that the issue before the Apex Court in Civil Appeal No.8902 of 2010 was not covering the 5th and 6th Pay Revision and payment of salary on the basis of 5th and 6th Pay Revision. The said writ petition was disposed of by this Court vide judgment and order dated 29.1.2014 with a direction to the respondents to look into the matter. Being unsatisfied with the said order, the petitioner preferred Special Leave to Appeal (Civil) No.12015 of 2014 which was dismissed as withdrawn but after extending the time to enable the petitioner to present the matter in pursuance of the judgment of the writ Court. When the representation of the petitioner was rejected, he preferred another petition namely Writ Petition (S/S) No.217 of 2015, inter alia, praying for quashing the order whereby his representation was rejected as well as making a specific prayer, apart from other reliefs, of being given the benefits of 5th and 6th Pay Revision. Again, while filing the said petition, the petitioner was conscious of the fact that the issue before the Apex Court in Civil Appeal No.8902 of 2010 was not pertaining to 5th and 6th Pay Revision.

19. The writ Court in Writ Petition (S/S) No.217 of 2015 vide judgment and order dated 28.1.2016, so far as relief pertaining to revised pay scales was concerned, categorically held that it was not open for the petitioner to raise the said issue all over again as the same would be barred by principles of res-judicata and constructive res-judicata. However, considering the order dated 29.7.2015 passed by the Apex Court directing that the revised pay scale and increments shall be calculated and released in favour of the appellant, the writ Court observed that as there is already an order of the Apex Court, the respondents are bound to comply with the same. However, no positive mandamus was issued by the writ Court for compliance of any order. Sri Sahai has categorically stated that the judgment of this Court dated 28.1.2016 has attained finality as the same has not been challenged either before this Court by filing special appeal or before the Apex Court, hence the findings recorded therein pertaining to res-judicata or constructive res-judicata so far as it pertains to the 5th and 6th Pay Revision have attained finality. Subsequent thereto, the Apex Court decided the contempt petition after perusal of the reply filed by the respondents and being satisfied that the order (dated 29.7.2015) has been substantially complied with. However, it was provided that in case the petitioner is still aggrieved by the action taken, he can question it in the appropriate proceedings before the appropriate forum.

20. What would be relevant is that the order of the Apex Court dated 27.11.2017 has to be seen in the context of the order dated 29.7.2015 against which the contempt petition had been filed by the petitioner. As already indicated above, the order dated 29.7.2015 cannot be construed to be an order with

respect to 5th and 6th Pay Revision as no such prayer had been made in the petition against which special leave petition had been filed by the petitioner. Thus, the liberty granted by the Apex Court vide order dated 27.11.2017 that in case the petitioner is still aggrieved by the action taken, he can question it in the appropriate proceedings, has to be seen in the context of what had been prayed for in the writ petition against the order in which initially order dated 29.7.2015 had been passed by the Apex Court, meaning thereby that neither before the writ Court in the year 1988 in Writ Petition No.9651 of 1998 or before the Apex Court, the 5th and 6th Pay Revision were involved. This would also be apparent from the conduct of the petitioner that he was perfectly conscious of the fact that the Apex Court while dealing with the Civil Appeal No.8902 of 2010 was not seized with the relief pertaining to 5th and 6th Pay Revision as in the interregnum period, the petitioner had already filed two writ petitions before the writ Court i.e. Writ Petition (S/S) No.2766 of 2011 and Writ Petition (S/S) No.217 of 2015 in which apart from other reliefs, the relief pertaining to 5th and 6th Pay Revision had also been prayed for. Thus, by no analogy or by any stretch of imagination can the liberty of the Apex Court dated 27.11.2017 be considered as giving liberty to the petitioner to again file a writ petition for grant of 5th and 6th Pay Revision in view of the detailed discussion made above.

21. Having thus summed up the litigations as entered into between the petitioner and the respondents and the issues involved therein, the preliminary objection pertaining to maintainability of the present petition would have to be seen.

22. The present petition, as already indicated above, has been filed for payment of salary along with emoluments, gratuity, leave encashment as also annual increments after giving benefit of the policy of Assured Career Progression, dearness allowance and for arrears of salary on account of 5th and 6th Pay Revision. The Orders as have been referred to by the petitioner as detailed above pertain to the orders that had been passed by the ITTUP for extending the benefit of 6th Pay Revision. Thus, primarily the reliefs as have been prayed for by the petitioner pertain to fixation of salary in terms of the 5th and 6th Pay Revision along with consequential benefits of dearness allowance, salary, gratuity, leave encashment, annual increments etc. The reliefs can be viewed in two ways. Firstly, when the petitioner had approached this Court by filing two petitions, namely, Writ Petition (S/S) No.2766 of 2011 and Writ Petition (S/S) No.217 of 2015 praying for being given the benefit of 5th and 6th Pay Revision and in Writ Petition (S/S) No.217 of 2015 it was categorically held that the said relief was barred on account of principle of res-judicata or constructive res-judicata, consequently the present petition would not be maintainable praying for the said relief. Once the ACP, dearness allowance, gratuity, leave encashment would all flow out after fixation of the pay of the petitioner in terms of the 5th and 6th Pay Revision keeping in view the judgment of the Apex Court in the case of Balbir Singh Turn (supra) but once the relief pertaining to 5th and 6th Pay Revision cannot be granted to the petitioner in the present petition keeping in view the judgment of this Court in Writ Petition (S/S) No.217 of 2015, consequently there cannot be any occasion for granting the consequences flowing therefrom in the present petition i.e. gratuity, leave encashment, annual increments, ACP etc.

23. Secondly, if the gratuity, leave encashment ACP and dearness allowance are said to not flow after giving benefit of

5th and 6th Pay Revision then too the present petition would not be maintainable taking into consideration the principle of Order II, Rule 2 of the CPC wherein in case the petitioner did not pray for any relief to the said effect in the earlier two petitions filed by him in the year 2011 and 2015, consequently he would be precluded from making the said prayer by means of the present petition. Thus in both the views, the present petition would not be maintainable taking into consideration the principle of res-judicata or constructive res-judicata and principle of Order II, Rule 2 of the C.P.C."

9. On due consideration to the submission advanced and perusal of the record, we are in full agreement with the finding recorded by learned Single Judge except the finding with regard to the bar of res-judicata on resolution dated 6.6.2018. The relevant finding is as under:-

Hon'ble Apex Court while deciding the Contempt Petition (C) No.111 of 2016, Sharwan Kumar vs. Mahesh Kumar Gupta and others, vide its order dated 27.11.2017 granted liberty to the petitioner that in case he is still aggrieved by the action taken he can question it in the appropriate proceedings before the appropriate forum. It appears that this liberty was granted to the petitioner considering the reply of the contemnor before the Hon'ble Apex court vide their affidavit dated 15.11.2017, which is at page 346 of the appeal, particularly para 9 and 10. In the affidavit reference was given to the 60th meeting of the Board of Directors of IITUP wherein the Board of Directors pursuant to the government order dated 29.12.2016 considered the matter and resolved to provide the pay scale to the employees of ITTUP to be revised w.e.f. 1.1.2017 as per 6th Pay commission.

10. Thereafter on the joint recommendations made by the employees of IITUP including the petitioner, the State Government inquired/required the details of burden of expenditure arising if arrears, according to the recommendations of the 5th and 6th pay commission w.e.f. 1.1.2006 were paid to the employees of ITTUP. In reply, respondent no.3 has submitted a report dated 21.11.2017 to the government giving details of expenditure, to be incurred in case the recommendations of the 6th pay commission are implemented and the benefits of pay revision is given to the employees of ITTUP w.e.f. 1.1.2006. In the letter dated 21.12.2017 (supra) respondent no.3 has further conveyed that the government has already informed that the ITTUP is capable to bear the expenditure which may be incurred on payment of arrears w.e.f. 1.1.2006 to the employees of ITTUP.

11. In the backdrop, it appears that Board of Directors in its 61st meeting held on 6.6.2018 took a decision on point no.5 of the agenda and approved the payment of arrears as per 6th pay commission recommendation w.e.f. 1.1.2006, and also provided the budgetary allocation for the purpose of said payment and the matter was directed to be referred to State Government. It is in this background the fresh cause of action has accrued to the petitioner. The letter dated 21.12.2017 of respondent No.3 and respondent no.2 giving details of the burden of the expenditure and also the

resolution of the Board of Directors passed in its 61st meeting held on 6.6.2018 was not there before the Apex Court when the liberty was granted to the petitioner.

12. Considering the aforesaid, we are of the view that the resolution of the Board of Directors dated 6.6.2018 by which a decision has been taken to make payment of arrears arising out of 6th pay commission recommendation w.e.f. 1.1.2006 to the employees of the ITTUP, read with letter dated 21.12.2017 coupled with the direction of Hon. Supreme Court undoubtedly give rise to the fresh cause of action to this limited extent.

13. Law in this regard is settled that if there is fresh cause of action, principle of res-judicata will not apply. Hon'ble Supreme Court in ***Hope Plantations Ltd. vs. Taluk Land Board, Peermade and another;*** (1999) 5 SCC 590 has held as under:-

"31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, through technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action....."

14. Considering the affidavits filed by the contemnor coupled with the fact that there was subsequent resolution of the Board of Directors dated 6.6.2018 passed in the 61st meeting whereafter respondent no.2 having approved the payment of arrears arising out of 6th pay commission w.e.f. 1.1.2006 and the budgetary allocation having also been provided and the matter was referred to the State Government, as also keeping in view the law laid down by Hon. Apex Court, we are of the opinion that to this limited extent, the writ petitioner has a fresh cause of action with respect to the payment of arrears of his salary in the light of sixth pay commission recommendation w.e.f. 1.1.2006 which also included the petitioner for the first time. The resolution dated 6.6.2018 was not before any court earlier, which has factually changed the entire situation. Hence, we direct the State Government to take a decision on the recommendation of the Board of Directors in their 61st meeting for grant of benefit available under 6th pay commission report to the petitioner w.e.f. 1.1.2006.

15. To the aforesaid extent, the order impugned in this appeal is modified.

16. The appeal is, accordingly, **partly allowed.**

(2020)03-05ILR A955
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.02.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR-II, J.

Special Appeal No. 631 of 2007

Janardan Prasad Yadav ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
A.P. Singh

Counsel for the Respondents:
C.S.C.

A. Service – Inquiry/Dismissal – Petition filed against punishment order of dismissal was dismissed. While allowing the present appeal, the Court held that non-holding of oral inquiry before imposing major penalty or removal would vitiate the entire proceeding including order of punishment. (Para 18)

B. In the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges - The approach of the Enquiry Officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous; against the principles of natural justice, fair play and fair hearing. (Para 7, 19, 20)

C. Exception - When the facts are admitted or no real prejudice has been caused to employee or no other conclusion is possible, in such a situation, the order shall not be vitiated. (Para 22)

Appeal allowed. (E-4)

Precedent followed:

1. Meenglas Tea Estate Vs. The Workmen, AIR 1963 SC 1719 (Para 9)

2. St. of U.P. Vs. C.S. Sharma, AIR 1968 SC 158 (Para 10)

3. P.N.B. Vs. A.I.P.N.B.E. Federation, AIR 1960 SC 160 (Para 11)

4. A.C.C. Ltd. Vs. Their Workmen, (1963) II LLJ. 396 (Para 11)

5. Tata Oil Mills Co. Ltd. Vs. Their Workmen, (1963) II LLJ 78 (SC) (Para 11)

6. S.C. Girotra Vs. United Commercial Bank, 1995 Supp. (3) SCC 212 (Para 12)

7. Subhas Chandra Sharma Vs. Managing Director & anr., 2000 (1) UPLBEC 541 (Para 13)

8. Subhas Chandra Sharma Vs. U.P. Co-operative Spinning Mills & ors., 2001 (2) UPLBEC 1475 (Para 14)

9. St. of U.P. Vs. Saroj Kumar Sinha, (2010) 2 SCC 772 (Para 15)

10. Roop Singh Negi Vs. P.N.B., (2009) 2 SCC 570 (Para 16)

11. Rajesh Prasad Mishra Vs. Commissioner, Jhansi Division, Jhansi & ors., 2010 (1) UPLBEC 216 (Para 17)

12. Subhash Chandra Gupta Vs. St. of U.P., 2012 (1) UPLBEC 166 (Para 18)

13. Imperial Tobacco Co. Ltd. Vs. Its Workmen, AIR 1962 SC 1348 (Para 19)

14. Uma Shankar Vs. Registrar, 1992 (65) FLR 674 (All.) (Para 19)

15. Mahesh Narain Gupta Vs. St. of U.P. & ors., (2011) 2 ILR 570 (Para 20)

16. Chamoli District Co-operative Bank Ltd. Vs. Raghunath Singh Rana & ors., AIR 2016 SC 2510 (Para 21)

17. K.L. Tripathi Vs. S.B.I. AIR 1984 SC 273 (Para 22)

18. State Bank of Patiala Vs. S.K. Sharma, AIR 1996 SC 1669 (Para 22)

19. Biecco Lawrie Ltd. Vs. West Bengal, (2009) 10 SCC 32 (Para 22)

Precedent distinguished:

1. L.K. Verma Vs. HMT Ltd. & anr., (2006) 2 SCC 269 (Para 4, 23 to 25) (E-4)

Present appeal is against judgment dated 20.04.2007, passed in Writ Petition No. 484 (S/S) of 1987.

(Delivered by Hon'ble Sudhir Agarwal, J.

Hon'ble Virendra Kumar-II, J.)

1. Heard Sri A.P. Singh, learned Senior Counsel assisted by Sri Amrendra Pratap Singh, Advocate for appellant and learned Standing Counsel for respondents.

2. This intra-Court appeal under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 *(hereinafter referred to as "Rules, 1952")* has arisen from judgement dated 20.04.2007 passed by learned Single Judge by dismissing appellant's Writ Petition No.484 (S/S) of 1987 filed against punishment order of dismissal dated 29.09.1986.

3. Learned counsel for appellant contended that a major punishment of dismissal has been imposed upon appellant without holding any oral enquiry whatsoever. Appellant, at no point of time, admitted charge levelled against him.

4. Learned Single Judge, however, relying on Supreme Court's decision in **L.K. Verma Vs. HMT Ltd. and Another 2006 (2) SCC 269** has observed that when reply was not given to charge-sheet, it amounts to admission of allegation levelled against him and, therefore, punishment is justified.

5. It is submitted by learned Senior Counsel that judgment of **L.K. Verma (supra)** has wrongly been relied as it does not lay down the law as stated by learned Single Judge. Repeatedly, a catena of decisions are available wherein it has been held by Apex Court as well as this Court that a major penalty of dismissal cannot be imposed without holding enquiry in accordance with Rules. Disciplinary Enquiry has to follow a procedure wherein Employer has first to prove charge and thereafter, employee is to be given opportunity of defence which has not been done in the case in hand. It has also been repeatedly held that non-submission of reply to the charge-sheet does not amount to admission of charge and in such case Department has to prove charge. Mere levelling of allegation upon employee does not amount to automatic proof of charge.

6. Facts, in brief, giving rise to the present appeal are that appellant was an Assistant Agricultural Inspector (Group-III) of Subordinate Agricultural Services. He was placed under suspension vide order dated 07.04.1981 on the allegations of embezzlement. A charge-sheet dated 22.02.1983 was served upon appellant. Three charges were imposed which read as under:-

*"**आरोप संख्या–1** यह कि आपने अप्रैल 80 से वार्षिक भौतिक सतयापन के समय सत्यापन से बचने के लिये बहाने बाजी की। आपके गोदाम को सीलकर दिया गया और गोदाम पर दूसरे प्रभारी की नियुक्ति कर दी गयी। आपने अपने उत्तराधिकारी को चार्ज देने में टाल मटोल की। अंत में मजबूर होकर गोदाम का चार्ज मजिस्ट्रेट की उपस्थिति में दिनांक 24.6.80 को कराया गया। आज के समय गोदाम के अभिलेख नहीं पाये गये तथा बाद में उनके पुर्नगठन करने पर चार्ज में दी गयी कृषि निषेधों की मात्रा निम्न अनुसार कम पायी गयी*

1. *उर्वरक 21,887–80*
2. *बीज 4,719–60*
3. *खसारी 957–50*
4. *कृषि रक्षा दवायें 299–12*
5. *डेड स्टाक 426–50*

————————————

योग 28,290–60

***इस प्रकार आपने मु0 28,290–60 पैसे का दूर्विनियोग किया और इसको छिपाने के अभिप्राय से संबंधित अभिलेखों को गायब कर दिया।** आप शासकीय स्टाक का गबन करने तथा सबूत नष्ट करने के दोषी पाये गये।*

उक्त संदर्भ में निम्न साक्ष्य विचाराधीन हैं।

1. उप कृषि निदेशक, गोरखपुर का पत्रांक 10179 दिनांक 28.3.80

2. श्री परशुराम सिंह, स0 वि0 अ0 कृषि कोषागंज की रिपोर्ट।

3. जिला कृषि अधिकारी देवरिया का पत्रांक 339 / दिनांक 17.4.80

4. जिलाधिकारी देवरिया का आदेश सं0 599 दिनांक 29.4.80

5. जिला कृषि अधिकारी देवरिया का पत्रांक 916 दिनांक 13–5–80 तथा 1468 दिनांक 13.6.80

6. मजिस्ट्रेट द्वारा बनाया गया इन्वेन्ट्री दिनांक 19.5.80

7. आपका पत्र दिनांक 19.5.80

8. पुर्नगठित लेजर।''

"Charge No.1:- That you resorted to excuses at the time of annual physical verification since April, 80. Your godown was sealed and some other incharge was appointed at godown. You procrastinated in giving charge to your successor. Finally, being aggrieved charge of godown was got transferred on 24.06.80 in presence of the Magistrate. As of now, records related to godown were not found and on their restoration quantities of agricultural stock which were given in the charge are as under:-

1. Fertilizer - 21,887.00
2. Seed - 4,719.60
3. Khesari - 957.50
4. Agro Protection medicines - 299.12
5. Dead stock - 426.50

Total 28,290.60

Thus, ***you misappropriated an amount of Rs.28,290.60/- and with an intent to conceal this act, caused the concerned records to disappear.*** *You are found guilty of embezzlement of government stock and destruction of evidences.*

In respect of the aforesaid, following evidences are under consideration:-

1. Letter No.339 dated 17.4.80 of the Deputy Director Agriculture, Gorakhpur.
2. Report of Sri Parashuram Singh, Assistant Development Officer, Agriculture, Kashganj.
3. Letter No.339/ dt. 17.4.80 of the District Agriculture Officer.
4. Order No.559 dt. 29.4.80 of the District Magistrate, Deoria.
5. Letter Nos.916 dt. 13.5.80 and 1468 dt. 13.6.80 of the District Agriculture Officer, Deoria.
6. Inventory dated 19.5.80 prepared by the Magistrate.
7. Your letter dated 19.5.80.
8. Reconstructed ledger."

आरोप संख्या–2 *:– यह कि आपने वर्ष 1979–80 में कृषि निवेशों की बिक्री की। कृषि निवेश कि आंशिक मूल्य की प्रति पूर्ति हेतु अनुसूचीका के संदर्भित बिल संख्या 357653, 357654 तथा 357695 दिनांक 15.3.80 के द्वारा कृषकों से कृषि निवेशों के मूल्य का मू0 1,47,790. 34 नकद लेना दर्शाया गया। किन्तु इसके विरूद्ध राजकीय कोष में मात्र 73,310.40 पै0 ही जमा किये गये इस प्रकार कृषि निवेशों की* ***बिक्री की धनराशि मु0 74,419–94 का राजकीय कोष में न जमा करके गबन कर लिया गया।***

उक्त की पुटि में निम्न साक्ष्य विचारार्थ हैः–

1. आप द्वारा काटे गये अनुदान के उक्त संदर्भित बिल।
2. ट्रेजरी चालान सं0 138 एवं 139 दिनांक 29.01.80
3. मजिस्ट्रेट द्वारा बनाई गयी इन्वेन्ट्री दिनांक 19.5.80 एवं 24.6.80

"Charge No.2:- That you sold agricultural stock in 1979-80. To make up for partial price, the prices of agricultural stock to the tune of Rs.1,47,790.34/- is shown to have been taken in cash from the farmers against Bill nos.357653, 357654 and 357695 dated 15.3.80 mentioned in index. But against the same, only Rs.73,310.40/- was deposited in government fund. In this way, ***by not depositing the said amount in government fund, you have committed embezzlement of Rs.74,419.94/- out of sale of agricultural stock.***

In confirmation of the above, the following evidences are for consideration:-

1. Aforesaid bills in respect of the grant issued by you.

2. Treasury Challan nos.138 and 139 dt. 29.01.80.

3. Inventory dated 19.5.80 and 24.6.80 prepared by Magistrate."

आरोप संख्या 3:— *यह कि आपके द्वारा जारी किये गये आरोप संख्या 2 में उल्लिखित अनुदान के बिल विभागीय निर्देशानुसार स0वि0अ0 कृषि तथा खण्ड विकास अधिकारी द्वारा बिना प्रमाणित कराये भुगतान है* ***प्रस्तुत किये गये बाद में जांच कराने पर इनमें दिखाये गये अनुदान की अवास्तविक एवं संदिग्ध पाया गया, इस प्रकार आप इन दर्शाये गये खर्चा अनुदान के रू0 47120.14 को शासन को क्षति पहुंचाने के दोषी पाये गये।***

उक्त की पुष्टि में निम्न साक्ष्य विचारार्थ है:—

1. आप द्वारा काटे गये अनुदान के उक्त संदर्थित बिल।

2. जांच कर्ता सहायक विकास अधिकारी तथा अतिरिक्त जिला कृषि अधिकारी की जांच रिपोर्ट।"

"Charge No.3:- That bills of the grant issued by you mentioned in charge no.2 have been presented for payment without verifying them by the Assistant Development Officer Agriculture and Block Development Officer in accordance with departmental guidelines, ***the grant mentioned therein was found fictitious and doubtful.*** *Thus, you are found guilty of committing loss of grant amount Rs.47,120.14/- to the government.*

In confirmation of the above, the following evidences are for consideration:-

1. The aforementioned bills of the grant issued by you.

2. Inquiry Reports of the Assistant Development Officer and Assistant District Agriculture Officer."

(Emphasis added)

(English Translation by Court)

7. Disciplinary Authority appointed an Enquiry Officer who issued notice to appellant but he did not submit reply to the charge-sheet. Thereupon Enquiry Officer straightaway submitted Enquiry Report dated 15.08.1986 holding charges proved and then punishment order was passed. Enquiry Report shows that it has discussed that opportunity was given to appellant to submit reply to the charge-sheet but he did not cooperate in enquiry by submitting reply to the charge-sheet and, therefore, Enquiry Officer proceeded by treating charges self proved. It is argued that this procedure adopted by Enquiry Officer is not consistent with law laid down in number of authorities.

8. Now the sole question up for consideration is "whether non holding of oral inquiry before imposing major penalty of removal would vitiate the entire proceeding including order of punishment."

9. In **Meenglas Tea Estate v. The workmen., AIR 1963 SC 1719,** Court observed "It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance

to hear the evidence in support of the charge and to put such relevant questions by way to cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted.

10. In **State of U.P. v. C. S. Sharma, AIR 1968 SC 158,** Court held that omission to give opportunity to the officer to produce his witnesses and lead evidence in his defence vitiates the proceedings. Court also held that in the enquiry, witnesses have to be examined in support of the allegations, and opportunity has to be given to the delinquent to cross-examine these witnesses and to lead evidence in his defence.

11. In **Punjab National Bank v. A.I.P.N.B.E. Federation, AIR 1960 SC 160,** (vide para 66), Court held that in such enquiries evidence must be recorded in the presence of charge-sheeted employee and he must be given an opportunity to rebut the said evidence. Same view was taken in **A.C.C. Ltd. v. Their Workmen, (1963) II LLJ. 396, and in Tata Oil Mills Co. Ltd. v. Their Workmen, (1963) II LLJ. 78 (SC).**

12. In **S.C. Girotra v. United Commercial Bank 1995 Supp. (3) SCC 212,** Court set aside a dismissal order which was passed without giving employee an opportunity of cross-examination.

13. This Court in **Subhas Chandra Sharma v. Managing Director and another, 2000(1) UPLBEC 541**, said:-

"In our opinion after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that ***date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence.*** *If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all.* ***All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."***

(emphasis added)

14. The above judgment was followed by another Division Bench in **Subhas Chandra Sharma v. U.P. Co-operative Spinning Mills and others reported 2001 (2) UPLBEC 1475** where Court held:

"In cases where a major punishment proposed to be imposed an oral enquiry is a must, whether the employee request, for it or not. *For this it is necessary to issue a notice to the employee concerned intimating him date, time and place of the enquiry as held by the Division Bench of this Court in Subhash Chandra Sharma v. Managing Director, (2000) 1 UPLBEC 541, against which SLP has been dismissed by the Supreme Court on 16-8-2000."*

(emphasis added)

15. In **State of Uttar Pradesh v. Saroj Kumar Sinha reported (2010) 2 SCC 772** Court said :-

"An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. ***Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.***

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service." (emphasis added)

16. Similar view was taken in **Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570** where Court said:

"Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. ***No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."***

(emphasis added)

17. In **Rajesh Prasad Mishra v. Commissioner, Jhansi Division, Jhansi and others reported 2010 (1) UPLBEC 216** Court observed, as under, after detail analysis of authorities on the subject:

"Now coming to the question, what is the effect of non-holding of oral inquiry, I find that, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541."

18. In another case in **Subhash Chandra Gupta v. State of U.P., 2012 (1)**

UPLBEC 166, a Division Bench of this Court, after survey of law on this issue, observed as under:

"It is well settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for ***imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof.*** *The view taken by us find support from the judgement of the Apex Court in State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541.*

A Division Bench decision of this Court in the case of Salahuddin Ansari Vs. State of U.P. and others, 2008 (3) ESC 1667 ***held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:-***

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma Vs. U.P.Cooperative Spinning Mills & others, 2001 (2) U.P.L.B.E.C. 1475 and Laturi Singh Vs U.P.Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 06.05.2005."

(emphasis added)

19. Even if employee refuses to participate in the enquiry, employer cannot straightaway dismiss him, but he must hold an ex-parte enquiry where evidence must be led as held in **Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).**

20. A Division Bench of this Court in **Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570** had also occasion to deal with the same issue. It has held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This

will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in exparte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

(emphasis added)

21. Recently, entire law on the subject has been reviewed and reiterated in **Chamoli District Co-operative Bank Ltd. Vs. Raghunath Singh Rana and others, AIR 2016 SC 2510** and Court has culled out certain principles as under:

"i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, ***the employer/department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.***

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any."

(emphasis added)

22. I may hasten to add that the above mentioned law is subject to certain exception. When the facts are admitted or no real prejudice has been caused to employee or no other conclusion is possible, in such a situation, the order shall not be vitiated. Reference may be made to some of such decisions of Supreme Court in **K.L.Tripathi v. State Bank of India reported AIR 1984 SC 273 ; State Bank of Patiala v. S.K. Sharma, AIR 1996 SC 1669;** and, **Biecco Lawrie Ltd. v. West Bengal reported (2009) 10 SCC 32.**

23. Learned Standing Counsel while not disputing that no oral enquiry was conducted by fixing any date, time or place, submitted that reliance placed by learned Single Judge on the judgement in **L.K. Verma (supra)** is correct and no inference is required.

24. We have gone through aforesaid judgement. Therein L.K. Verma was employed as a Safety Officer in HMT Limited. He was placed under suspension whereagainst he preferred an appeal before Labour Commissioner in terms of Rule 14 of U.P. Factories (Safety Officers) Rules, 1984 (in short "Rules, 1984"). Appeal was not decided. Hence, he filed writ petition which was disposed of directing Labour

Commissioner to decide appeal. When the matter was pending before Commissioner, departmental enquiry was completed. A show-cause notice was issued to L.K. Verma on 08.01.1998 as to why punishment of dismissal be not awarded. Thereafter, Labour Commissioner issued notice to HMT Limited to appear on 02.04.1998. Employer sought adjournment on the ground that officers were busy in closing of financial year. Adjournment was refused by Labour Commissioner and he fixed 09.04.1998 for hearing of the parties which was a holiday. Memo of Appeal was also not supplied to Employer when this matter was pending before Labour Commissioner. Employer passed an order dated 21.02.1998 dismissing L.K. Verma from service. Later, Labour Commissioner vide order dated 12.04.1998 allowed appeal preferred by L.K. Verma against suspension order dated 20.05.1996. Aggrieved by order of Labour Commissioner passed on 12.04.1998, Employer i.e. HMT Limited filed writ petition before Uttranchal High Court which was allowed and, hence, matter came before Supreme Court. Supreme Court found that L.K. Verma was issued a charge-sheet on 20.05.1996 containing three charges. In departmental proceedings, he did not deny or dispute that he had used indecent language and also abused the officer. The findings of Enquiry Officer and punishment was challenged by L.K. Verma on the ground of malice which was negative by Supreme Court observing that out of three charges only charge-2 was found proved and L.K. Verma was exonerated in charges-1 and 3 which repel the contention of malice otherwise all the charges could have been held proved. Furthermore, when a charge is proved, question of exonerating employee on the ground of purported malice on the part of Management does not arise.

25. We do not find from aforesaid judgement that Court laid down as precedent that if no reply is given to charge-sheet, charges shall stand proved. On the contrary para-16 of judgement shows that L.K. Verma was found to have accepted that he made utterances which admittedly lack civility and he also threatened a superior officer. He sought to explain it that he was in tension but Court held that he could have at least tendered an apology but he did not do so. Court also held that witnesses were examined for proving charge before Enquiry Officer. Enquiry Officer recorded conclusion that both Management and witnesses corroborated each other's statements and though witnesses were cross-examined thoroughly, no contradiction was found in their statements in regard to said charge. This clearly shows that aforesaid judgement has been misread and does not state or lay down any law as stated in the impugned judgement of learned Single Judge. Therefore, we have no hesitation in holding that judgement of **L.K. Verma (supra)** is misread and has no application to the facts of the case and does not help respondents in any manner.

26. In view thereof, we allow this appeal. Impugned judgement dated 20.04.2007 passed by learned Single Judge in Writ Petition No.484 (S/S) of 1987 as well as punishment order dated 29.09.1986 are hereby set aside. Writ petition stands allowed. Appellant shall be entitled for all consequential benefits. However, this order shall not preclude respondents from proceeding afresh in accordance with law from the stage after service of charge-sheet.

(2020)03-05ILR A965
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 834 of 2020

Smt. Santoshi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Agnivesh, Sri Jadu Nandan Yadav, Sri Arimardan Yadav

Counsel for the Respondents:
C.S.C.

A. Civil law- UP Recruitment of Dependants of Government Servant Dying in Harness Rules, 1974 - Rule 5(1) -Compassionate Appointment -appointment of dependent of the deceased employee cannot be interfered with solely on the ground that she contracted remarriage which is not restricted under the aforesaid Rules - subject to the condition that she has to maintain the dependants of the deceased employee even after re- marriage

B. Constitution of India - Article 21 -Right to remarry - no one can force a person to give up his/her fundamental right to remarry only because she obtained compassionate appointment.

Writ Petition disposed off. .(E-10)

List of cases cited:

1. Smt. Subhwanti Devi Vs. Siksha Adhikshak, Basic Siksha, Nagar Chetra, Allahabad &ors 1988 UPLBEC 80

2. Municipal Employees' Union Vs. Additional Commissioner (Water) DWS & SDU & anr. 1996 (73) LR 963

3. Anikta Srivastava Vs St. of U.P. & ors, Civil Misc. Writ Petition No. 19016 of 2013

4. Premlata Acharya Vs. Suman Acharya & ors, Special Leave to Appeal (C) No. 16315 of 2017

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Agnivesh holding brief of Sri Arimardan Yadav, learned counsel for the petitioner and Sri Shyam Sundar, learned standing counsel for the State-respondents.

2. This writ petition has been filed praying for the following relief:

"(i) Issue a writ, order or direction in the nature of mandamus directing the respondents to permit the petitioner for remarriage without effecting the services of the petitioner."

3. Briefly stated facts of the present case are that the husband of the petitioner, namely Dharmendra Kumar was a class-IV employee in the respondent No.3 - Institution. During tenure of his service, he died on 06.03.2011. Therefore, the petitioner applied for her appointment on compassionate ground and she was appointed as a class-IV employee by appointment letter dated 23.12.2011, under the Uttar Pradesh Recruitment of Dependants of Government Servant Dying in Harness Rules, 1974. Now the petitioner wants to remarry with her *devar* (real younger brother of her husband), namely Sri Ranjeet Kumar. Averments in this regard has been made in paragraph-8 of the writ petition. In paragraph-9 of the writ petition, it is stated that the respondents are not permitting the petitioner to remarry with her *devar* Ranjeet Kumar.

4. Learned counsel for the petitioner submits that the respondent Nos.2 and 3 have threatened that if the petitioner remarries with her *devar*, then action may be taken against her since her appointment was made on compassionate ground as she has to maintain the dependants of her deceased husband. Learned counsel for the petitioner states that the petitioner shall maintain dependants of her deceased husband including her mother-in-law. Learned counsel for the petitioner further states that to show her bona fide, the petitioner would pay every month, one third of her salary to her mother-in-law after she contracts marriage with her *devar*.

5. I have carefully considered the submissions of the learned counsel for the petitioner and the learned standing counsel.

6. The petitioner has obtained employment on compassionate ground under Rule 5 of the Uttar Pradesh Recruitment of Dependants of Government Servant Dying in Harness Rules, 1974 (hereinafter referred to as 'the Rules, 1974'), which is reproduced below:

*"5. **Recruitment of a member of the family of the deceased** - (1) In case a Government servant dies in harness after the commencement of these rules, and the spouse of the deceased Government servant is not already employed under the Central government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purpose, be given a suitable employment in Government Service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person -*

(i) fulfils the educational qualifications prescribed for the post:

Provided that in case appointment is to be made on a post for which typewriting has been prescribed as an essential qualification and the dependent of the deceased Government servant does not possess the required proficiency in typewriting, he shall be appointed subject to the condition that he would acquire the requisite speed of 25 words per minute in typewriting well within one year and if he fails to do so, his general annual increment shall be withheld and a further period of one year shall be granted to him to acquire the requisite speed in typewriting and if in the extended period also he again fails to acquire the requisite speed in typewriting, his services shall be dispensed with.

Provided further that in case appointment is to be made on a post for which the knowledge of computer operation and typewriting has been prescribed as an essential qualification and the dependent of the deceased Government servant does not possess the required proficiency in computer operation and typewriting, he shall be appointed subject to the condition that he would acquire the 'CCC' certificate in computer operation awarded by the DOEACC Society or a certificate equivalent thereto from an Institution recognized by the Government together with the required speed of 25 words per minute in typewriting well within one year and, if he fails to do so, his general annual increment shall be withheld and a further period of one year shall be granted to him to acquire the required certificate in

computer operation and the required speed in typewriting and if in the extended period also he again fails to acquire the required certificate in computer operation and the required speed in typewriting, his services shall be dispensed with."

(ii) is otherwise qualified for Government service; and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, if may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner:

Provided further that for the purpose of the aforesaid proviso, the person concerned shall explain the reasons and give proper justification in writing regarding the delay caused in making the application for employment after the expiry of the time limit fixed for making the application for employment along with the necessary documents/proof in support of such delay and the Government shall, after taking into consideration all the facts leading to such delay, take the appropriate decision."

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

(4) Where the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his services may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time."

7. From perusal of Rule 5 of the Rules, 1974, it is clear that appointment of dependent of a deceased employee under Rule 5 of the Rules, 1974 is conditional. The conditions are provided in sub-Rules (3) and (4) of Rule 5. Therefore, a person obtaining appointment under Rule 5(1) of the Rules, 1974 is bound to maintain other members of the family of the deceased government servant, who were dependent on the deceased government servant immediately before his death and are unable to maintain themselves. If the person so appointed under Rule 5(1) of the Rules, 1974 neglects or refuses to maintain a dependent of the deceased employee to whom he is liable to maintain under sub-Rule (3), then services of such compassionate appointee may be terminated under sub-Rule (4) in accordance with the provisions of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time. But the appointment of the dependent of the deceased employee under Rule 5(1) of the Rules, 1974, cannot be interfered with solely on the ground that he/ she has contracted remarriage. Remarriage is not restricted by the Rules, 1974.

8. Remarriage is a personal choice of the petitioner who has obtained employment on compassionate ground under the Rules, 1974, which does not curtail employment of the petitioner on remarriage. Even after remarriage, the petitioner is bound to comply with the provisions of sub-Rule (3) failing which he

may suffer consequences under sub-Rule (4) of Rule 5.

9. Right to marry with person of choice, is an integral part of Article 21 of the Constitution of India. Companionship of choice by remarriage by a widow cannot be denied as companionship is one of the faculties by which life can be enjoyed. Merely because compassionate appointment has been obtained by the petitioner, she cannot be forced to sacrifice her fundamental right under Article 21 of the Constitution of India. In the relevant Rules as enacted dealing with disciplinary proceedings, remarriage has not been mentioned as one of the misconduct, disqualifications or disabilities. This is possibly for reason that fundamental rights under Article 21 of the Constitution of India, cannot be curtailed on account of remarriage by a widow. Even if a statutory provision is enacted to prohibit remarriage by a widow, as a condition for employment under the dying in harness Rule, its validity may be liable to challenge for breach of fundamental rights guaranteed under Article 21 of the Constitution of India.

10. In **Smt. Subhwanti Devi vs. Siksha Adhikshak, Basic Siksha, Nagar Chetra, Allanabad and others, 1988 UPLBEC 80 (paras-8 and 9)**, a Division Bench of this court considered termination of an employee on the ground of remarriage and held that remarriage may be a social or biological human necessity or it may be on account of oppressive or aggressive nature of certain anti-social elements but that cannot be made the basis for termination of service.

11. In **Municipal Employees' Union vs. Additional Commissioner (Water) DWS & SDU and another, 1996 (73) FLR 963 (Paras-8 and 10)**, a Division Bench of Delhi High Court considered the similar controversy of remarriage of a widow and held that there being no restraint by any personal law against remarriage, she is entitled to remarry. Even if a Rule prohibiting remarriage exists, it may be liable to challenge for breach of Article 21 of the Constitution of India. Even if any such condition is imposed in any contract of employment restricting a widow to remarry, that would be ultra vires to the provisions of Article 21 of the Constitution of India and will be of no effect in law.

12. In **Civil Misc. Writ Petition No.19016 of 2013 (Smt. Anikta Srivastava vs. State of U.P. and others), decided on 11.04.2013**, a Bench of this court considered similar controversy and held as under:

"Remarriage is a personal choice of the petitioner and same can not at all be curtailed in any manner whatsoever, under the provisions of Dying in Harness Rule, 1974 as on compassionate appointment being offered she will have to comply with the obligation that which has been cast upon her i.e. to maintain the family members of deceased and in the event of failure to maintain, she can be subjected to the disciplinary proceeding and nothing beyond the same. Authority concern could not have insisted and asked the petitioner to file undertaking that she would not remarry in future and taking of such an undertaking would be clearly violative of Article 21 of the Constitution of India, inasmuch as right to marry a person of owns choice has been curtailed.

Apex Court, in the case of Kapila Hingorani Vs. State of Bihar 2003(6) SCC1 , has proceeded to mention that term life

used in Article 21 has a wide and for reaching concept. It means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and localities by which life is enjoyed. Right to marry person of ones choice, has been accepted as integral part of Article 21 of Constitution a per the judgment of Apex Court, in the case of Lala Singh Vs. State of U.P. One cannot be denied of companionship, as companionship is one of the faculties by which life can be enjoyed, and merely because compassionate appointment ha been provided, a person cannot be forced to sign affidavit sacrificing his/her fundamental right, that in future remarriage will not at all be contracted . The employer has in effect misused his dominant status of employer by asking for such an affidavit. This Court also in the case of Smt. Subhwanti Devi Vs. Shiksha Adhikshak 1988 U.P.L.B.E.C. 80 (DB) has taken the view, that remarriage may be a social or a biological human necessity, but same can never be made for termination of service, and remarriage has not at all been defined as one of the misconduct, disqualifications or disabilities. "

13. In **Special Leave to Appeal (C) No.16315 of 2017 (Smt. Premlata Acharya vs. Suman Acharya and others), decided on 28.07.2017**, Hon'ble Supreme Court considered similar controversy in the matter of payment of family pension while considering the provisions of the Rajasthan Compassionate Appointment of Dependants of Deceased Government Servants Rule, 1996 and observed that the family pension should continue to be paid to the grandfather of the children for the benefit of the children as per the Rules and 50% of the salary of the widow who remarried leaving her children with the maternal grandfather of the children, should continue to be paid for the children until the last of them attains the age of 25 years.

14. For all the reasons afore-stated, **the writ petition is disposed off** making it open to the petitioner that she is free to contract her remarriage. She shall give an undertaking in the form of an affidavit before the respondent Nos.2 and 3 that she shall pay one third of her salary to her mother-in-law every month, after she contracts the remarriage and shall continue to pay it to her mother-in-law till her (mother-in-law) life time.

15. With the aforesaid observations, **the writ petition is disposed off.**

(2020)03-05ILR A969
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 2193 of 2020

Yogendra Singh Indolia & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Anurag Shukla

Counsel for the Respondents:
C.S.C.

A. Service Law - Rule of absorption in service - regular employment is the general rule - exception to such employment is litigious employment - it cannot be claimed as a matter of right -

once a person has knowingly exercised the option for their absorption in public employment, they cannot turn round and claim the benefits of Old Pension Scheme which stood abolished before their appointment

When the petitioners claim to have been appointed, Old Pension Scheme was not in existence. It was abolished in March 2005, whereas the petitioners have been appointed by absorption in the months of September or October 2007. The basis of their appointments is the provision of Section 21 E of the U.P. Secondary Education (Services Selection Boards) Act, 1982 which was inserted by U.P. Act of 37 of 2006 published in the gazette on 11.12.2006. Therefore, the Old Pension Scheme which already stood abolished in March 2005 was neither available to the petitioner on the date of their appointments nor the petitioners are entitled for benefit under the said scheme.

B. Doctrine of Election - Rule of Estoppel - where one knowingly accepts the benefits of a contract or conveyance or an order, he is estopped to deny the validity or binding effect on him of such contract or conveyance or order

Writ Petition rejected. .(E-10)

List of cases cited:

1. Manoj Kumar Rastogi & ors. Vs. St. of U.P. Writ Petition No. 35653 of 2003

2. Secretary, St. of Karnataka Vs. Uma Devi (2006) 4 SCC 1

3. Pratap Kishore Panda & ors. Vs. Agni Charan Das & ors (2015) 17 SCC 789

4. St. of U.P. Vs. Anand Kumar Yadav (2018) 13 SCC 560

5. Brij Mohan Lal Vs. U.O.I. & ors., (2012) 6 SCC 502

6. Indu Shekhar Singh & ors. Vs. St. of U.P. & ors., (2006) 8 SCC 129

7. R.N. Gosain Vs. Yashpal Dhir (1992) (4) SCC 683

8. Ramankutti Guptan Vs. Avara (1994) 2 SCC 642

9. Bank of India & ors. Vs. O.P. Swarnakar & ors. (2003) 2 SCC 721

10. Mrigank Johari & ors. Vs. U.O.I. (2017) 8 SCC 25

11. U.O.I. Vs. Onkar Chand (1988) 9 SCC 298

12. U.O.I. & ors. Vs. K Savitri & ors. (1998) 4 SCC 358

13. Joint Action Committee of Air Line Pilots' Association of India (ALPAI) & ors. Vs. Director General of Civil Aviation and or.s (2001) 5 SCC 435

14. Babu Ram @ Durga Prasad Vs. Indra Pal Singh 1998 (6) SCC 507

15. Mumbai International Airport Pvt. Ltd. Vs. Golden Chariot Airport & anr .2010 (10) SCC 422

16. Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (International Company Limited) (2011) 10 SCC 420

17. Nagubai Ammal Vs. B. Shama Rao AIR 1956 SC 593

18. CIT Vs. MR.P. Firm Muar AIR 1965 SC 1216

19. NTPC Ltd. Vs. Reshmi Constructions, Builders & Contractors (2004) 2 CC 663

20. Ramesh Chandra Sankla Vs. Vikram Cement (2008) 14 SCC 58

21. Pradeep Oil Cropn. Vs. MCD (2011) 5 SCC 270

22. S.B.I. & anr. Vs. Raj Kumar (2010) 11 SCC 661

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Anurag Shukla, learned counsel for the petitioner and the learned standing counsel for the respondents.

2. This writ petition has been filed praying for the following relief:-

"i Issue a writ, order or direction in the nature of mandamus commanding the Respondents to treat the Petitioners as covered by Old Pension Scheme.

ii. Issue a writ, order or direction in the nature of mandamus commanding the Respondents to make regular deduction from the salary of the

Petitioners towards General Provident Fund (G.P.F.) regulary every month."

3. Briefly stated facts of the present case are that a Government Order No.395/15-7-99-1600(559)/98, dated 11.10.1999 was issued by the State Government for part time engagement of subject expert on honorarium basis with the conditions that they shall not be State Government employees and shall not be entitled for pension, provident fund and leave etc. Clauses 7, 8, 10, 11 of the aforesaid Government Order dated 11.10.1999 are reproduced below:-

''7– उपर्युक्त चयनित विषय विशेषज्ञों को रू0 5000/– प्रतिमाह एक मुश्त निर्धारित मानदेय का भुगतान किया जायेगा। नियत मानदेय के अतिरिक्त कोई अन्य भत्ता/सुविधा अनुमन्य नहीं होगी। चूंकि वह राज्य कर्मचारी नही होंगें। अतः यह स्पष्ट किया जाता है। कि इन्हें पेंशन ''भविष्य निधि'' अवकाश आदि प्राप्त नहीं होंगे।

8– चयनित विषय विशेषज्ञ 4 वादन प्रतिदिन अर्थात 24 वादन प्रति सप्ताह लेंगे परन्तु विषय विशेषज्ञ उपरोक्त अध्यायन कार्य के अतिरिक्त अन्य कार्य करने के लिये मुक्त होंगे।

10– इस निमित्त विषय विशेषज्ञों को मानदेय का भुगतान शिक्षा निदेशक मंडलीय संयुक्त शिक्षा निदेशक कार्यालय की कंटीजेन्सी मद से किया जायेगा। इसके लिये विधिवत अतिरिक्त स्वीकृति शिक्षा निदेशक/ सम्बन्धित मण्डलीय संयुक्त शिक्षा निदेशक को दी जायेगी। इस सम्बन्ध में अलग से विद्यालयो में अतिरिक्त संसाधन जुटाये जाने के लिये प्रेरित किया जायेगा।

11– ऐसे विषय विशेषज्ञ प्रति वर्ष शैक्षिक सत्र के अंक तक कार्यरत रहेंगे। ग्रीष्मावकाश की अवधि में ऐसे विषय विशेषज्ञों को कार्यमुक्त कर दिया जायेगा तथा कोई मानदेय नही दिया जायेगा।''''

4. Pursuant to the aforesaid Government Order dated 11.10.1999, the petitioners were engaged on honorarium basis on different dates. One such engagement letter of the petitioner no.1 is reproduced below:-

कार्यालय मण्डलीय संयुक्त शिक्षा निदेशक आगरा

आदेश

सं0/मा0–1/9026–9985/2000–2001 दि0 6–9–2000

शासनादेश

सं0/395/15–7–99–1600(559)/98 दि011–10–99, शासनादेश सं0/7/15–7–2000–1600(559)/98 दि 06–4–2000 एवं शासनादेश सं01869/15–7–1600(559)/98 दि0 13–6–2000 में विहित प्राविधानों के अधीन गठित चयन समिति द्वारा विषय विशेषज्ञ के रूप में चयनित निम्नांकित अभ्यर्थी को उनके नाम के सम्मुख स्तम्भ कि अशासकीय सहायता प्राप्त माध्यमिक विद्यालय में कार्यभार करने की तिथि से अधिकतम 31 मई 2001 तक के लिये रूपया 5000=00 प्रतिमाह के एकमुश्त नियत मानदेय पर तैनात किया जाता है।

1– उपयुर्क्त तिथि के बाद यह सेवाऐं स्वतः समाप्त मानी जायेगी तथा इसके पूर्व भी किसी भी समय बिना किसी पूर्व सूचना के समाप्त की जा सकती है।

2– विषय विशेषज्ञ को रूपये 5000=00 प्रतिमाह एकमुश्त नियत मानदेय के अतिरिक्त कोई अन्य भत्ता/सुविधा अनुमन्य नही होगी। चूंकि यह राज्य कर्मचारी नही होगें, इन्हें पेंशनें, भविष्य निधिं, अवकाश आदि देय नही होगे।

3– विषय विशेषज्ञ को 4 वादन प्रतिदिन अर्थात 24 वादन प्रति सप्ताह अध्यायन कार्य करना होगा। उपरोक्त अध्यायन कार्य के अतिरिक्त व अन्य कार्य करने के लिये मुक्त होगें।

4– विषय विशेषज्ञ को शैक्षिक सत्र के अन्त तक दिनांक 31 मई 2000 तक कार्यरत रखा जायेगा ग्रीष्मकलिन अवधि में दिनांक 01 जून 2001 से उन्हें कार्यमुक्त कर दिया जायेगा तथा कोई मानदेय नही दिया जायेगा।

5– चयनित अभ्यर्थी को कार्यभार ग्रहण करने के लिये किसी प्रकार का यात्राभत्ता /मार्गव्यय आदि देय नही होगा। संयुक्त शिक्षा निदेशक द्वारा निर्देशित विद्यालय में शिक्षण हेतु उपस्थिति होने की अन्तिम तिथि 30–09–2000 है। अन्तिम तिथि तक उपस्थित न होने पर यह प्राधिकार स्वतः निरस्त मान्य होगा जिसका पूर्ण उत्तरदायित्व चयनित अभ्यर्थी का होगा।

क्र0 सं0	अभ्यर्थी/अभ्यर्थिनी का नाम एवं पता	विषय का नाम शैक्षिक योग्यता की श्रेणी,	विद्यालय का नाम विवरण आरक्षण जहां उपस्थित होना है।
1	2		3
4	5		6
1	श्री योगेन्द्र सिंह, पुत्र श्री शिव प्रसाद सिंह, गांव, पो0 अभुआपुरा, पो0 किरावली, अछनेरा, आगरा आगरा अनु0 4011	इतिहास एम0 ए0 राष्ट्रीय इण्टर कालेज,	

संयुक्त शिक्षा निदेशक

आगरा

पू0 सं0 मा01/9026–9985/2000–2001 दिनांक वही

प्रतिलिपि निम्नांकित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित :–

1–श्री योगेन्द्र सिंह, चयनित अभ्यर्थी/अभ्यर्थिनी को इस आशय से प्रेषित है कि वे निर्धारित तिथि तक अपने योगदान की सूचना विद्यालय के प्रबन्धक/प्रधानाचार्य के समक्ष प्रस्तुत करें अन्यथा यह प्रधिकार स्वतः निरस्त माना जायेगा।

2–प्रबन्धक/प्रधानाचार्य शिंव प्रसाद राष्ट्रीय इण्टर कालेज, अछनेरा को इस आशय से प्रेषित कि वे विषय विशेषज्ञ के रूप में चयनित अभ्यर्थी/अभ्यर्थिनी को तत्काल कार्यभार ग्रहण करायें तथा इसकी सूचना तत्काल अपने जि0 वि0 नि0 को दें। कार्यभार ग्रहण कराने से पूर्व अभ्यर्थी/अभ्यर्थिनी के समस्त शैक्षिक/प्रशिक्षण मूल प्रमाणपत्रों तथा अंक पत्रों को स्वंय अवलांकित करें। तथा उनकी एक–2 प्रमाणित प्रति अभिलेख हेतु सुरक्षित रख लें तथा पूर्णतया संतुष्ट होने के उपारान्त ही कार्यभार ग्रहण करायें अन्यथा यदि इसमें कोई त्रुटि पायी जाती है तो इसके लिये वे स्वयं उत्तरदायी होगें।

3– सम्बन्धित जि0 वि नि0 को इस निर्देश के साथ कि जनपद में पदस्थापित किये गये विषय विशेषज्ञों के कार्यभार ग्रहण करने की सूचना अभ्यर्थीवार तत्काल उपलब्ध करायें।

4–अपर शिक्षा निदेशक मा0 उ0 प्र0 इलाहाबाद।

5– शिक्षा निदेशक मा0 उ0 प्र0 लखनऊ।

संयुक्त शिक्षा निदेशक
आगरा

5. It appears that subsequently a Government order dated 06.06.2001 and 30.06.2003 imposed certain restrictions for engagement of subject expert who have completed three academic sessions, which was challenged by several persons by filing the writ petitions, leading writ petition being Writ Petition No.35653 of 2003 (Manoj Kumar Rastogi and Others Vs. State Of U.P. and Others) which was disposed of by order dated 28.10.2003 following the directions given in Writ Petition No.6319 (S/S) of 2003 (Chandra Kishore and others Vs. State of U.P. & others decided on 20.10.2003), which is reproduced below:-

"i) The impugned order dated 30.6.2003 which prohibits the renewal of

those Subject Experts who have completed three academic session, is quashed.

ii) Similar restriction imposed in the order dated 6.6.2001 alongwith the restriction for non-payment during summer vacation are also quashed.

iii) The opposite party no.2 is directed to issue direction for all the Regional Joint Directors for permitting all the Subject Experts including the petitioners in their respective regions to resume duties immediately if the Subject experts are eligible and they were selected according to the prescribed procedure. The order shall be issued within a period of 10 days so that the students may not suffer any more.

iv)The opposite party no.1 is directed to frame a policy for the regularization of the existing Subject Experts against the existing 4000 vacancies of the teachers in the aided educational institutions after taking into consideration the aforesaid observation and if required, make necessary amendment in the U.P. Intermediate Education Act or U. P. Secondary Service Selection Board Act within a period of two months."

6. By U.P. Act No.37 of 2006, published in the U.P. Gazette Extra Part I, Section (Ka), dated 11.12.2006, Section 21-E was inserted in U.P. Secondary Education (Services Selection Boards) Act 1982, (hereinafter referred to as "the Act 1982"), which is reproduced below:-

*"[**21E. Absorption of subject experts.** - (1) There shall be a list of subject experts working in private aided secondary schools possessing prescribed educational and training qualification including the subject experts who have received honorarium and worked for a minimum period of two academic sessions and were working on September 30, 2006. The list shall be maintained by the Director in such manner as may be prescribed.*

(2) Where any substantive vacancy in the post of a teacher in an institution is to be filled by direct recruitment, such post shall, at the instance of the Inspector, be offered by the Management to a subject expert whose name is included in the list referred to in sub-section (1).

(3) Where any subject expert is offered an appointment in accordance with the provision of sub-section (2) fails to join the post within the time allowed, which shall not be less than seven days, his name shall be removed from the list, referred to in sub-section (1).

(4) No appointment of any teacher to an institution shall be made under Section 16 unless the list referred to in sub-section (1) is exhausted.

(5) The subject experts included in the list referred to in sub-section (1) shall be absorbed in those institutions where any substantive vacancy is to be filled by direct recruitment. No subject expert shall have claim for appointment to any particular post.

Explanation.- For the purpose of this Section, -

(a)"Director"means the Director of Secondary Education, Uttar Pradesh and includes any other officer authorized by him in this behalf;

(b) the words"Inspector","Institution","Management"and eacher shall have the meaning respectively assigned to them in the Uttar Pradesh High School and Intermediate College (Payment of Salaries of Teachers and Other Employees) Act, 1971, provided that "teacher" shall not include a Principal or Headmaster,

(c)"subject experts"mean, persons working in aided Secondary Schools on a fixed honorarium appointed in the prescribed manner on a contractual basis.]"

7. It appears that in view of the provisions for absorption inserted in the Act, 1982 as aforequoted, the petitioners were absorbed and appointed in service as Teachers against substantive existing vacancies. These appointment orders of the petitioners have been issued in the month of September or October 2007. One such appointment order of the petitioner No.1, dated 09.10.2007, is reproduced below:-

''प्रेषक,

जिला विद्यालय निरीक्षक
कानपुर देहात।

सेवा में,

प्रबन्धक/साधिकार नियंत्रक,
आई0पी0एस0इण्टर कालेज, रुरा
कानपुर देहात।

पत्रांक चयन बोर्ड/ /2006–07 दिनांक 09/10/07

विषयः उ0प्र0 माध्यमिक शिक्षा सेवा चयन बोर्ड (संशोधन) अधिनियम 2006 की धारा 21ड (1) (2) के अन्तर्गत चयनित संस्थाओं में विषय विशेषज्ञों के आमेलन के सम्बन्ध में।

महोदय,

उ0प्र0 शासन की अधिसूचना संः 1521/79 वि–01 (क)/42–2006 दिनांक 11.12.2006 द्वारा उ0प्र0 माध्यमिक शिक्षा सेवा चयन बोर्ड (संशोधित) अधिनियम 2006 द्वारा निजी सहायता प्राप्त माध्यमिक विद्यालयों में कार्यरत विषय विशेषज्ञों के आमेलन की व्यवस्था सुनिश्चित की गई है। शासनादेश संः 2920/15.12.2006–1600(3)/05 दिनांक 29.12.2006 द्वारा गठित समिति के माध्यम से आपकी संस्था में प्रशिक्षित प्रवक्ता वेतनक्रम 6300–10500 इतिहास में विषय विशेषज्ञ श्री योगेन्द्रसिंह इंदौलिया आत्मज श्री हाकिम सिंह इन्दौलिया पिछड़ी जाति के अभ्यर्थी को नियुक्ति हेतु आपकी संस्था आवंटित की गई है।

अतः उक्त के अनुपालनार्थ आपको निर्देशित किया जाता है कि उ0प्र0 माध्यमिक शिक्षा सेवा चयन बोर्ड (संशोधित) अधिनियम 2006 की धारा –21 ड (2) में दी गई व्यवस्था के अनुरुप मौलिक रुप से रिक्त पद पर नियुक्त पत्र निर्गत करते हुये चयनित अभ्यर्थी को कार्य भार ग्रहण कराना सुनिश्चित करें। कार्यभार ग्रहण कराने से पूर्व चयनित अभ्यर्थियों के प्रमाणपत्रीय मूल अभिलेख का सत्यापन करना भी सुनिश्चित करें। प्रबन्धतन्त्र द्वारा 15 दिन में नियुक्ति पत्र अनिवार्य रुप से निर्गत कर दिया जाये अन्यथा की दशा में उपरोक्त अधिनियम की धारा–21 (च) के अन्तर्गत कार्यवाही सुनिश्चित की जायेगी जिसका सम्पूर्ण उत्तरदायित्व प्रबन्धतन्त्र का होगा।

भवदीय
जिला विद्यालय निरीक्षक
कानपुर देहात''

8. The Old Pension/GPF Scheme was effective till March 2005. By the Uttar Pradesh Retirement Benefits (Amendment) Rules 2005 notified on 07.04.2005, Rule 3 was inserted in the Uttar Pradesh Retirement Benefit Rules 1961 whereby it was provided that the Rules 1961 shall not be applicable on employees entering in service on or after 01.04.2005. It appears that simultaneously by another Notification dated 07.04.2005, General Provident Fund (Uttar Pradesh) Rules 1985 were amended by the Amendment Rules 2005 which came into force w.e.f. 01.04.2005. A new Pension Scheme by Notification No.l-3-379/nl -2005-301(9)/2003, dated 28.03.2005 was enacted which was followed by Government Order No. l-3-1051/nl-2008-301(9)-2003 - 14.8.2008 providing that the New Pension Scheme shall apply to all State Government

employees coming in service on or after 1.4.2005. Details have been provided in the said scheme, a copy of which has been filed as Annexure 11 to the writ petition.

9. On the facts as briefly noted above, the petitioners are claiming benefit of Old Pension Scheme and, therefore, they have filed the present writ petition.

Submissions

10. Learned counsel for the petitioners submits that the petitioners are entitled for Old Pension Scheme for reason that despite directions given in the order dated 28.10.2003 in Civil Misc. Writ Petition No.35653 of 2003, the State Government delayed in framing policy for regularisation of Subject expert. If the State Government would have framed the requlrisation policy immediately after the aforesaid order in the case of **Manoj Kumar Rastogi and Others (supra)** then the petitioners could have got benefit of Old Pension Scheme. Therefore, for the delay caused by the State Government in framing the regularisation scheme, the benefit of Old Pension Scheme can not be denied to the petitioners.

11. Learned standing counsel submits that the petitioners are not entitled for Old Pension Scheme in view of the Statutory Provisions and the nature of their initial engagement as subject expert.

Discussion and Findings

12. I have carefully considered the submissions of learned counsels for the parties.

13. Undisputedly, the petitioners were engaged as subject expert by different engagement letters issued in the year 2000, as part timer on fixed honorarium. The relevant portion of the Government order dated 11.10.1999, permitting such engagement and the engagement letters of the petitioners, as already been reproduced above, leaves no manner of doubt that the petitioners were engaged on a fixed honorarium as a part time subject experts and they were not to be treated as Government employee and were not entitled for benefit of pension, provident fund and leave etc.

14. Petitioners have been absorbed and came to be appointed only after Section 21 E was inserted in the Act 1982 on 11.12.2006. The petitioners have been appointed and became part of service cadre and became Government Servant only on their appointments which were made in September and October 2007 when the new scheme was in force. The Old Pension Scheme was abolished in March 2005, which is much prior to the appointments of the petitioners. The petitioners themselves accepted the offer of their appointment by absorption after well looking into the relevant provisions and the Government orders as well as the offer for the post made to them. The provisions of the Scheme 21 E or the relevant Government orders or the Old Pension Scheme and the New Pension Scheme are not under challenge in the present writ petition. It is settled law that writ, order or direction in the nature of mandamus under Article 226 of the Constitution of India can not be issued either contrary to the statutory provisions or to disobey or ignore the statutory provisions. Under the circumstances none of the relief of mandamus as prayed by the petitioners can be granted to the petitioners.

Rules of absorption

15. In **Secretary, State of Karnataka Vs. Uma Devi (2006) 4 SCC 1** (paras 3 & 4), the Constitution Bench of Hon'ble Supreme Court laid down the law that regular appointment must be the rule. But sometimes this process is not adhered and the constitutional scheme of public employment is by-passed. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Whether the wide power under Article 226 of the Constitution of India is intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over. It is time, that the Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. In paragraphs 5 & 6 of the aforesaid judgment in the case of **Umadevi** (supra), Hon'ble Supreme Court has held as under:-

"5. This Court has also on occasions issued directions which could not be said to be consistent with the Constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualization of justice. The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin, has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the Constitutional scheme, certainly tend to water down the Constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench.

6. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (See Basu's Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. *That Article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedure which specify the necessary qualifications, the mode of appointment etc. If rules have been made under Article309 of the Constitution, then the Government can make appointments only in accordance with the rules.* ***The State is meant to be a model employer.*** *The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various*

departments and for filling up of those vacancies, based on a procedure. ***Normally, statutory rules are framed under the authority of law governing employment.*** *It is recognized that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the Constitutional scheme. It may even amount to negating the accepted service jurisprudence.* ***Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed."***

(emphasis supplied)

16. In **Pratap Kishore Panda & others Vs. Agni Charan Das & others (2015) 17 SCC 789 (para 17)**, Hon'ble Supreme Court referred to the law laid down by the Constitution Bench in **Umadevi** (supra) and held that the doctrine is that if employment of persons is contrary to or de-hors the statutory provisions and / or Rules and Regulations, then equities will not have any play even if such persons have been rendering services for service years. **The most that can be done for such employees is for the State Government to devise a scheme, as a one time measure, for their absorption so long as the Governing Statute or the Rules and Regulations are not infringed.**

17. In **State of U.P. Vs. Anand Kumar Yadav (2018) 13 SCC 560**, the Hon'ble Supreme Court summarised the principles of rule of equity in public employment and Articles 14 & 16 of the Constitution of India.

18. In **Brij Mohan Lal Vs. Union of India & others (2012) 6 SCC 502 (paras 172 & 173)**, the Hon'ble Supreme Court held that **absorption in service is not a right.**

19. In **Indu Shekhar Singh & others Vs. State of U.P. & others (2006) 8 SCC 129 (para 26)**, the Hon'ble Supreme Court referred to its earlier judgment in **R.N. Gosain Vs. Yashpal Dhir (1992) (4) SCC 683, Ramankutti Guptan Vs. Avara (1994) 2 SCC 642 and Bank of India & others Vs. O.P. Swarnakar & others (2003) 2 SCC 721 and held that once person exercises his right of option and obtain entry in service on the basis of election, he cannot be allowed to turn round that the conditions are illegal.** Further more, there is no fundamental right in regard to counting of the services rendered in an autonomous body. **The past services can be taken into consideration only when the Rules permit the same** or where a special situation exits, which would entitle the employee to obtain such benefit of past service. The aforesaid judgment in the case of **Indu Shekhar Singh** (supra) involved the controversy with regard to availability of benefit of past service rendered prior to absorption of deputitionist.

20. In the case of **Mrigank Johari & others Vs. Union of India (2017) 8 SCC 256 (para 33)**, the Hon'ble Supreme Court has held that **since the appellants accepted the terms and conditions of the absorption, they could not plead otherwise.**

21. In **Union of India Vs Onkar Chand (1988) 9 SCC 298 (para 12)**, the Hon'ble Supreme Court while considering the benefit of length of service on deputation before absorption and held that **opting permanent absorption, a person cannot claim benefits of absorption as**

well as the service put in time in the deputation quota.

22. In **Union of India & others Vs. K Savitri & others (1998) 4 SCC 358 (paragraph 9)**, the Hon'ble Supreme Court held as under:-

"The service conditions of the redeployed employees under the Rules being governed by the provisions in the rules as well as the instructions issued from the Government of India from time to time and in view of the clear unambiguous language in para 11.1 of the instructions referred to above the conclusion is irresistible that the past services of the redeployed staff cannot be counted for seniority in the new organisation. The Tribunal, therefore, committed serious error in directing that the past services would counted for the seniority of the employees in the All India Radio." (emphasis supplied)

23. The principles of law of public employment as discussed above leaves no manner of doubt that regular employment must be a rule. The power of State as an employer is more limited than that of the private employer inasmuch as it is subject to constitutional limitation. But some time, this process is not adhered and constitutional scheme of public employment is by passed as happened in the present case. Such employment is called *"litigious employment"*. Absorption in public employment is not a right. It is an exception to the normal rule of public employment. It is subject to conditions of absorption. Once the petitioners have knowingly and with open eyes exercised the option for their absorption in public employment, they cannot turn round and say that New Pension Scheme should not be enforced and instead the Old Pension Scheme which already stood abolished in March 2005 should be applied to them.

24 It is settled law that when a scheme is abolished, even pending applications seeking benefit of the scheme, unless saved, will also cease to exist. Reference in this regard may be had to the judgment of Hon'ble Supreme Court in the case of State Bank of India and another vs. Raj Kumar, (2010) 11 SCC 661.

25. In the present set of facts when the petitioners claim to have been appointed, Old Pension Scheme was not in existence. It was abolished in March 2005, whereas the petitioners have been appointed by absorption in the months of September or October 2007. The basis of their appointments is the provision of Section 21 E of the Act, 1982 which was inserted by U.P. Act 37 of 2006 published in the gazette on 11.12.2006. Therefore, the Old Pension Scheme which already stood abolished in March 2005 was neither available to the petitioner on the date of their appointments nor the petitioners are entitled for benefit under the said scheme.

Estoppel

26. The petitioners have elected to accept their appointments by absorption pursuant to the provisions of Section 21 E. Their appointment is based on the doctrine of election which is Rule of estoppel which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a

transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn round and say that it is void for the purpose of securing some other advantage.'

27. As per **Halsbury's Laws of England (4th Edition) Vol. 16 (Paragraph 1508),** after taking an advantage under an order a party may be precluded from saying that it is invalid and asking to set it aside.

28. In the case of **Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others v. Director General of Civil Aviation and others, (2001) 5 SCC 435 (Paragraph-12)**, Hon'ble Supreme Court referred to its earlier judgments in the case of **Babu Ram alias Durga Prasad v. Indra Pal Singh, 1998(6) SCC 358, P.R. Deshpande v. Maruti Balaram Haibatti, 1998(6) SCC 507 and Mumbai International Airport Private Limited v. Golden Chariot Airport and another, 2010 (10) SCC 422** and held that the doctrine of election is based on the rule of estoppel. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

29. In the case of **Cauvery Coffee Traders, Mangalore v. Hornor Resources (International Company Limited), (2011) 10 SCC 420 (Paragraph 34), Hon'ble Supreme Court referred to its decision in the case of Nagubai Ammal v. B. Shama Rao, AIR 1956 SC 593, CIT v. V. MR.P. Firm Muar AIR 1965 SC 1216, NTPC Ltd. v. Reshmi constructions, Builders & Contractors, (2004) 2 SCC 663, Ramesh Chandra Sankla v. Vikram Cement (2008)14 SCC 58 and Pradeep Oil Corpn. v. MCD (2011) 5 SCC 270** and held that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". **Where one knowingly accepts the benefits of a contract or conveyance or an order, he is estopped to deny the validity or binding effect on him of such contract or conveyance or order.** This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. In the present set of facts the petitioners have completely failed to establish that they have any right to claim the benefit of the abolished old pension scheme which was abolished much prior to their appointments or a right for consideration of their appointment pursuant to Section 21 E of the Act 1982 inserted on 11.12.2006.

30. For all the reasons aforestated, I do not find any merit in this writ petition. Consequently, the writ petition fails and is hereby **dismissed**.

(2020)03-05ILR A979
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.02.2020

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ-A No. 9034 of 2013
with
Writ-A No. 31865 of 2013
with
Writ-A No. 31868 of 2013

Mohammad Shoeb Khan & Anr.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri G.K. Singh, Sri Prabhat Kumar Singh, Sri V.K. Singh

Counsel for the Respondents:
C.S.C., Sri Gautam Baghel, Sri Ambuj Mishra

A. Civil law- U.P. Intermediate Education Act, 1921- Section 16FF - Recruitment in Minority Institution - - minority institution cannot adopt a selection process which does not answer to the requirements of Article 14 and 16 of the Indian Constitution

A process of recruitment which does not answer the rudimentary requirements of a fair and just process can neither commend sanction in law nor can it be preserved by the protective umbrella of Article 30 of the Constitution. The provisions of Section 16FF cannot be construed as conferring an immunity to the minority institution to claim a right to select and appoint by adopting a process which is neither fair or transparent. (Para 18)

B. Constitution of India- Article 30 - nothing can impose any restriction upon the State to regulate the affairs of the minority institution

Writ Petition rejected. .(E-10)

List of cases cited:

1. Ajay Singh & anr. Vs. St. of U.P. & ors. Civil Misc. Writ Petition No. 32932 of 2004

2. Sanjay Kumar Singh Vs. District Inspector of Schools, Jaunpur & ors. Civil Misc. Writ Petition No. 9738 of 2009

3. Prashant Kumar Jaiswal & ors. Vs. St. of UP. & ors. 2018 (2) ADJ 633 *(followed)*

4. Mukul Kumar Tyagi Vs. St. of U.P. 2019 SCC Online SC 1646 *(followed)*

5. TMA Pai Foundation Vs. St. of Karnataka (2002) 8 SCC 481*(followed)*

6. Sk. Md. Rafique Vs. Managing Committee Contai Rahamania High Madrasah & ors. 2020 SCC Online SC 4 *(followed)*

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri Vijay Kumar Singh, learned Senior Counsel assisted by Sri Prabhat Kumar Singh, learned counsel for the petitioner, Sri Ankur Tandon, the learned Standing Counsel and Sri Ambuj Mishra, learned counsel holding brief of Sri Gautam Baghel, learned counsel for the respondents.

2. These three petitions with the consent of parties are taken up for hearing together and shall stand disposed of by this common judgment.

3. Writ A No.9034 assails the validity of an order dated 17 November 2011 passed by the Joint Director of Education and consequential order of 14 December 2012 passed by the District Inspector of Schools. The order of Joint Director dated 17 November 2011 itself has come to be made pursuant to the directions issued by the Court on Writ A No.20463 of 2011. The order directed the District Inspector of Schools to undertake a detailed enquiry in respect of the alleged irregularities in connection of the selection of two Assistant Teachers in the respondent minority institution. The two Assistant Teachers are the petitioners in the writ petitions which are also being disposed of by this common judgement.

4. The petitioners claim to have been selected and appointed in the Institution as Assistant Teachers in the LT Grade on 10 April 2003. On a petition filed at their behest, directions were issued to the District Inspector of Schools to pass

appropriate orders in relation to the approval which was sought. The District Inspector of Schools by its order of 22 February 2005 accorded approval to the appointment of the petitioners. While matters could have rested there, it appears from the record that a complaint was made in 2010 to the District Inspector of Schools by certain members claiming affiliation to a new Committee of Management which had come to hold office. One of the complainants approached the Court by filing Writ Petition No.20463 of 2011 which came to be disposed of with a direction to the Joint Director of Education to enquire into the complaint and take appropriate decision. It is pursuant to those directions that the impugned order of 17 November 2011 came to be passed. Pursuant to the directions made by the Joint Director in that order, an enquiry is stated to have been initiated whereafter the Committee of Management passed the order terminating the services of petitioners. The orders of termination are assailed by the individual petitioners in the connected writ petitions.

5. As is evident from the findings which are recorded in the order of the Joint Director of Education of 17 November 2011, it has been found that there were gross illegalities and irregularities committed in the entire selection process. The enquiry which was undertaken by the educational authorities established that most of the members of the Selection Committee had subsequently stated that their signatures had been forged on the papers relating to selection which were forwarded by the Management. The respondents have also found serious discrepancies and lack of particulars in the advertisements which were issued. They have noted that in none of the advertisements were the subject or disciplines in respect of which appointments were sought to be made find mention. The Joint Director in its order has also noted that Mohd. Saleem Khan [petitioner in Writ A No.31865 of 2013] came to be appointed on the post of Assistant Teacher LT Grade even though he possessed the qualifications of B.Sc., B.Ed. whereas the advertised qualification was of B.A., B.Ed. Insofar as Mohd. Shoeb Khan [petitioner in Writ A No.31868 of 2013] is concerned, it has come to be noted in the impugned order that the said candidate admittedly held the qualifications of B.A. and testimonials establishing having passed the Drawing Grade Examination. The order essentially holds that the said petitioners did not hold the B.Ed. degree at all. It is these gross illegalities which according to the respondents constrained them to command the Management to terminate the services of the two Assistant Teachers.

6. Sri V.K. Singh learned Senior Counsel has firstly submitted that the Joint Director of Education clearly had no jurisdiction or authority to pass directions to the District Inspector of Schools to undertake any enquiry. Referring to the provisions made in Section 16FF of the **Intermediate Education Act, 19211**, it was contended that the power to interfere with the choice made by the Management stands vested only in the Regional Deputy Director of Education or the Inspector as the case may be. It was consequently submitted that the Joint Director had no power to recommend or command the Management to terminate the services of the petitioners. It was further submitted that the respondents could not have interfered with the selection made only if they found that the persons selected did not possess the

minimum qualifications as prescribed or were otherwise ineligible. This submission is addressed in light of the provisions made in Section 16FF(4). Turning then to the issue of the record as maintained by the Selection Committee, it was submitted that there was no legal requirement obliging the Selection Committee to award quality point marks under different heads or fields. It was also submitted that it was not open for the respondents to take cognizance of the complaints many years after approval had been accorded to the appointment of the petitioners by the District Inspector of Schools.

7. Sri Tandon learned Standing Counsel has on the other hand submitted that bearing in mind the gross illegalities which were noticed in the course of enquiry and from which the selection proceedings undisputedly suffered, the respondents were fully justified in interfering with the entire process and command the respondent Management to terminate those illegal appointments. It was submitted that while a minority institution may be empowered to select appropriate and eligible persons in light of the provisions made under Section 16FF, the State cannot be said to be totally deprived or denuded of authority especially when the burden of salaries of such teachers would ultimately fall on public exchequer. Sri Tandon learned Standing Counsel submitted that despite the nature of disclosures which are carried in the order of Joint Director, the petitioners have failed to establish that the selection process was in fact carried forth in accordance with law or for that matter was imbued with at least the minimal attributes of fairness as the Constitution otherwise commands.

8. Sri Mishra learned counsel appearing for the Management submits that the entire selection process was mired and tainted by fundamental illegalities and clearly did not commend acceptance by the respondents. He has while referring to the advertisements which were issued submitted that while the advertisement in Hindustan Times made no reference to the number of posts for which the recruitment process was being undertaken, the second advertisement published in Hindustan referred to two posts of trained L.T. Grade Teachers being the subject matter of the recruitment. He highlighted the fact that neither of the two advertisements set forth the disciplines for which applications were being invited for the purposes of selection. It was further contended that the advertisement mentions that the dates of interview would be intimated to the applicants by registered post and yet no material have been brought forth to establish that even this stipulation was adhered to or that it was pursuant to the intimation so received that the petitioners here ultimately participated in the alleged interview. Insofar as the validity of the proceedings drawn by the Selection Committee is concerned, Sri Mishra learned counsel refers to the judgment rendered by a learned Judge in **Ajay Singh And Another v. State of U.P. And Others**2 where the position has been taken that the provisions made in Appendix -C contained in Chapter II of the Regulations framed under the 1921 Act would ipso facto apply to minority institutions also and in view thereof it was incumbent upon the Selection Committee to award quality point marks upon the evaluation of individual candidates. In **Ajay Singh** the legal position was enunciated thus:-

"In view of the aforesaid provisions, Appendix 'C' attached to Chapter-II becomes applicable in respect of

selections made on the post of Lecturers in minority institutions automatically. Appendix 'C' regulates the manner in which quality point marks and interview marks ought to be provided as well as bifurcation of the same. Proceedings of selection are necessary to be submitted in Appendix 'C', referred to above. It is only on such proceedings submitted in Appendix 'C', that the educational authorities can act upon and take decision for grant of approval to selected candidate. Appendix 'C' reads as follows:"

From the affidavit filed by the Regional Joint Director of Education, noticed herein above, it is apparent that the proceedings of selection, as required, have not been intimated as required in Appendix 'C' nor there is any other record available to educational authorities on the basis whereof Appendix 'C' could be prepared for taking decision that the selection on the post in question is in accordance with law. Even otherwise none of the respondents being able to demonstrate as to what was the maximum marks fixed for interview, the entire documents submitted for selection are rendered mere paper transaction. This Court is also not able to ascertain what was the maximum marks fixed for interview.

In view of the aforesaid, the entire papers pertaining to the selection of Sri Desh Deepak Srivastava do not inspire confidence and therefore the selection of Sri Desh Deepak Srivastava cannot be said to have taken place in accordance with the provisions applicable."

9. Sri Mishra then placed reliance upon a judgment rendered by a learned Judge in **Sanjay Kumar Singh v. District Inspector of Schools, Jaunpur and Others**3 to submit that consequent to the promulgation of the Government Order dated 19 December 2000 and constitution of the Regional Level Committee in terms thereof, the District Inspector of Schools had clearly no jurisdiction to accord approval since that power stood taken away and conferred on the Committee. According to Sri Mishra where the entire selection process was tainted by such gross illegalities, the petitioners could not have been permitted to draw salaries from State exchequer and that the Management was fully justified in terminating their services. In **Sanjay Singh** the position as would prevail after the issuance of the Government Order of 19 December 2000 was explained as under:-

"In the present case, it has been sought to be contended that once approval had been accorded by the District Inspector of Schools in exercise of authority vested under Section 16FF of U.P. Act No. 2 of 1921, then salary has to be ensured ipso facto automatically. Such question is being looked into and answered accordingly.

Section 16FF and the provisions as contained in Chapter II Regulation 17 quoted above would go to show that approval is required before making appointment. After approval has been accorded, the same is followed by exercise to be undertaken by the committee of management of the institution in terms of Chapter II Regulation 18, wherein the committee of management has been obliged under the resolution to issue an order of appointment by registered post to the candidate in the form given in Appendix- 'B', requiring the candidate to join the duty within ten days of receipt of such order, failing which appointment of candidate would be liable to cancellation. It is only when appointment letter is issued after approval has been accorded in terms of Chapter II Regulation 18 of the Regulations framed under .P. Act No. 2 of

1921, and incumbent accepts the appointment and joins then situation arises for ensuring payment of salary. In cases where institution is not at all in grant-in-aid list of State Government, there is no issue as salary has to be ensured by Management from its own resources, and State has no role to play in the same. In case institution is on the grant-in-aid list of the State Government and the provisions of U.P. Act No. 24 of 1971 are applicable, and papers are received for ensuring payment of salary, then at the said point of time, salary can be refused to an incumbent in case it is found that the appointment has been made in contravention of the statutory provisions or against any other post other than the sanctioned post. Chapter II Regulation 19, thus, gives the District Inspector of Schools one more opportunity vis-a-vis the provisions of U.P. Act No.24 of 1971 to re-examine the matter, as U.P. Act No. 24 of 1971 provides for ensuring salary for the post against which maintenance grant is paid by the State Government, and the District Inspector of Schools has also to see and ensure that the salary is paid accordingly. "Shall decline to pay salary and other allowances" though couched in negative manner, casts mandatory duty on the District Inspector of Schools, while exercising authority under the provisions of U.P. Act No. 24 of 1971, to see and ensure that no incumbent, whose appointment is in contravention of the provisions of Chapter II of U.P. Act No. 24 of 1971 or an incumbent who has not been appointed against sanctioned post, gets salary. There are two stages of examination; (i) Pre-appointment stage, in accordance with Section 16FF of U.P. Act No. 24 of 1971 read with Chapter II Regulation 17; (ii) Post-appointment stage in terms of Chapter II Regulation 18 of U.P. Act No. 24 of 1971, after appointment letter is issued. Qua pre-appointment examination, District Inspector of Schools under Section 16FF of U.P. Act No.2 of 1921 has no authority to withhold the approval of selection where the incumbent possesses the minimum qualifications prescribed and is otherwise eligible whereas once approval has been accorded in terms of Section 16FF of U.P. Act No. 2 of 1921, and incumbent has been issued appointment letter, and has joined and claim of salary is covered under U.P. Act No. 24 of 1971, then before release of salary, District Inspector of Schools has to see that the incumbent has not been appointed in contravention of Chapter II of U.P. Act No. 2of 1921 and has not been appointed against non sanctioned post. District Inspector of Schools has to satisfy himself on these two counts while undertaking exercise under the provisions of U.P. Act No. 24 of 1971 read with Chapter II Regulation 19. Both the provisions operate in different field and deals with different stages; i. e. (i) Pre-appointment and (ii) Post appointment state, as such to say that once appointment has been approved under Section 16FF of U.P. Act No. 2 of 1921, grant of salary is automatic, cannot be accepted and District Inspector of Schools has to undertake requisite exercise before release of salary."

....

"The validity of Government Order dated 19.12.2000 had been subject matter of challenge in **Special Appeal No.1394 of 2004, Committee of Management vs. Regional Joint Director of Education and another as well as in Special Appeal No.1078 of 2005, Munna Lal Singh and another vs. State of U.P. and others.** This Court in both the cases has not at all found transgression or overstepping of jurisdiction in constitution of Regional Committee, rather constitution of Regional Committee under the aforesaid

Government Order has been seen in the context of extending assistance in favour of lawful incumbent. In respect of payment of salary also, Regional Level Committee assists the District Inspector of Schools. As already noted and discussed above, at no place and in no way Government Order dated 19.12.2000 proceeds to encroach upon or is in conflict with the provisions of U.P. Act No.2 of 1921 or U.P. Act No. 24 of 1971, inclusive of Constitution of India. Hon'ble Apex Court in the case of **Kolawana Gram Vikas Kendra vs. State of Gujrat and others, J.T. 2009 (13) SC 581**, vis-a-vis minority institution has taken the view that such exercise is valid exercise and in no way circular issued in the said direction amounts to unconstitutional interference in the internal working of minority institution, and has approved the action of the State Government vis-a-vis issuance of such Government Order in respect of ensuring payment of salary in following terms:

"6. In our considered view this to be the interference in the selection process. It would be perfectly all right for a minority institution to select the candidates without any interference from the Government. However, the requirement of this prior approval is necessitated because it is for the Government to see as to whether there was actually posts available in the said institution as per the strength of students and secondly; whether the candidates, who were sought to be appointed, were having the requisite qualifications in terms of the rules and regulations of the Education Department. That is precisely the stand taken by the State of Gujrat before us in its counter affidavit. Para 3 of the said affidavit reads as under:

"Minority institutions are free to select their teaching and non-teaching staff. No Government Officer or the representative of the Board was appointed in the selection committee of the minority institution. There is no interference by the government in the administration of schools. However, N.O.C. Is required to be obtained to verify whether there is a vacancy of a teach of a particular subject as per the workload fixed by the Gujrat Secondary and Higher Secondary Education Board specially when government is providing grant-in-aid and that he possesses minimum required qualification for the post he is appointed"

7. From the reading of aforementioned para 3, it is clear that all that the Government wants to examine is as to whether the proposed appointments were within the framework of the rules considering the workload and the availability of the post in that institution and, secondly; whether the selected candidate had the necessary qualification for the subjects in which the said teachers were appointed. The same applies to the non-teaching staff also.

8. In view of this clear stand taken by the State Government, we cannot pursue ourselve to hold that the aforementioned circular amounts to any unconstitutional interference in the internal working of the minority institution. In that view, we would choose to dismiss these appeals. However, Mr. Ahmadi raised another point saying that if the prior approval or the no objection certificate, as the case may be, is not awarded within seven days without any reason, then it would be hazardous for the minority institution to run itself. We do expect the competent authority to issue the no objection certificate within the time provided in the said circular which is of seven days. Of course, if there are any objections, the authority will be justified to take some more time within the reasonable limits."

Consequently, for the reasons discussed above, and in the facts of the case, as till date in consonance with the

Government Order dated 19.12.2000, the Regional Committee has not at all vetted the claim of petitioner in respect of release of salary under U.P. Act No. 24 of 1971; consequently, no orders have been passed by the District Inspector of Schools, as such Regional Committee constituted under Government Order dated 19.12.2000 is directed to examine the claim of petitioner in accordance with the parameters as provided for under Chapter II Regulation 19 of U.P. Act No. 2 of 1921 and take appropriate decision, within two months from the date of receipt of a certified copy of this judgment, and along with necessary recommendations, papers be transmitted to the District Inspector of Schools for further follow-up action."

10. Having noticed the rival submissions the stage is now set to deal with the issues that arise. At the very outset it may be noted that the selection and appointment of teachers in a minority institution and the right of the respondents to review or scrutinise an appointment made is governed by the provisions made in Section 16FF. The provision firstly lays down the composition of the Selection Committee. In case selection is for the Head of the institution, it must comprise of an expert selected out of a panel prepared by the Director. In case of appointment of a Teacher, the Selection Committee must also include the Head of the Institution as a member. Section 16FF (2) then provides that the Selection Committee shall follow such procedure **"as may be prescribed"**. Regulation 17 falling in Chapter II which admittedly governs selections undertaken by a minority institution, attracts the procedure prescribed by Regulation 10 clauses (e) and (f) to such selections. It is in that backdrop that **Ajay Singh** [and in the considered view of this Court correctly] holds that it is incumbent upon the Selection Committee to draw a chart evidencing a comparitive analysis of the respective merit of candidates and the award of quality point marks. Undisputedly in the present case not only was no such exercise undertaken, the members who were shown as constituting the Selection Committee have not only denied having participated in any such exercise, they have gone to the extent of asserting that their signatures as stated to appear on the record of selection have been forged. This aspect amounts to a flagrant violation of the procedure prescribed by statute.

11. The Court then notices that the advertisements which were issued failed to disclose the disciplines/subjects in respect of which applications were being invited. One of the advertisements did not even mention the number of posts for which the selection was sought to be undertaken. It would be preposterous to countenance or uphold advertisements like the ones which form subject matter of the instant writ petition as being constitutionally valid. The Court is constrained to enter these observations bearing in mind that the selectees were entering public employment and whose salaries were to be borne out of public exchequer.

12. Insofar as **Mohd. Shoeb Khan** [the petitioner in Writ A No.31868 of 2013] is concerned, it is not disputed that he did not possess the qualifications as prescribed. His appointment was thus clearly untenable and the respondents were clearly empowered not only to direct but also to ensure that the Management brought that illegality to an end. Regard must be had to the fact that Section 16FF does empower the State respondents to enquire whether the candidate selected holds the

prescribed qualifications and *"is otherwise eligible"*. Before this Court it was not disputed that the writ petitioner did not possess the prescribed qualification. In view thereof the respondents must be held to have acted within their jurisdiction in commanding the Management to annul that appointment. That writ petition consequently merits dismissal on this score alone.

13. That then takes the Court to consider the principal submission which is addressed, namely, the extent of the jurisdiction which the respondents could have validly exercised in light of the provisions of Section 16FF. But before proceeding to do so, it would be apposite to articulate two fundamental precepts which necessarily must be borne in mind while evaluating the correctness of the submission advanced.

14. Article 14 is undisputedly the soul of the Constitution and embodies the quintessence of constitutionalism as evolved by our Courts. The doctrine of equality and fairness, which forms its fundamental core, must inform all actions in a constitutional democracy. This Article also guides and fortifies the guarantee immortalised in Article 16 of the Constitution. The pledge of equality as incorporated in these two Articles must guide all actions taken in connection with public employment. An essential facet of employment under the State is a fair and impartial recruitment process. Explaining this vital precept this Court in **Prashant Kumar Jaiswal And Others Vs. State of U.P. And Others**4 observed:-

65. The Court additionally bears in mind that the selections in question were for recruitment to a public service, a service in and under a corporation of the State. Certificates and diplomas issued by organisations which this Court chooses to describe as "sweatshop centers" which have no recognition or approval cannot be accepted as rendering a holder thereof eligible for employment in public service. An incumbent aspiring to enter public service or a corporation of the State must possess qualifications which are recognised or capable of being recognised in law. This because of the very nature of the employment being sought. After all, the incumbent and others like him in public service are the sinews of the organ which we call the State. On them is placed the burden and obligation to ensure the well being of the citizen, to secure the welfare of the people. A member of such a service must necessarily be possessed of certain core qualifications of a particular standard. Dealing with the issue of public service and employment in the context of appointments having been obtained on the basis of false caste certificates, the Supreme Court in *Chairman and Managing Director FCI & others Vs. Jagdish Balaram Bahira* 2017 SCC Online 715 and others made the following significant and eloquent observations which would ring true even in the present case and guide the Court in dealing with such issues. The Supreme Court noted:

"77. Service under the Union and the States, or for that matter under the instrumentalities of the State subserves a public purpose. These services are instruments of governance. Where the State embarks upon public employment, it is under the mandate of Articles 14 and 16 to follow the principle of equal opportunity. Affirmative action in our Constitution is part of the quest for substantive equality. Available resources and the opportunities provided in the form of public employment

are in contemporary times short of demands and needs. Hence the procedure for selection, and the prescription of eligibility criteria has a significant public element in enabling the State to make a choice amongst competing claims. The selection of ineligible persons is a manifestation of a systemic failure and has a deleterious effect on good governance. Firstly, selection of a person who is not eligible allows someone who is ineligible to gain access to scarce public resources. Secondly, the rights of eligible persons are violated since a person who is not eligible for the post is selected. Thirdly, an illegality is perpetrated by bestowing benefits upon an imposter undeservingly. These effects upon good governance find a similar echo when a person who does not belong to a reserved category passes of as a member of that category and obtains admission to an educational institution. Those for whom the Constitution has made special provisions are as a result ousted when an imposter who does not belong to a reserved category is selected. The fraud on the constitution precisely lies in this. Such a consequence must be avoided and stringent steps be taken by the Court to ensure that unjust claims of imposters are not protected in the exercise of the jurisdiction under Article 142. The nation cannot live on a lie. Courts play a vital institutional role in preserving the rule of law. The judicial process should not be allowed to be utilised to protect the unscrupulous and to preserve the benefits which have accrued to an imposter on the specious plea of equity. Once the legislature has stepped in, by enacting Maharashtra Act XXIII of 2001, the power under Article 142 should not be exercised to defeat legislative prescription. The Constitution Bench in Milind spoke on 28 November 2000. The state law has been enforced from 18 October 2001. Judicial directions must be consistent with law. Several decisions of two judge benches noticed earlier, failed to take note of Maharashtra Act XXIII of 2001. The directions which were issued under Article 142 were on the erroneous inarticulate premise that the area was unregulated by statute. Shalini noted the statute but misconstrued it.

91. Medical education is what middle-class parents across the length and breadth of the county aspire for their children (whether this will continue to be so in future is a moot question). There is intense competition for a limited number of under-graduate, post-graduate and super-speciality seats. This can furnish no justification for recourse to unfair means including adopting a false claim to belong to the reserved category. The fault - lines of our system, be it in education, health or law, are that its lethargy and indolence furnish incentives for the few who choose to break the rules to gain an unfair advantage. In such a situation, the court as a vital institution of democratic governance must be firm in sending out a principled message that there is no incentive other than for behaviour compliant with rules and deviance will meet severe reprimands of the law." (emphasis supplied)

66. The views expressed by the Supreme Court in *Jagdish Balaram* highlighting the concepts of "substantive equality", the recognition of "limited opportunities" all bid us to hold that in matters of public employment the processes undertaken must be strictly tested on the principles enshrined in Articles 14 and 16 of the Constitution. The Supreme Court has aptly described public services as "instruments of governance". This clearly underpins the conclusion arrived at by this Court that there can be no entry in public

services on the strength of unrecognised qualifications. This Court therefore finds itself unable to accept the submission that an unrecognised qualification or for that matter a certificate issued by an organisation which is not recognised or acknowledged by law can be accepted in recruitment to a public service or in an organisation which is State as understood in terms of Article 12 of the Constitution.

15. The aforesaid decision has since been affirmed by the Supreme Court in **MUKUL KUMAR TYAGI VS. STATE OF UTTAR PRADESH**5.

16. It is equally important to remember that Article 30 standing in Part III of the Constitution like all other rights is not absolute or untramelled. The Constitution while recognising and preserving the right of minorities to establish and administer educational institutions does not envisage it to be a carte blanche to maladminister or to ignore basic concepts of fairness which must infuse any recruitment exercise. While undertaking a process of selection, the administrators of a minority institution cannot claim immunity from the rigours of Articles 14 and 16 of the Constitution. It would be appropriate to recollect the following caveat enunciated in **TMA Pai Foundation Vs. State of Karnataka**6 by the Constitution Bench:-

"135.We agree with the contention of the learned Solicitor-General that the Constitution in Part III does not contain or give any absolute right. All rights conferred in Part III of the Constitution are subject to at least other provisions of the said Part. It is difficult to comprehend that the framers of the Constitution would have given such an absolute right to the religious or linguistic minorities, which would enable them to establish and administer educational institutions in a manner so as to be in conflict with the other Parts of the Constitution. We find it difficult to accept that in the establishment and administration of educational institutions by the religious and linguistic minorities, no law of the land, even the Constitution, is to apply to them.

136.Decisions of this Court have held that the right to administer does not include the right to maladminister. It has also been held that the right to administer is not absolute, but must be subject to reasonable regulations for the benefit of the institutions as the vehicle of education, consistent with national interest. General laws of the land applicable to all persons have been held to be applicable to the minority institutions also -- for example, laws relating to taxation, sanitation, social welfare, economic regulation, public order and morality.

137.It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain other laws of the land pertaining to health, morality and standards of education apply. The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same. By the same analogy, there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1).

17. Reiterating the legal position the Supreme Court in a recent decision in **Sk. Md. Rafique Vs. Managing Committee Contai Rahamania High Madrasah and others**7 held:-

106.The decision in*TMA Pai Foundation*8, rendered by Eleven Judges of

this Court, thus put the matter beyond any doubt and clarified that the right under Article 30(1) is not absolute or above the law and that conditions concerning the welfare of the students and teachers must apply in order to provide proper academic atmosphere, so long as the conditions did not interfere with the right of the administration or management. What was accepted as correct approach was the test laid down by Khanna, J. in*Ahmedabad St. Xavier's College*5case that a balance be kept between two objectives - one to ensure the standard of excellence of the institution and the other preserving the right of the minorities to establish and administer their educational institutions. The essence of Article 30(1) was also stated - *"to ensure equal treatment between the majority and the minority institutions"* and that rules and regulations would apply equally to the majority institutions as well as to the minority institutions.

18. The imperatives of a fair and just process of recruitment in order to select the most deserving and qualified candidate is a facet which has an indelible bond to standards of education in an educational institution. The rights that are claimed by a minority institution, coonsequently must be read as being subject to the caveat noticed above, namely, the obligation to act in accordance with the mandate of Articles 14 and 16. A process of recruitment which does not answer even the rudimentary requirements of a fair and just process can neither commend sanction in law nor can it be preserved by the protective umbrella of Article 30 of the Constitution. Regard must also be had to the fact that the Institution was in receipt of State aid. Once that institution stands conferred that benefit, the respondents could legitimately claim the right to regulate the selection process within the narrow confine culled out above. The provisions of Section 16FF cannot be construed as conferring an immunity to the minority institution to claim a right to select and appoint by adopting a process which is neither fair nor transparent. The right to select a teacher must be read as being hedged and subject to the rigours of other parts of the Constitution.

19. The power of the State to regulate and overseee within this narrow confine has an ineradicable link to maintenance of standards of education. The power if so exercised can neither be viewed as an infringment nor can it be said to impinge upon the rights guaranteed by Article 30. The State cannot be expected to remain a mute spectator while a minority institution proceeds to adopt a selection process which does not answer the requirement of Articles 14 and 16. Article 30 is neither an impregnable barrier nor can it be construed as a restraint upon the power of the State to regulate the affairs of a minority institution to the extent that the said power is exercised and invoked in aid of maintenance of standards. A minority institution cannot be permitted in law to act with impunity and then rise up to claim an unbridled constitutional right to administer. That right must be balanced against the constitutional obligation placed upon all constituents to act in accordance with law and the Constitution.

20. The Court also bears in mind that in the present case, it is the Management which has proceeded to annul the appointment of the petitioners. It does not assert or contend that its rights to administer and manage have been interfered with. Bearing in mind the serious irregularities from which the selection process stood tainted, the Court is of the

considered view that the petitioners are not entitled to any relief and the petitions must fail.

21. The writ petitions are consequently **dismissed**.

(2020)03-05ILR A991
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Writ-A No. 16680 of 1991
&
Writ-A No. 11177 of 2017
&
Writ-A 34882 of 2017

Ram Piarey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri D.V. Singh, Sri J.P. Yadav, Sri Raj Mohan Saggi, Sri V.K. Singh

Counsel for the Respondents:
Sri P.P. Srivastava, Sri A.K. Srivastava, Sri D.V. Singh, S.C., Sri S.P. Bharti

A. Service law- U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 - Section 18 of the Act, 1982 read with Clause 2 of - Appointment short term vacancy must be filled observing the provisions of law

Absence of Assistant Teacher (C.T. Grade), Sri Harish Chand Pandey without prior permission from the competent authority resulted in a short term vacancy which could be filled by the Management following the procedure prescribed under Section 18 of Act, 1982 read with Clause 2 of U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981. Non observance of such procedure has rendered the ad hoc appointment of Shatrughan Singh or Ram Piarey patently illegal and void ab initio

B. Ban on appointment - State Government has power to declare any post as of dying cadre or even ban appointment on such posts

Writ Petition rejected. .(E-10)

List of cases cited

1. Dr. Ramji Dwivedi Vs. St. of U.P. & ors 1983 (3) SCC 52

2. Durgesh Kumari Vs. St. of U.P. & ors 1995 (3) UPLBEC 1387

3. Prabhat Kumar Sharma & ors. Vs. St. of U.P. & ors. A.I.R. 1996 SC 2638

4. Shesh Mani Shukla Vs. D.I.O.S., Deoria & ors J.T. 2009 (10) S.C. 309

5. Jahaj Pal Vs. District Inspector of Schools & ors. 2019 (3) ADJ 424

6. U.O.I. & anr. Vs. Raghuwar Pal Singh 2018 (15) SCC 463

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

1. Heard Sri Raj Mohan Saggi, Advocate for petitioner and learned Standing Counsel, Sri S.P. Bharti and Sri Arvind Yadav, Advocates for respondents in Writ Petition No. 16680 of 1991 *(hereinafter referred to as "First Petition")*; Sri Arvind Yadav, Advocate for petitioner and learned Standing Counsel, Sri R.M. Saggi and Sri S.P. Bharti, Advocates for respondents in Writ Petition No. 11177 of 2017 *(hereinafter referred to as "Second Petition")*; and, Sri Uma Nath Pandey, Advocate for petitioner and learned Standing Counsel as well as Sri Arvind Yadav, Advocate for respondents in Writ

Petition No. 34882 of 2017 *(hereinafter referred to as "Third Petition").*

2. First Petition has been filed by sole petitioner-Ram Piarey praying for a writ of mandamus commanding respondents to permit him to continue to function as Ad hoc Teacher in C.T. Grade at Janta Uchchattar Madhyamik Vidyalaya, Deokali Kala, District Basti *(hereinafter referred to as "College")* and pay salary w.e.f. 12.12.1989, i.e., from the date of appointment till a candidate duly selected by Commission joins the post.

3. Brief facts as borne out from pleadings of First Petition are that College is a recognized, aided, secondary education institution governed by the provisions of U.P. Intermediate Education Act, 1921 *(hereinafter referred to as "Act, 1921")*. For the purpose of payment of salary of teaching and non-teaching staff it is governed by the provisions of Uttar Pradesh High Schools and Intermediate College (Payment of Salaries of Teachers and Other Employees) Act, 1971 *(hereinafter referred to as "Act, 1971")* and for recruitment of Teaching staff it is governed by the provisions of U.P. Secondary Education Services Selection Board Act, 1982 *(hereinafter referred to as the "Act, 1982")*.

4. One, Sri Harish Chandra Pandey, Assistant Teacher (C.T. Grade) suddenly absented from College causing a short term vacancy. The Committee of Management of College treated said vacancy to be substantive and requisition and sent information to District Inspector of Schools, Basti *(hereinafter referred to as "DIOS")* so as to forward requisition to U.P. Secondary Education Services Selection Board *(hereinafter referred to as "Board")* but did not receive any recommendation within two months. Consequently Management proceeded to make ad hoc appointment under Section 18 of Act, 1982, vide resolution dated 01.10.1989. Vacancy was notified on notice board of College and thereafter Selection Committee made recommendation placing names of Sri Shatrughan Singh at Serial No. 1, Ram Piarey (petitioner) at Serial No. 2 and Sri Shyam Narayan Singh at Serial No. 3. Appointment letter was issued to Sri Shatrughan Singh on 12.11.1989 which was allegedly received by him on 13.11.1989 but he did not join within the period of 15 days. Thereafter Management, in its meeting dated 03.12.1989, resolved to cancel said appointment letter issued to Sri Shatrughan Singh and decided to issue appointment letter to next candidate, i.e., petitioner. Consequently appointment letter dated 05.12.1989 was issued to petitioner, pursuant whereto he joined on 12.12.1989. Intimation was given by Management of College to DIOS vide letter dated 15.12.1989 stating that appointment letter issued to Sri Shatrughan Singh was cancelled since he did not join and petitioner has now been appointed, therefore, his appointment be approved. DIOS however neither communicated any approval to petitioner's appointment nor made any arrangement for payment of salary. It appears that DIOS did not recognize appointment in view of Government Order dated 11.08.1989 whereby fresh appointment in C.T. Grade was banned on the ground that C.T. Grade has been declared a dying cadre. It is also stated in the First Petition that a radiogram was issued by Government on 20.06.1989 stopping all appointments in C.T. Grade in State of U.P.

5. Petitioner when filed First Petition made reference to some writ petitions pending at that time wherein validity of aforesaid radiogram dated 20.06.1989 was challenged, i.e., Writ Petitions No. 22054 of 1989, Dr. Hari Govind Mishra and others vs. District Inspector of Schools,

Deoria and 2639 of 1990, Subhash and another vs. District Inspector of Schools, Deoria and others, alleging that since he is continuously working, entitled for payment of salary.

6. When First Petition initially came up before this Court for admission on 30.05.1991, Court connected it with Writ Petition No. 2639 of 1990 and directed it to be listed alongwith that. Subsequently on 16.12.1991 First Petition was further directed to be connected with Writ Petition No. 22244 of 1990.

7. Respondent-3 initially filed counter affidavit sworn on 26.03.1992 stating that Sri Harish Chand Pandey though absented without any prior permission but no substantive vacancy occurred since he was never terminated and no such information was given to DIOS. Therefore, Management's action of assuming that a substantive vacancy has occurred was clearly illegal and entire exercise of ad hoc appointment is also illegal. It was also pointed out that in anticipation of approval, Sri Shatrughan Singh was given ad hoc appointment vide appointment letter dated 12.11.1989 which was not approved by DIOS vide letter dated 13.07.1990 and it was challenged by Sri Shatrughan Singh in Writ Petition No. 22244 of 1990, which was pending.

8. Another counter affidavit has been filed on behalf of Respondent-3 in First Petition, sworn on 21.07.2010. It is stated tharein that Sri Harish Chand Pandey, Assistant Teacher C.T. Grade absented himself without prior permission from 01.07.1989 to 16.10.1989. During aforesaid period of absence of about three and half months, Management itself proceeded to make ad hoc appointment by placing an advertisement on the notice board of College, inviting applications from 09.10.1989 to 16.10.1989. Total four applications were received pursuant whereto selection was made and Sri Shatrughan Singh was issued appointment letter dated 12.11.1989 appointing him on ad hoc basis as Assistant Teacher C.T. Grade. Appointment letter of Sri Shatrughan Singh which was forwarded to DIOS was returned by DIOS vide letter dated 13.07.1990 disapproving the same on that ground that C.T. Grade has already been declared a dying cadre and no fresh appointment can be made on said post. In the meantime Sri Shatrughan Singh claimed that he had already joined on 15.11.1989 and challenging DIOS letter dated 13.07.1990 he filed Writ Petition No. 22244 of 1990 wherein an interim order was passed on 24.08.1990 to the following effect:

"In the meantime it is directed that till a duly selected candidate joins the post in question or the services of the petitioner are terminated in accordance with law the petitioner shall be allowed to continue on the said post and paid salary which is due to him, in if he has functioned on the said post. If he functions on the said post, he shall be entitled to get salary in accordance to law."

9. Respondent-3 has further stated in his counter affidavit that Ram Piarey was never appointed nor could have been appointed on the said post of Assistant Teacher C.T. Grade. In order to comply with aforesaid interim order, necessary instructions were issued to Management but neither Management allowed Shatrughan Singh to work nor forwarded salary bill. In this regard a letter dated 16.07.1991 was also sent by DIOS

informing that Management's claim for seeking approval for appointment of Ram Piarey is not correct and it should proceed in accordance with interim order passed by this Court in Writ Petition No. 22244 of 1990. Since Management did not allow Shatrughan Singh to work, DIOS passed order dated 09.12.1991 attaching Sri Shatrughan Singh to his office and salary was paid to him.

10. Management also filed counter affidavit sworn by Dinesh Chandra Srivastava, Manager of the then Committee of Management of College stating that due to absence of Sri Harish Chand Pandey, a substantive vacancy arose, whereupon intimation was given to DIOS and Management then proceeded to make ad hoc appointment under Section 18(1)(b) of Act, 1982 vide resolution dated 01.10.1989 and appointed Sri Shatrughan Singh vide appointment letter dated 12.11.1989 but he failed to join. Thereafter another appointment letter was issued on 05.12.1989 appointing Sri Ram Piarey as Assistant Teacher C.T. Grade. Ram Piarey joined College on 12.12.1989 and working regularly. With regard to compliance of interim order dated 24.08.1990 it is said that Management enquired into matter and found that Sri Shatrughan Singh was not working in College hence he could not have been paid salary since interim order was conditional that if Shatrughan Singh was working on the post only then he was entitled for salary.

11. It is also evident from record that Writ Petition No. 22244 of 1990 has already been dismissed as infructuous on a statement made by counsel of Sri Shatrughan Singh on 06.07.2004 and the order reads as under:

"Counsel for the petitioner stated that in view of the orders of District Inspector of Schools, Basti dated 05.02.2002, the petitioner has get L.T. Grade. The prayers made in the writ petition have, therefore, become infructuous. ***The writ petition is dismissed as infructuous."*** *(emphasis added)*

12. Second Petition has been filed by Committee of Management of College and Sri Rahul Srivastava, Manager of Committee of Management impleading Sri Shatrughan Singh and Sri Ram Piarey, both as Respondents-4 and 5. It has also reiterated the initial facts as stated in First Petition that due to unauthorized absence of Sri Harish Chand Pandey, Assistant Teacher (C.T. Grade), Management treated to have occurred a substantive vacancy and passed resolution on 01.10.1989 for making ad hoc appointment. After advertisement of vacancy on the notice board of College, selection was held wherein a merit list was prepared in which Shatrughan Singh was placed at Serial No. 1; Ram Piarey at Serial No. 2 and Shyam Narayan Singh at Serial No. 3. Appointment letter dated 12.11.1989 was issued to Shatrughan Singh, who failed to join. Thereafter resolution dated 03.12.1989 was passed and Ram Piarey was issued appointment letter dated 05.12.1989 who joined College on 12.12.1989. Documents were forwarded to DIOS seeking approval of appointment of Ram Piarey on 15.12.1989. However, DIOS vide letter dated 13.07.1990 cancelled selection of Respondent-4 and returned documents on the ground that C.T. Grade has declared dying cadre, therefore, no appointment could be made. DIOS did not take any notice of appointment of Ram Piarey. The letter dated 13.07.1990 sent by DIOS, reads as under:

"आपके पत्र संख्या–शून्य दिनांक 20.11.89 जिसके अन्तर्गत विद्यालय के सी0टी0 ग्रेड के सहायक अध्यापक श्री हरिश्चन्द्र पाण्डेय जो दिनांक 1.7.89 से अचानक लापता हो गये हैं, के रिक्त स्थान पर ***श्री शत्रुध्न सिंह, एम0ए0 बी0एड0 की सी0टी0 ग्रेड में दिनांक 12.11.89 से प्रस्तावित तदर्थ अस्थायी नियुक्ति प्रकरण को अस्वीकृत करते हुए मूल रूप में इस निर्देश के साथ वापस किया जाता है कि शासन एवं विभाग द्वारा सी0टी0 ग्रेड के समस्त पदों को मृत Dying Cadre श्रेणी का घोषित कर दिया गया है।*** *फलस्वरूप सी0टी0 ग्रेड में किसी रिक्ति पर नियुक्ति किये जाने का विधानतः कोई औचित्य नहीं उत्पन्न होता है।"*

"With reference your letter No. Nil dated 20.11.1989 proposed resolution dated 12.11.1989, for ad hoc appointment of Shatrughan Singh M.A. B.Ed. in C.T. Grade on the vacancy caused by Assistant Teacher Sri Harish Chand Pandey in C.T. Grade who has all of sudden absented from 01.07.1989, is rejected and is being returned in original with direction that all the posts of C.T. Grade have been declared as "dying cadre" by the Government and the department. Consequently, there does not arise any justification for any appointment legally against any vacancy in C.T. Grade. (English translation by Court) (emphasis added)

13. This order of DIOS was challenged by Sri Shatrughan Singh in Writ Petition No. 22244 of 1990 wherein a conditional interim order was passed on 24.08.1990.

14. DIOS sent another letter dated 27.02.1991 enquiring from Management of College as to how selection and appointment was made in C.T. Grade when it was already declared a dying cadre and why Shatrughan Singh was not allowed to sign attendance register. Thereafter, Ram Piarey filed First Petition. DIOS passed order on 16.07.1991 directing Management to ensure payment of salary to Shatrughan Singh. College informed DIOS vide letter dated 11.03.1991 that Shatrughan Singh has never joined post and instead Ram Piarey was appointed who has joined post and working. DIOS put pressure on Management to allow Shatrughan Singh to join and thereafter passed order on 15.11.1991 making accounts to be operated by single operation. Another order was passed by DIOS on 09.12.1991 directing that Shatrughan Singh shall stand attached with the office of DIOS w.e.f. 02.08.1990. Said order dated 09.12.1991 passed by DIOS reads as under:

"आपके प्रार्थनापत्र दिनांक 10.09.91, 20.09.91 एवं 7.10.91 तथा इस कार्यालय स्तर से निर्गत हुए पूर्व आदेशों व निर्देशों के परिप्रेक्ष्य में यह सूचित किया जाता है कि जनता इण्टर कालेज देवकलां के अधिकारियों को आवश्यक निर्देश के उपरान्त भी कार्यभार ग्रहण नहीं कराया गया। ***फलस्वरूप आपको दिनांक 2.8.90 के पूर्वान्ह से इस कार्यालय से सम्बद्ध किया जाता है।*** *आप कृपया आज की तिथि से अपनी उपस्थिति का योगदान अधोहस्ताक्षरी के कार्यालय में अग्रिम आदेशों तक सुनिश्चित करें। वेतन भुगतान के प्रकरण पर बाद में विचार सम्भव होगा। आदेश का त्वरित सअनुपालन सुनिश्चित करें।"*

"With reference to your applications dated 10.09.91, 20.09.91 & 7.10.91 and orders/directions issued earlier on the level of this office, it is informed that even after there being necessary directions for the officers of the Janta Inter College, Devkalan, joining was not given. Hence, you are attached to this office w.e.f. 2.8.90 (Forenoon). Please ensure your presence from today in the office of the undersigned till further orders. Matter related to the payment of salary shall be considered later. Immediate compliance of the order be ensured."

(English translation by Court)
(emphasis added)

15. During pendency of Second Petition, DIOS passed order on 05.02.2002 granting L.T. Grade to Sri Shatrughan

Singh and he got his Writ Petition No. 22244 of 1990 dismissed as infructuous on 06.07.2004.

16. It appears that subsequently Joint Director of Education, Basti *(hereinafter referred to as "JDE")* made inspection of the office of DIOS on 21.07.2016 and passed an order on 22.07.2016 observing that Shatrughan Singh was found working in the office of DIOS though he was said to have been appointed as Assistant Teacher (C.T. Grade) in the College, hence this arrangement is illegal and DIOS could not have allowed Shatrughan Singh to remain attach with his office and should not have paid salary, instead should have appointed an Authorized Controller in the College, Management was not complying with the order of DIOS. Consequently, notice was issued to Management which was replied by Management vide letter dated 23.06.2016 and 05.08.2016. Management as well as both persons, Shatrughan Singh and Ram Piarey, were then directed by DIOS to appear in his office for oral hearing. Management again submitted representation dated 20.10.2016 alongwith his evidence.

17. Thereupon Shatrughan Singh filed a Writ Petition No. 45383 of 2016 challenging Joint Director of Education's letter dated 22.07.2016. This writ petition was disposed of vide judgment dated 21.09.2016, which reads as under:

"Heard learned counsel for the petitioner and the learned Standing Counsel for the respondents.

The petitioner was posted as an Assistant Teacher in Janta Inter College, Devkali Kala, Sant Kabir Nagar but it appears that the management of the institution was not letting him to work and pay his salary therefore under some order passed by the District Inspector of Schools, Sant Kabir Nagar, he was attached to the office of the District Inspector of Schools, Sant Kabir Nagar and was allowed to work as an office assistant and paid salary under Section 3(3) of the Payment of Salaries Act, 1971. Thereafter, it appears, an inspection was carried out and the continued attachment of the petitioner in the office of the District Inspector of Schools, Sant Kabir Nagar was not found to be justified and, therefore, the Joint Director of Education, Basti Region, Basti called for report from District Inspector of Schools, Sant Kabir Nagar by impugned notice dated 22nd July, 2016 and, in the meantime, attached the petitioner to his own office.

The case of the petitioner is that there is no fault on the part of the petitioner if he had been attached to the office of the District Inspector of Schools, Sant Kabir Nagar but he apprehends that his salary may not be paid on account of the order of attachment.

As, admittedly, report has been called for from the District Inspector of Schools, Sant Kabir Nagar and not from the petitioner, the apprehension of the petitioner is misplaced. It is expected that the Joint Director, Basti Region, Basti would pass appropriate order in accordance with law to ensure that the petitioner is placed at an appropriate place. Accordingly, this writ petition is disposed of giving liberty to the petitioner to file a fresh writ petition if any penal action is taken against him."

18. Thereafter JDE passed order dated 31.01.2017 observing that attachment of Shatrughan Singh in the office of DIOS was not justified and, therefore, Shatrughan Singh should be allowed to join the College

since he was appointed by Management and payment of salary should be made on his working in the College. The Second Petition has been filed by Management challenging this order of JDE.

19. Third Petition has been filed by Shatrughan Singh. I do not find it appropriate to reiterate the facts upto the stage when JDE passed order dated 31.01.2017 which has been challenged by Management in Second Petition and only subsequent events which have led to Third Petition would be relevant. It is stated by Shatrughan Singh-petitioner in Third Petition that he was relieved vide order dated 09.02.2017 passed by JDE with further direction to join College forthwith and Management was directed to allow Shatrughan Singh to join and then take steps for payment of salary. DIOS also passed order dated 13.02.2017 directing Management to ensure joining of Shatrughan Singh in the College. Shatrughan Singh appeared before Management of College on 17.02.2017 but he was refused to join, whereupon Shatrughan Singh filed representation before DIOS on 20.02.2017. DIOS in furtherance sent a report vide letter dated 09.03.2017 to JDE requesting for appropriate order in the matter. JDE sent letter dated 23.03.2017 directing DIOS to take appropriate steps to ensure joining of Shatrughan Singh in College. Thereupon DIOS sought permission to initiate proceedings against Management for single operation of accounts. Show cause notice dated 26.05.2017 was issued by DIOS to Management and thereafter DIOS sent letter dated 06.06.2017 recommending appointment of Authorized Controller in College. JDE vide order dated 03.07.2017 superseded Management and appointed Authorized Controller in exercise of power under Section 6(3) of Act, 1971. Thereafter surreptitiously JDE passed order dated 12.07.2017 recalling his order dated 03.07.2017. Shatrughan Singh has filed Third Petition challenging this order dated 12.07.2017 passed by JDE.

20. After hearing learned counsel for parties, in my view, the issues which need to be considered in this matter are:

(I) Whether their occurred any vacancy whatsoever due to alleged unauthorized absence of Sri Harish Chand Pandey, Assistant Teacher C.T. Grade and if so the nature of vacancy, whether it was a short term vacancy or substantive vacancy and which procedure for ad hoc appointment was to be followed by Management.

(II) Whether it was open to Management to make any ad hoc appointment on the post of Assistant Teacher (C.T. Grade) when C.T. Grade was declared a dying cadre and fresh appointments thereon were banned/ stopped by State Government.

(III) Whether appointment of Shatrughan Singh or as the case may be of Sri Ram Piarey, at all, was made validly by Management so as to entitle any of them or both of them to claim right to hold the post and/or to claim salary from State Exchequer.

21. The above facts clearly show that here is a Management of a College which acted patently illegal since its very inception and thereafter even educational authorities added further illegality by their unmindful actions and by non

communication of appropriate directions or orders well in time.

22. Now coming to first question, it is an admitted case of parties that substantively appointed Assistant Teacher (C.T. Grade), Sri Harish Chand Pandey, suddenly absented himself without prior permission from competent authority, i.e., Management of College. Said absence per se did not result either in termination of service of Sri Harish Chand Pandey nor any order of termination was ever passed by competent authority. Therefore, at the best it can be said that absence of Sri Harish Chand Padey, Assistant Teacher C.T. Grade had resulted in a short term vacancy which could have been filled in by Management following the procedure prescribed under Section 18 of Act, 1982 read with Clause 2 of U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 *(hereinafter referred to as the "Second Order")*. The first question, therefore, is answered by holding that alleged unauthorized absence of Harish Chand Pandey, Assistant Teacher (C.T. Grade) resulted in a short term vacancy and ad hoc appointment could have been made only after following procedure prescribed under Section 18 read with Clause 2 of Second Order.

23. Coming to second question, it is evident from record that by radiogram dated 20.06.1989 appointment on C.T. Grade were banned by State Government. It is also not in dispute that C.T. Grade has been declared a dying cadre vide Government Order No. 3299/15-7/89-11(1361)/89 Shiksha Anubhag-7 dated 11.08.1989. The power of State Government banning appointment of Teachers has been upheld by Supreme Court with reference to Section 9 of Act, 1921 in **Dr. Ramji Dwivedi vs. State of U.P. and others 1983 (3) SCC 52** wherein a radiogram of 07.04.1981 whereby all appointments were stopped, upheld by Supreme Court. Subsequently a Division Bench of this Court in **Durgesh Kumari V. State of U.P. and others 1995(3) UPLBEC 1387** has also recognized and upheld power of State Government of banning appointments of Teachers in recognized aided educational institutions. Therefore, when by radiogram dated 20.06.1989 appointment in C.T. Grade were stopped/ banned by State Government, in my view, Management could not have proceeded to make ad hoc appointment on the post of Assistant Teacher (C.T. Grade) since all appointments are stopped. The second question, therefore, is answered by holding that appointment in C.T. Grade were banned and order of State Government for banning such appointments by issuing radiogram was valid.

24. Now coming to third question, here also I find no hesitation in stating that even ad hoc appointment made by Committee of Management is patently illegal, void ab initio and nullity since entire exercise is in the teeth of statutory provisions, namely Section 18 of Act, 1982 read with Second Order, which has not been followed at all.

25. If ad hoc appointment in a short term vacancy could have been made by Management with reference to Section 18 of Act, 1982, it was incumbent upon it to follow the procedure prescribed in Clause 2 of Second Order. Clause 2 reads as under:

***"2. Procedure for filling up short term vacancies.**--(1) If short term*

vacancy in the post of a teacher, caused by grant of leave to him or on account of his suspension duly approved by the District Inspector of Schools or otherwise, shall be filled by the Management of the institution, by promotion of the permanent senior most teacher of the institution, in the next lower grade. The Management shall immediately inform the District Inspector of Schools of such promotion alongwith the particulars of the teacher so promoted.

(2) Where any vacancy referred to in clause (1) cannot be filled by promotion, due to non-availability of a teacher in the next lower grade in the institution, possessing the prescribed minimum qualifications, it shall be filled by direct recruitment in the manner laid down in clause (3).

(3)(i) The management shall intimate the vacancies to the District Inspector of Schools and shall also immediately notify the same on the notice board of the institution, requiring the candidates to apply to the manager of the institution alongwith the particulars given in Appendix 'B' to this Order. The selection shall be made on the basis of quality point marks specified in the Appendix to the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, issued with Notification No. Ma-4993/XV-7-1 (79)-1981, dated July 31, 1981, hereinafter to be referred to as the First Removal of Difficulties Order, 1981. The compilation of quality point marks shall be done under the personal supervision of the Head of Institution.

(ii) The names and particulars of the candidate selected and also of other candidates and the quality point marks allotted to them shall be forwarded by the manager to the District Inspector of Schools for his prior approval.

(iii) The District Inspector of Schools shall communicate his decision within seven days of the date of receipt of particulars by him failing which the Inspector will be deemed to have given his approval.

(iv) On receipt of the approval of the District Inspector of Schools or, as the case may be, on his failure to communicate his decision within seven days of the receipt of papers by him from the manager, the management shall appoint the selected candidate and an order of appointment shall be issued under the signature of the Manager.

Explanation.--For the purpose of this paragraph--

(i) the expression 'senior most' teacher means the teacher having longest continuous service in the institution in the Lecturer's grade or the Trained graduate (L.T.) grade, or Trained undergraduate (C.T.) grade or J.T.C. or B.T.C. grade, as the case may be;

(ii) in relation to institutions imparting instructions to women, the expression 'District Inspector of Schools' shall mean the 'Regional Inspectress of Girls Schools';

(iii) 'short term vacancy' means a vacancy which is not substantive and is of a limited duration."

26. Apparently aforesaid procedure has not been followed and, therefore, whether it is the ad hoc appointment of Shatrughan Singh or that of Ram Piarey, both are nullity in the eyes of law and non of them can be said to have been validly appointed at all, therefore, have no right either to hold post or to claim salary from State Exchequer.

27. The effect of non compliance of any part of Removal of Difficulties Order

has been considered by the Apex Court in **Prabhat Kumar Sharma & others Vs. State of U.P. & others, A.I.R. 1996 SC 2638** wherein it has been held that the procedure for ad hoc appointment under the Removal of Difficulties Order is mandatory and if the said procedure is not observed strictly, the appointment, if any, shall be void ab initio and would not confer any right upon the incumbent either to hold the post or to claim salary. This decision was reiterated and followed by the Apex Court recently in **Shesh Mani Shukla Vs. D.I.O.S., Deoria & others, J.T. 2009 (10) S.C. 309**. A Five Judges Bench of this Court very recently has also taken similar view in **Jahaj Pal vs. District Inspector of Schools and others, 2019(3) ADJ 424.**

28. Recently Supreme Court in Union of India and another vs. Raghuwar Pal Singh, 2018(15) SCC 463 said that an appointment which has not been made in accordance with procedure prescribed, is a nullity and for cancelling such appointment even principle of natural justice are not applicable.

29. This Court finds it strange that DIOS concerned at no point of time even made any attempt to analyze the statutory provisions as also the action taken by Management so as to make the things clear and to give a clear direction to the parties. On the contrary he (DIOS) also acted in such a disarranged manner that benefit was given to one or other party in a most illegal manner. It shows some kind of collusion also on the part of Management vis-a-vis Ram Piarey and educational authority i.e., DIOS vis-a-vis Shatrughan Singh. In my view, neither appointment of Shatrughan Singh nor that of Ram Piarey was made legally so as to entitle them for any benefit whatsoever and all otherwise orders passed by educational authorities are nullity in the eyes of law.

30. In the circumstances, I have no hesitation in dismissing First and Third Petitions, i.e., Writ Petitions No. 16680 of 1991 and 34882 of 2017.

31. Since Shatrughan Singh has been paid salary in a most illegal and arbitrary manner, inasmuch as there is no provision under which DIOS could have attached a Teacher of a Secondary Education Institution in his office and pay salary, therefore, the aforesaid salary paid to Shatrughan Singh is wholly illegal. I am clearly of the view that aforesaid salary which has been paid from State Exchequer must be recovered from concerned erring parties for which I hold Committee of Management, concerned DIOS as also Shatrughan Singh, individually as also jointly responsible. Let entire amount of salary which has been paid to Shatrughan Singh, illegally, be recovered from all three, namely, Committee of Management, concerned DIOS as also Shatrughan Singh, in equal proportion, and for this purpose Principal Secretary, Secondary Education, U.P. Government shall take appropriate steps forthwith and ensure recovery as directed above within six months. He shall also file a compliance report to this Court immediately after six months.

32. So far as Committee of Management's writ petition is concerned, here also it is evident that Management had also acted in a most erratic and illegal manner at every stage. However, in view of the fact of dismissal of First and Third Petition holding appointments of Shatrughan Singh and Ram Piarey, both as illegal, there is no occasion now to allow Shatrughan Singh to join College and in

fact the Second Petition, i.e., Writ Petition No. 11177 of 2017 stands infructuous and is dismissed accordingly.

(2020)03-05ILR A1001
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2020

BEFORE

THE HON'BLE ANIL KUMAR, J.

Writ-A No. 17620 of 2008

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

Counsel for the Petitioners:
Sri P.K. Upadhyay, Sri Ratnesh Kumar Pandey

Counsel for the Respondents:
C.S.C., Sri Ravi Shankar Prasad

Constitution of India- Article 226 - administrative action suffering from illegality, irrationality and procedural impropriety are subject to judicial review

Writ Petition rejected.(E-10)

List of cases cited:

1. Council of Civil Service Unions (CCSU) Vs. Minister for the Civil Service [1984] 3 All ER 935

2. Mohd. Yunus Vs. Mohd. Mustaqim & ors. AIR 1984 SC 38

3. Indian Overseas Bank Vs. Indian Overseas Staff Canteen Workers' Union (2000) 4 SCC 245

4. U.O.I. Vs. Rajendra Prabhu (2001) 4 SCC 472

5. Tata Cellular Vs. U.O.I. (1994) 6 SCC 651

6. Heinz India Private Ltd. & anr. Vs. St. of U.P. & ors. (2012) 5 Supreme Court Cases 443

7. Reid Vs. Secy. Of St. for Scotland (1999) 1 ALL ER 481 (HL)

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

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

2. By means of present writ petition, petitioners have prayed for quashing of the impugned order dated 26.12.2007 passed by respondent no.3/Director of Education (Basic), U.P. at Allahabad.

3. Facts, in brief, of the present case are that in the city of Fatehpur, there is an Institution known as Thawaishwar Purva Madhyamik Vidyalaya, Thawai, Fatehpur (in short 'Institution') is a recognized Basic Junior High School from the State of U.P under U.P. Basic Education Act, 1972.

4. As per the case of the petitioners, on 12.02.1989 three vacancies for the post of Peon was advertised in the Local Newspaper (Dainik Varta) of District Fatehpur by the Principal/ Manager of the Institution. In pursuance of said advertisement, petitioners were appointed by order dated 01.07.1989 issued by the Manager of the Institution, as contained in annexure no.3 to the writ petition.

5. Learned counsel for the petitioner submits that since the date of their joining, the petitioners were performing their duties regularly on the post of Peon. When the Institution has been brought under grant-in-aid list on 01.12.2006, the petitioners were under the impression that their names were sent by the Manager of the Institution to the respondent no.4. It came to the knowledge

of the petitioners that their names are not in the grant-in- aid list, they submitted their representations to the competent authority. When the representations of the petitioners were not dicided of by competent authority, they approached this Court by filing Writ Petition No.46761 of 2007 (Ram Dinesh Singh and another Vs. State of U.P. and others) which was disposed of by means of order dated 25.09.2007, the same on reproduction reads as under:-

"Heard learned counsel for the petitioner as well as learned Standing Counsel and Sri Suresh Singh, learned counsel appearing for the respondents.

Petitioners allege to have been appointed as Peon in a Junior High School in the year 1989. It is further stated that at the time the petitioners were appointed, the institution was recognized as a Junior High School by the Basic Shiksha Parishad, U.P., at Allahabad. It is claimed that they have been continuously working in the institution.

A news item has been published whereby the State Government has taken a decision to bring large number of recognized Junior High Schools within the grant-in-aid list. Because of such application, the Management of the institution with an ulterior motive to engage its own men, has started to modify/alter the managers' return, inasmuch as teacher whose names find mention in the managers' return would become entitled for payment of salary under grant-in-aid list by the State Government.

At this stage of the proceedings, the petitioner have approached this Court for a writ of mandamus commanding the respondents not to alter/modify the managers' return as well as not to interfere in the function of the petitioner as Peon.

Large number of writ petitions for practically the same relief and with same allegations, are being filed before this Court every day. It is desirable that the State Government/ Director of Education (Basic) U.P. Lucknow, may, therefore, issue necessary directions for ensuring;

(a) That teachers, who have been validly appointed in recognized Junior High Schools are not adversely affected because of deliberate arbitrary actions of the Management of the Institution, as which are to be taken in the grant-in-aid list of the State Government.

(b) The right of the teachers, who are validly appointed since prior to the date institution is taken on the grant-in-aid list against sanctioned post is to be protected in accordance with law. For the said purpose, it is necessary that the authority competent to sanction salary bills for payment of salary to such teachers, amongst others must enquire as to whether the appointment of the teachers/head masters concerned has been made in strict compliance of the U.P. Recognized Basic School (Junior High School) (Recruitment) and Conditions of Service of Teachers) Rules, 1978 or not, inasmuch as once the institution is granted recognition as Junior High School under the U.P. Basic Education Act. The aforesaid prevision became applicable to the institution. The authority must record specific findings individualy in respect of such teachers, who are entitled for payment of salary through the public exchequer.

Let the Director of Education, (Basic) U.P. Lucknow take appropriate action as aforesaid, with intimation to the Basic Shiksha Parishad, preferably within

six weeks from the date a certified copy of this order is filed before him.

With the aforesaid observations/directions, this writ petition is finally disposed of."

6. It is submitted by learned counsel for the petitioners that in pursuance of the aforesaid order, opposite party no.3/ Director of Education (Basic) U.P. at Lucknow has passed the impugned order dated 26.12.2007.

7. Accordingly, a query has been put to learned counsel for the petitioner to show in the writ petition on the basis of pleading whether the appointment of the petitioners was made as per rules or not.

8. Learned counsel for the petitioner has failed to show any averment by way of pleading in the writ petition that their initial appointment on the post of Peon in the Institution by the Manager were as per the Rules which governs the field.

9. Thus taking into consideration the said facts as well as reasoning given in the impugned order dated 26.12.2007 passed by opposite party no.3/ Director of Education (Basic) U.P. Lucknow while rejecting the claim of the petitioners that their names were not mentioned in the attendance register and the photocopy of the attendance register which has been given by the petitioner no.1 available in the institution/ college and their appointment orders were also not available in the record of the institution/ college and on the basis of the same, it is clearly established that the petitioners are not working in the institution/ college, accordingly the representation of the petitioners have been rejected . So no interference is needed in the matter in question while exercising the power of judicial review under Article 226 of the Constitution of India as in the case of *Council of Civil Service Unions (CCSU) v. Minister for the Civil Service [1984] 3 All ER 935*, the scope of judicial review has been held by Lord Diplock is stated as under:-

"Judicial Review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer or else there would be something badly wrong with our judicial system…

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness

towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

10. Hon'ble the Apex Court in the case of **Mohd. Yunus v. Mohd. Mustaqim and Ors., AIR 1984 SC 38** Hon'ble the Apex Court held that there is a very limited scope under Article 226 of the Constitution and even the errors of law cannot be corrected in exercise of power of judicial review under Article 226 of the Constitution. The power can be used sparingly when it comes to the conclusion that the Authority/ Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction. The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principles of law or where order of the Tribunal, etc. has resulted in grave injustice.

11. Hon'ble the Supreme Court in the case of **Indian Overseas Bank v. Indian Overseas Bank Staff Canteen Workers' Union (2000) 4 SCC 245**, observed that it is impermissible for the Writ Court to re-appreciate evidence liberally and drawing conclusions on its own on pure questions of fact for the reason that it is not exercising appellate jurisdiction over the awards passed by Tribunal. The findings of fact recorded by the fact finding authority duly constituted for the purpose ordinarily should be considered to have become final. The same cannot be disturbed for the mere reason of having based on materials or evidence not sufficient or credible in the opinion of Writ Court to warrant those findings. At any rate, as long as they are based upon some material which are relevant for the purpose no interference is called for. Even on the ground that there is yet another view which can reasonably and possibly be taken the High Court can not interfere.

12. And in the case of **Union of India v. Rajendra Prabhu, (2001) 4 SCC 472**, it has been held that the High Court in exercise of its extraordinary powers under Article 226 of the Constitution, cannot re-appreciate the evidence nor it can substitute its subjective opinion in place of the findings of Authorities below.

13. Hon'ble the Apex Court has held in the case of **Tata Cellular v. Union of India (1994) 6 SCC 651**, this Court identified the grounds of judicial review of administrative action in the following words :

"The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to

act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(I) Illegality : This means the decision-maker must understand correctly the law that regulates his decision- making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety."

14. Ho'ble the Supreme Court in the case of **Heinz India Private Ltd. And another vs. State of U.P. and Ors. (2012) 5 Supreme Court Cases 443** after placing the reliance on the judgment of **Reid Vs. Secy. Of State for Scotland (1999) 1 ALL ER 481 (HL)** held that Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence.

15. For the foregoing reasons, the writ petition lacks merit and is dismissed.

16. No order as to costs.

(2020)03-05ILR A1005
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2020

BEFORE

THE HON'BLE SURYA PARAKASH KESARWANI, J.

Writ A No. 25974 of 2018

Hari Shanker Sahu & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shantanu Khare, Sri Ashok Khare

Counsel for the Respondent:
C.S.C., Sri Anil Kumar Singh, Sri Satyaveer Singh

A. Civil Law-Education - U.P. Intermediate Education Act, 1921- Chapter II, Appendix "A" – Interpretation - Casus Omisus – A Judge must not alter the material of which the Act is woven, but he can and should *iron out the creases. (Para 12, 16)*

It is not allowable to read words in a statute which are not there, but where alternative lies between either supplying by implication words which appear to have been accidently omitted, or adopting a construction which deprives

certain existing words of all meaning, it is permissible to supply the words. (Para 14)
The controversy in the present case is regarding the qualifications given under Clauses (a) and (b) of the respective statute; whether both need to be possessed by the candidate or possessing one of them would make the candidate eligible for appointment as teacher (Silai subject) for High School. (Para 5)

The Court held that the word "or" between Clause (a) and Clause (b) has been somehow missed. It is apparent drafting error or accidental omission. If the word "and" is read between these two clauses, then the qualifications mentioned in these two clauses would not only lead to irreconcilable conflict but would also result in absurdity and manifest contradiction and shall defeat the apparent purpose of the enactment for recruitment on the post of teacher. (Para 17, 18)

Writ Petition allowed. (E-4)

Precedent followed:

1. Reema Aggrawal Vs. Anupam, (2004) 3 SCC 199 (Para 12)

2. Padma Sundara Rao Vs. St. of T.N., (2002) 3 SCC 533 (Para 13)

3. Surjit Singh Karla Vs. U.O.I., (1991) 2 SCC 87 (Para 14)

4. Gujrat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd., (2008) 4 SCC 755 (Para 15)

5. Hameedia Hardware Stores Vs. B. Mohan Lal Sowear, (1988) 2 SCC 513 (Para 16)

Present petition is against decision dated 31.10.2018, passed by U.P. Secondary Education Service Selection Board, Allahabad.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Abhishek Sekhar Ojha and Sri Seemant Singh learned counsels for the petitioners, Sri A.K.S. Parihar and Sri Mritunjay Tiwari, learned standing counsel for the State-respondent Nos.1 and 2 and Sri Anil Singh learned counsel for respondent no.3 - U.P. Secondary Education Service Selection Board, Allahabad.

2. Briefly stated facts of the present case are that pursuant to Advertisement No.1/2013 inviting applications for recruitment of Trained Graduate Teachers in the subject *"Silai"*. The petitioners and others submitted applications. They appeared in written examination and interview. According to the U.P. Secondary Education Service Selection Board, Allahabad (hereinafter referred to as the "Selection Board") all the petitioners do not possess qualification as provided in Appendix "A" in Chapter II of the U.P. Intermediate Education Act, 1921. For the aforesaid reasons the selection board found that none of the petitioners may be recommended for appointment on the post of Teacher *(Silai)*. Accordingly order to this effect was passed on 31.10.2018 which is reproduced below:-

"उ0प्र0 माध्यमिक शिक्षा सेवा चयन बोर्ड, इलाहाबाद।

विज्ञप्ति

पत्रांक– 1410/004/(2018) चयन /2018–19 दिनांक 31.10.2018

विज्ञापन संख्या–1/2013 के माध्यम से विज्ञापित प्रशिक्षित स्नातक सिलाई विषय के पदों के प्रति अन्तिम चयन परिणाम तैयार करते समय अभ्यर्थियों की शैक्षिक योग्यता/प्रशिक्षण की जॉच में यह पाया गया कि किसी भी अभ्यर्थी के पास इण्टरमीडिएट शिक्षा अधिनियम 1921 के अध्याय –02 के परिशिष्ट ''क'' में उल्लिखित सिलाई विषय हेतु अनिवार्य शैक्षिक/प्रशिक्षण योग्यता धारित नहीं की गयी है।

उक्त के सम्बन्ध में चयन बोर्ड ने अपने बैठक दिनांक 26.10.2018 में यह निर्णय लिया कि

चूँकि कोई भी अभ्यर्थी निर्धारित अर्हता धारित नहीं करते है अतएव इस विषय के संदर्भ में किसी अभ्यर्थी की संस्तुति करना नियमानुकूल नहीं होगा। अतः विज्ञापन संख्या–1/2013 के सिलाई विषय के चयन का निरस्त किये जाने का निर्णय लिया गया है।

सचिव
उ0 प्र0 माध्यमिक शिक्षा सेवा चयन बोर्ड
इलाहाबाद

पृ0सं0:–
/004/(2018)/चयन/2018–19 तद्दिनांक
प्रतिलिपि– निम्नलिखित अनुभागों को सुचनार्थ।
1. अधियाचन अनुभाग/वाद अनुभाग।
2.गार्ड पत्रावली

सचिव
उ0 प्र0 माध्यमिक शिक्षा सेवा चयन बोर्ड
इलाहाबाद^^

3. Aggrieved with the aforesaid decision of the Selection Board, dated 31.10.2018 the petitioners have filed the present writ petition.

4. The educational qualification for the post of Trained Graduate Teacher *(Silai)* is provided in Appendix "A" at Serial No.44 under Chapter II of the Act, 1921 (Hindi version and English version both) which is reproduced below :-

Hindi version

''44. सिलाई अध्यापक इन्टरमीडिएट (क) सिलाई के साथ इण्टरमीडिएट सी0टी0 **(कक्षा 11–12)के लिए** (ख) इण्टरमीडिएट तथा सलाई में (1) प्रेम महाविघालय, वृदावन से डिप्लोमा विशेष अथवा योग्यता (2)आर्य समाज टेलरिंग इन्स्टीट्यूट, लखनऊ से डिप्लोमा तथा हाईस्कूल कक्षाओं में विषय के 3 वर्ष के अध्यापन का अनुभव, अथवा (3) सरकार से मान्यता प्राप्त किसी भी संस्था से दो वर्ष के पाठ्यक्रम के पश्चात दिया जाने वाला

सिलाई का डिप्लोमा।

हाईस्कूल(कक्षा 9–10) (क) (1) इन्टरमीडिएट सी0टी0 (इन्टरमीडिएट में सिलाई के लिए रहित अथवा सी0टी0 में सिलाई में विशेष योग्यता)
(ख) हाईस्कूल तथा
(1) प्रेम महाविद्यालय, वृदावन से डिप्लोमा
अथवा
(2) आर्य समाज टेलरिंग इन्स्टीट्यूट,आर्य समाज रोड, लखनऊ से डिप्लोमा।
अथवा
(3) सरकार से मान्यता प्राप्त किसी भी संख्या से दो वर्ष के पाठ्यक्रम के पश्चात दिया जाने वाला

सिलाई का डिप्लोमा

टिप्पणी– (ख) के अन्तर्गत योग्यतायें रखने वाले अध्यापकों का स्थायी नियुक्ति से पूर्व शिक्षा निदेशक द्वारा संचालित अथवा स्वीकृत अध्यापन विज्ञान सम्बन्धी प्रशिक्षण सामान्यतः पूर्ण करना चाहिए। सुपात्रों को इस अध्यापन विज्ञान सम्बन्धी प्रशिक्षण से छूट दी जा सकती है।''

English version

44.Tailoring teacher for intermediate (a) Intermediate with tailoring C.T., specialisation (class 11-12) in tailoring (b) Intermediate and (1) Diploma from Prem Vidyalaya, Vrindavan or (2) Diploma from Arya Samaj

	Tailoring Institute, Lucknow, and 3 years teaching experience of the subject in High School Classes.
	Or
	(3) Tailoring Diploma awarded by any Govt. recognised institution after two years course.
For High School C.T.(Intermediate with tailoring **(class9-10)**	(a)(1) Intermediate or specialisation in tailoring in C.T.)
	(b) High School and
	(1) Diploma from Prem Mahavidyalay, Vrindavan
	or
	(2) Diploma from Arya Samaj Tailoring Institute Arya Samaj Road, Lucknow
	or
	(3) Diploma of Tailoring awarded by any Govt.recognised institution awarded after two years course.

Note- Teacher possessing qualification under clause (b) should normally complete training relating to pedagogical science run or approved by Director of Education Suitable candidates can be exempted form training relating to pedagogical science."

5. All the petitioners have applied for Teacher in *Silai* subject for High School (Class 9 -10). The sole controversy involved in the present writ petitions is :-

"Whether for appointment as teacher (Silai subject) for High School (Class 9 - 10), a candidate should possess qualification as provide in the aforequoted Clause (a) OR Clause (b) OR both ?"

Submissions

6. Learned counsels for the petitioners submit that the qualification as provided in Clause (a) is Intermediate C.T. (Intermediate with tailoring or specialisation in tailoring in C.T.). The qualification provided in Clause (b) is High School and diploma from certain institute in *Silai*. The qualification provided in Clause (a) is higher qualification. Those who are merely High School have also been made eligible in Clause (b) provided they have diploma in *Silai*. Therefore, a candidate is required to possess qualification either in Clause (a) or in Clause (b).

7. Sri Khare has specifically referred to paragraph 23 of the writ petition and submits that in earlier selection the candidate possessing Intermediate Certificate with tailoring craft have been granted appointment pursuant to Advertisement issued by the selection board in the year 2003 and 2006 which has not been disputed by the selection board in its counter affidavit.

8. Learned counsels for the selection board and the learned standing counsel jointly submit that the qualifications as provide in Clause (a) and in Clause (b) both are to be possessed by a candidate so as to be eligible for the post of Teacher in *Silai* subject for teaching in High School (Class 9 -10).

Discussion and Findings

9. I have carefully considered the submissions of learned counsels for the parties.

10. The qualification provided in Clause (a) is Intermediate C.T. (Intermediate with tailoring or specialisation in tailoring in C.T.) which is admittedly possessed by all the petitioners. The persons having passed Intermediate must have passed High School. The qualification provided in

Clause (b) is High School which does not specify any subject or specialisation. Therefore, for those persons who are High School, an additional qualification for diploma in *Silai* from specified institute has been provided so as to make them eligible to apply for the post. Thus, qualification mentioned in clause (b) is in alternative to the qualification mentioned in clause (a). The note appended to the item no.44 is merely with respect to the persons falling under Clause (b). It has nothing to do with Clause (a). Thus, a candidate so as to be eligible for the post in question must possess the qualification as provided in Clause (a) or in Clause (b) of item no.44 of Appendix "A" in Chapter II of the U.P. Intermediate Education Act, 1921. But word "or" is missing between clauses (a) and (b).

Casus Omissus

11. Casus Omisus is a matter which should have been, but has not been provided for in a statute, can not be supplied by courts subject to few exceptions, as to do so will be legislation and not construction. Casus Omisus can not be supplied by the courts except in case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time Casus Omisus should not be readily inferred.

12. In **Reema Aggrawal vs Anupam (2004) 3 SCC 199 (para25)** Hon'ble Supreme Court observed as under:-

*"25. **In Seaford Court Estates Ltd. v. Asher (1949) 2 All ER 155 (CA), Lord Denning** advised a purposive approach to the interpretation of a word used in a statute and observed:(All ER p.164 E-H)*

*"The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, **when a defect appears, a Judge cannot simply fold his hands and blame the draftsman.** He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.....**A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in this texture of it, they would have straightened it out? He must then do so as they would have doe. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."***

(Emphasis supplied)

13. In Padma Sundara Rao Vs State of Tamil Nadu (2002) 3 SCC 533 (Para 15) Hon'ble Supreme Court considered the principles of construction and held as under:-

*"15.Two principles of construction - **one** relating to casus omissus and **the other** in regard to reading the statute as a whole - appear to be well settled. **Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself** but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J., in Artemiou v. Procopiou (1966 1 QB 878), (at All ER pp.544 -I), "is not to be imputed to a statute if there is some other construction available". **Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction.** [Per Lord Reid in Luke v. I.R.C. (1963 AC 557) where at AC p. 577 he also observed: (at All ER p.664 -I) "This is not a new problem, though our standard of drafting is such that it rarely emerges".]*

(Emphasis supplied)

14. **Thus, it is not allowable to read words in a statute which are not there, but where alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words.** Referring to Craies Statute Law (7th edition page 109) Hon'ble Supreme Court so observed in **Surjit Singh Karla Vs. Union of India (1991) 2 SCC 87 (Para19) :-**

"19. True it is not permissible to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meanings, it is permissible to supply the words"(Craies Statute Law, 7th Edition, P. 109). Similar are observations in Hameedia Hardware Stores V. B. Mohan Lal Sowcar, [1988] 2 SCC 513 at 524-25 where it was observed that the court construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and, the object of the statute in which the said provision is enacted, the court should construe it in a harmonious way to make it meaningful. An attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. [See: Sirajul Haq Khan v. Sunni Central Board of Waqf,(1959) SCR 1287,1299].

15. In **Gujrat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd (2008) 4 SCC 755 (paras 53-56)** Hon'ble Supreme Court referred to Maxwell and observed as under:-

"53. In the chapter on `Exceptional Construction' in his book on `Interpretation of Statutes' Maxwell writes :

"WHERE the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the ***sentence.*** *This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what the words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning."*

54. Thus, Surjit Singh Kalra vs. Union of India (1991)2 SCC 87, this Court has observed that ***sometimes courts can supply words which have been accidentally omitted.***

55. In G.P. Singh's `Principles of Statutory Interpretation' 9th Edn., 2004 at pp. 71-74 several decisions of this Court and foreign Courts have been referred to where the Court has added words to a statute (though cautioning that normally this should not be done).

*56.****Hence we have to add the aforementioned words at the end of Section 175*** *otherwise there will be an irreconciliable conflict between Section 174 and Section 175.*

(Emphasis supplied)

16. In **Hameedia Hardware Stores Vs. B. Mohan Lal Sowear(1988) 2 SCC 513 (Para 11,12)** Hon'ble Supreme Court observed as under:-

"11. In Seaford Court Estates Ltd. v. Asher, (1949) 2 All ER 155, 164. Lord Denning L.J. said:

"When a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament ..... and then he must supplement the written word so as to give 'force and life' to the intention of the legislature ..... A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they should have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven but he can and should iron out the creases."

12. This rule of construction is quoted with approval by this Court in M. Pentiah v. Muddala Veeramallappa, (1961) 2 SCR 295, 314 and it is also referred to by Beg, C.J. in Bangalore Water-Supply & Sewerage Board, etc. v. R. Rajappa (1978) 3 SCR 207. In the present case by insisting on the proof of the bona fides of the requirement of the landlord, the Court is not doing any violence to the statute nor embarking upon any legislative action. The Court is only construing the words of the statute in a reasonable way having regard to the context."

Conclusion

17. It appears that the word "or" between Clause (a) and Clause (b) has been some how missed. It is an apparent drafting error or accidental omission of the word "or". In various other entries preceding the item No.44, the word "OR" between Clause (a) and (b) has been used. For example, item Nos.37, 38, 39 and 41 providing for essential qualification for High School teacher in subjects - (37) spinning and

weaving teacher, (38) wood craft teacher, (39) Book Craft teacher and (41) Metal Craft teacher, the word "OR" has been used between the qualification provided in Clauses (a) and (b). As discussed in para 10 above, a candidate to be eligible for the post of Trained Graduate Teacher (*Silai*) must posses the minimum qualification as provided in Clause (a) or Clause (b) of item No.44. If the word "and" is read between these two Clauses, then the qualifications mentioned in these two Clauses would not only lead to irreconcilable conflict but would also result in absurdity and manifest contradiction and shall defeat the apparent purpose of the enactment for recruitment on the post of teacher. Since between Clauses (a) and (b) of item No.44, the word "OR" does not exist, therefore, there is clear necessity to supply casus omissus to iron out creases so as to give force and life to the intention of the legislature to entries (a) and (b) of item No.44.

18. **Thus, the question framed above is answered that a candidate who posses either the qualification provided in Clause (a) or the qualification provided in Clause (b) of item No.44 in Appendix "A" under Chapter II of the U.P. Intermediate Education Act, 1921 shall be eligible for the post of Trained Graduate Teacher in *Silai* subject for High School (Class 9 -10).**

19. For all the reasons aforestated, the impugned orders passed by the Secretary U.P. Secondary Education Selection Board, Allahabad, dated 31.10.2018 are hereby quashed. The aforesaid selection board is directed to declare the results within a month and proceed further in accordance with law.

20. All the Writ Petitions are **allowed** to the extent indicated above.

21. It is made clear that if any of the petitioners do not possess requisite qualification as provided either in Clause (a) or in Clause (b) of item No. 44, Appendix 'A' under Chapter II of the U.P. Intermediate Education Act, 1921, then they shall not be considered for appointment.

(2020)03-05ILR A1012
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Writ-A No. 46483 of 2016

Annu ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jyotir Bhushan Singh

Counsel for the Respondents:
C.S.C.

(A) Appointment - denial of appointment of petitioner on the post of daily wager sweeper as per the Circular dated 01.11.1999 is against the principles of natural justice and is violation of Article 14, 16 and 21 of the Indian Constitution - reasonable opportunity of hearing must be given

Writ Petition disposed of. (E-10)

(Delivered by Hon'ble Shamim Ahmad, J.)

1. This writ petition under Article 226 of the Constitution of India has been filed by the petitioner with the following prayer:-

(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 16.07.2016 and order dated 20.11.2015 passed by the respondent no.3 in rejecting the claim of the daily wager sweeper of the petitioner.

(ii) Issue a writ order or direction in the nature of mandamus directing the respondent authorities to treat the petitioner as daily wager sweeper from part time sweeper in pursuance of the circular dated 01.11.1999 made by the Chief Engineer, U.P. P.W.D., Lucknow in the department and to give all the benefits to the petitioner since the date on which Junior has been benefited in the department.

(iii) Issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper under the facts and circumstances existing in the present case.

(iv) Award the cost of this writ petition in favour of the petitioner throughout.

2. Learned counsel for the petitioner argued that the petitioner was appointed and performing his duties as part-time sweeper in the department since 10.07.1998 and has been allowed to work time to time in Government residential colony of the department, in this regard experience certificate dated 30.08.2007 was issued by the Assistant Engineer, Nirman Khand-1, P.W.D., Banda.

3. Learned counsel for the petitioner further argued that the Engineer-in-Chief U.P. Lok Nirman Vibhag, Lucknow issued a circular on 01.11.1999 to ensure for making appointment of part-time sweeper and other Class-IV employees on the post of Daily Wager Employee for the purpose of regularization in the Public Works Department, copy of the circular dated 01.11.1999 is annexed as Annexure No.1 to the writ petition. After the above circular, the petitioner moved an application on 04.01.2002 before the respondent no.3-Executive Engineer, Nirman Khand-1, P.W.D. Banda for getting appointment on the post of Daily Wager Employee in the department and on the application of the petitioner the Superintending Engineer, Banda Circle, P.W.D. Banda wrote a letter dated 06.05.2002 to the Engineer-in-Chief, Viyav "ga" Verg, P.W.D., Lucknow with the request grant of permission to appoint the petitioner on daily wager in the department but no action was taken by the respondents for appointing the petitioner on daily wager basis.

4. Learned counsel for the petitioner further argued that the junior part-time sweeper to the petitioner namely Suresh Kumar working in the Public Works Department, Banda filed a Writ Petition No.47604 of 2012 before this Court to treat him as daily wager in spite of part-time sweeper as per Circular dated 01.11.1999 and this Hon'ble Court vide judgment and order dated 27.11.2012 disposed of the writ petition with the direction to decide the case of the petitioner-Suresh Kumar and in pursuance of the order dated 27.11.2012 the respondent no.3 by an order dated 12.03.2013 appointed the Suresh Kumar as daily wager employee and was being paid the benefit of payment of daily wager employee in the department.

5. Learned counsel for the petitioner further argued that since the petitioner has been working on the post of sweeper since long time as part-time and several post of sweeper were falling lying vacant. The petitioner was also entitled for regular post in the department and since the petitioner

has been engaged as part-time sweeper and is entitled to be treated as daily wager employee in the department as per Circular dated 01.11.1999 but he was deprived of his rights and whereas juniors have been given the benefit. Respondent did not consider the claim of the petitioner for treating him as daily wager sweeper, therefore, the petitioner approached this Hon'ble Court and filed Writ Petition No.41417 of 2015 with the request that he may be treated as daily wager sweeper in spite of part-time sweeper as per Circular dated 01.11.1999 and this Hon'ble Court vide order dated 24.09.2015 finally disposed of the writ petition. Relevant portion of the judgment and order dated 24.09.2015 is reproduced hereinbelow:-

"Learned Counsel for the petitioner has drawn the attention of the Court to a communication which has been issued by the Chief Engineer, Public Works Department, U.P., Lucknow dated 1st November, 1999 wherein it is mentioned that the practice of engaging part-time sweeper is highly objectionable as these employees are denied the benefit of regularization on the ground that they are working as part-time. The direction has been issued to discontinue such practice.

It is contended by the learned Counsel for the petitioner that in spite of the said clear direction of the Chief Engineer, the petitioner is being engaged as a part-time sweeper.

From the record it appears that the petitioner, for redressal of his grievance, has made a representation dated 6th July 2015 which is on the record as annexure-12 to the writ petition.

Having regard to the facts and circumstances of the case, I am of the view that the ends of justice would be subserved by issuing a direction upon the third respondent to consider the cause of the petitioner and pass appropriate order in accordance with law expeditiously, preferably within three months from the date of communication of this order.

The writ petition is, accordingly, disposed of. There shall be no order as to costs."

6. Learned counsel for the petitioner further submits that the copy of the order dated 24.09.2015 was served by the petitioner before the respondent no.3 with a representation dated 05.10.2015 but the respondent no.3 was not passing any order in compliance of the direction issued by this Court, therefore, the petitioner filed a Contempt Petition No.1342 of 2016 before this Hon'ble Court, in which notices were issued against the respondent no.3 with a direction to comply with the order of writ court.

7. Learned counsel for the petitioner further submits that after getting the contempt notice issued by this Hon'ble Court, the respondent no.3 passed the order dated 16.07.2016 which is impugned in the present writ petition and the claim of the petitioner was rejected on irreverent ground.

8. Learned Standing Counsel oppose the argument raised by the learned counsel for the petitioner and submitted that the impugned order dated 16.07.2016 is rightly passed and no interference is required by this Hon'ble Court and the petitioner is not entitled for any relief.

9. In the rejoinder affidavit learned counsel for the petitioner denied the averments made in the counter affidavit.

10. Heard learned counsel for the petitioner, learned Standing Counsel for the respondents and perused the record.

11. From the perusal of the impugned order dated 16.07.2016, which is filed as Annexure No.19 to the writ petition, the ground taken by the respondents while rejecting the claim of the petitioner is that

the petitioner was not employed as part-time sweeper in the department but he has been performed the work of sweeper as per requirement from time to time by the Junior Engineer and he was paid cash payment by the department. It was further mentioned in the impugned order that there is a ban on 01.07.1992 by the Engineer-in-Chief against the appointment of the muster role employee in the department and it is further stated that Government Order dated 29.06.1991, 17.07.1991 and 02.09.1992 imposes ban for the appointment of daily wager employee in the department and it was further stated that the full time sweeper is not required in the department, as such, the petitioner is not entitled for being appointed on the post of daily wager sweeper.

12. From the perusal of the impugned order dated 16.07.2016 it is crystal clear that the respondent no.3 did not consider the direction of Circular dated 01.11.1999 issued by the Chief Engineer, Public Works Department U.P. Lucknow, wherein a clear cut direction was issued that the practice of engaging part-time sweeper is highly objectionable as these employees are denied the benefit of regularization on the ground that they are working as part-time. The direction has been issued to discontinue such practice. The respondent no.3 without considering the pith and substance of the Circular dated 01.11.1999 passed the impugned order and reliance has been placed in the Government Order dated 01.07.1992 mentioning therein that there is a ban for engaging a muster role employees whereas the case of the petitioner is not for engaging him as muster role employee. The respondent no.3 further referred the G.O. dated 29.06.1991, 17.07.1991 and 02.09.1992 by which he has mentioned that as per above G.O. there is a ban for the appointment of daily wager employee in the department, whereas these G.O. have no relevance regarding the appointment of the petitioner and petitioner is claiming on the basis of Circular dated 01.11.2019 for being considered as daily wager employee in the department, the respondent cannot apply these G.O., retrospectively, in the case of the petitioner.

13. It appears that the respondent no. 3 without application of mind and without considering the direction issued in the Circular dated 01.11.1999 of the Chief Engineer, P.W.D. U.P. Lucknow passed the impugned order dated 16.07.2016. While passing the impugned order, the respondent no.3 has not considered this fact that the petitioner was engaged as part-time sweeper since long and the Assistant Engineer has already issued an experience certificate which means that the petitioner was engaged on regular basis and not on the basis of cash payment as per the requirement of the department and he rendered his services in the department since 10.07.1998 and the authorities have recommended the case of the petitioner for considering his case for regularization on daily wager sweeper. This aspect was at all not considered and dealt with the respondent no.3 while passing the impugned order.

14. It is also not out of place to mention that the respondent no. 3 while passing the impugned order had at all not considered this aspect that the juniors to the petitioner were appointed as daily wager sweeper in the light of the Circular dated 01.11.1999.

15. It is also relevant to mention here that while passing the impugned order the respondent no.3 has not given any

opportunity of hearing to the petitioner and the order was passed on surmises and conjectures and no valid reason was given in the impugned order for not considered the petitioner for daily wager sweeper in the light of the Circular dated 01.11.1999.

16. The denial of appointing the petitioner on the post of daily wager sweeper is against the principles of natural justice and also in violation of Article 14, 16 and 21 of the Constitution of India.

17. In view of the above discussion and argument advanced by learned counsel for the parties, the impugned order dated 16.07.2016 passed by respondent no.3 is quashed and the matter is remanded back to the respondent no.3 to consider the claim of the petitioner afresh in the light of the Circular dated 01.11.1999 issued by Chief Engineer, P.W.D. U.P. Lucknow and pass a reasoned and speaking order in accordance with law within a period of two months from the date of production of the certified copy of this order, thereafter , the respondent no.3 shall communicate the order passsed by him to the petitioner forthwith.

18. With the aforesaid observations, the writ petition is finally **disposed of.**

19. No order as to costs.

(2020)03-05ILR A1016
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.02.2020

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Contempt Appeal No. 2067 of 2016

Mewalal & Ors. ...Applicants
Versus
Sri Rajeev Kumar-II Prin. Secy.(Appointments) Admin. & Ors.
...Opposite Parties

Counsel for the Applicants:
Ram Kumar Verma

Counsel for the Opposite Parties:
Puneet Chandra, Pankaj Khare

Petitioners-retrenched employees-claimed absorption by filing Writ-District Magistrate-no compliance-contempt filed-State Government passed an order-fresh cause of action-no wilful disobedience-no fresh direction can be passed in Contempt afresh.

Held, In the case in hand, since no direction was issued vide judgment and order dated 2.5.2016 passed in Special Appeal No.522 of 2012 nor any direction was issued in special Appeal No.110 of 2013, therefore, in view of the law laid down by Hon'ble Supreme Court in Sudhir Vasudeva's case (supra), this court being the Court of contempt cannot travel beyond what has been ordered by the writ Court/special appellate court and therefore, I am not inclined to proceed against the contemners for alleged non-compliance of order dated 30.8.2019 passed by the contempt court. (para 13) (E-9)

Cases Cited:

1. V. Kanakrajan Vs. General Manager South Eastern Railway & ors. (1996) 10 SCC 102

2. J.S. Parihar Vs. Ganpat Duggar & ors. (1996) 6 SCC 291

3. Sudhir Vasudeva Chairman and Managing Director, Oil and Natural Gas Corporation Limited & ors. Vs M. George Ravishekaran & ors., (2014)3 SCC 373

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard learned counsel for the petitioners and Shri Ramesh Kumar Singh,

learned Senior Advocate, assisted by Shri Pankaj Khare, Advocate for respondents.

2. Petitioners have preferred contempt petition alleging non-compliance of order dated 02.05.2016 passed in Special Appeal No. 522/2012 (Mewa Lal and others Vs. State of U.P. and others) whereby the appellate court while setting aside the judgment and order dated 05.1.2012 of learned Single Judge directed the opposite party to consider the case of the appellants in the light of judgment dated 26.02.2013 passed in Special Appeal No. 110 of 2013 State of U.P. and others versus Pramod Kumar and others.

3. It has been pleaded on behalf of the petitioners that the petitioners are the retrenched employees of the Directorate of Census Operation, U.P., Lucknow. The work and conduct of the petitioners have all throughout been good. Government Orders have been issued for absorption and appointment of the retrenched employees of the Census Department while relaxing age against vacant post(s) lying in different Departments. Copies of the Government Orders dated 21.08.2007 and 09.10.2007 are annexed with the petition as Annexures 3 and 4 respectively.

Pursuant to the Government Orders, the petitioners approached the respondent-authorities for absorption in the other Government Departments but since the respondents have not considered the grievance of the petitioners, hence, the petitioners filed Writ Petition No. 5602 (S/S) of 2009 and writ petition No. 7672 (S/S) of 2009. The Hon'ble Single Judge vide judgment and orders dated 14.09.2009 and 20.11.2009 directed District Magistrate, Barabanki to consider the petitioners' case for absorption keeping in view of the aforesaid Government Orders against the post of Lekhpal/Collection Amin or any other vacant post.

It is further pleaded that instead of complying the judgment and orders passed by the learned Single Judge dated 14.09.2009 and 20.11.2009 regarding petitioner Nos. 12 and 13, the District Magistrate, Barabanki vide orders dated 08.12.2009 and 29.12.2009 rejected the claim of the petitioners. Thereafter, the petitioners have challenged the order dated 08.12.2009 and 29.12.2009 vide writ petition No. 7180 (S/S) of 2010 (Mewa Lal and others Vs. State of U.P. and others) which was dismissed by this Court vide judgment and order dated 05.1.2012.

Aggrieved by the order dated 05.01.2012, petitioners filed Special Appeal No. 522 of 2012 (Mewa Lal and others Vs. State of U.P. and others) which was allowed by a Division Bench of this Court vide judgment and order dated 02.05.2016 setting aside the judgment and order dated 05.01.2012 passed by learned Single Judge in writ petition No. 7180 of 2010. The Division Bench in Special Appeal further directed the respondents to consider the case of the petitioners in the light of the judgment and order dated 26.02.2013 passed in Special Appeal No. 110 of 2013.

It is contended by learned counsel for the petitioners that even after the judgment in the Special Appeal, the respondents did not comply the order passed in Special Appeal No. 522 of 2012 hence, the present contempt petition has been filed.

4. The District Magistrate, Barabanki has filed an affidavit, inter alia stating that the judgment and order passed by the Division Bench in Special Appeal No. 522 of 2012 dated 02.05.2016 has been

complied with and there is no willful defiance of the judgment passed by the Division Bench of this Court.

It is submitted on behalf of the respondents that vide Government Order dated 21.08.2007, scheme for temporary employees of census Department for the year 1991 and 2000-01 was formulated. Initially the scheme framed by the Government Order dated 21.08.2007 was for three years from the date of issuance of the Government Order which provided that no preference will be given in the matter of recruitment to the Census employees. A clarification was issued vide consequential Government Order dated 09.10.2007.

Subsequently, in compliance of the orders passed by this Court, in the case of the petitioners, the Government Order was issued on 23.08.2017 in which condition no. 4 mentioned in the Government order dated 21.08.2007 which provides that scheme will be only for three years from the date of issuance of State Government Order was relaxed for the petitioners. Thereafter, the Principal Secretary, General Administration conveyed a meeting of the census employees of different Departments to ensure the compliance of the order passed by this Court. The minutes of meeting dated 14.02.2019 circulated on 18.02.2019 are annexed along with affidavit of the District Magistrate, Barabanki.

Thereafter, pursuant to the decision taken by the State Government, consequential order dated 23.02.2019 was passed by the District Magistrate whereby cases of the writ petitioners were considered and appointment was offered to the eight writ petitioners. Consequently, appointment orders were issued to eight writ petitions on 23.02.2019. The copies of the appointment orders have been filed along with affidavit.

5. This Court vide order dated 12.03.2019 required the contemnor(s) to file fresh affidavit for taking conscious decision in respect of petitioner no. 2. Thereafter, the case of the petitioner no. 2 Raj Kumar was considered vide order dated 23.03.2019 by the District Magistrate, Barabanki and consequential appointment orders were issued by the Sub Divisional Magistrate, on 25.03.2019. Thereafter on 30.08.2019 the contempt court directed the respondents to offer lump sum amount to the persons who have attained the age of superannuation and could not be accommodated.

To make compliance of the order dated 30.08.2019, the District Magistrate, Barabanki vide his letter dated 13.09.2019 referred the matter to the State Government. The State Government after examining the matter sent the instructions to the District Magistrate Varanasi vide its letter dated 17.09.2019 that under the scheme, the eligible persons have been accommodated/appointed after extending the benefit of relaxation. It is further stated in the letter dated 17.9.2019 that under the scheme, there is no provision for providing lump sum amount to anybody nor there is any amount proposed in the budget, in this regard.

Learned counsel for respondents submitted that as per the scheme dated 21.08.2007, the relaxation mentioned therein was applicable only to the date of notification of vacancies and the census employees were not entitled for any other preferences or privileges. He further submitted that except petitioners 1, 5, 6, 11 and 12, the other petitioners have been appointed keeping in view the benefit of

the scheme. The remaining five petitioners could not be adjusted as they have already attained the age of superannuation and since there is no provision in the scheme for providing lump sum amount to the retired employees and there is no budget for the same therefore, the same cannot be granted to them.

It is further submitted that in the light of the scheme, the case of the petitioners has been considered on merit and the orders dated 02.05.2016 passed in Special Appeal No. 522 of 2012 have been complied with, in its letter and spirit.

He has further submitted that even the appellate court in special appeal no. 522 of 2012 has not issued any order for giving lump sum amount to the retired employees nor there is any provision in the scheme and therefore, the five writ petitioners (since retired) are not entitled to the said benefit.

It is contended on behalf of the respondents that the order dated 30.8.2019 passed by the Contempt Court directing the authorities to offer lump sum amount to the persons who had attained the age of superannuation is beyond the four corners of the order dated 2.5.2016 passed in Special Appeal No.522 of 2012, which is alleged to have been violated and therefore was beyond the jurisdiction of the contempt court. Relevant portion (paras 2 and 3) of the order dated 30.8.2019 passed by the Contempt court reads as under :

"1.....

2. The matter remained pending with the concerned authorities around ten years. In the meantime, some of the petitioners attained the age of superannuation. However, a decision has been taken to accommodate those, who have not attained the age of superannuation pursuant to the judgment and order in question.

3. Since the petitioners cannot he held at fault for delayed decision by the authority concerned, it would be appropriate to offer lump-sum amount to the persons, who have attained the age of superannuation and could not be accommodated.

4.....

5....."

6. Submission of learned counsel for respondents in context of offering lump sum amount to the persons retired, which is beyond the scope of order dated 2.5.2016, appears to be correct. The operative part of the order dated 2.5.2016 passed in Special Appeal No.522 of 2012 reads as under :

"Accordingly, the special appeal is allowed and the order dated 05.01.2012 passed by the learned Single Judge is set aside. The respondents are directed to consider the case of the appellants in the light of the judgment and order dated 26.02.2013 passed in Special Appeal No.110 of 2013. "

7. A perusal of the aforesaid order dated 2.5.2016 depicts that the Division Bench has only directed the respondents to consider the case of the appellants in the light of judgment and order dated 26.2.2013 passed in Special Appeal No.110 of 2013 wherein the State Government was directed to consider the case of the private respondents on merit in the light of Scheme as well as the Government Orders issued towards the compliance of the judgment of the Apex Court as well as the judgment passed by learned Single Judge. The relevant portion of the order dated 26.2.2013 passed in Special Appeal No.110 of 2013 is reproduced as under :

"In that view of the matter when the majority of learned Single Judges have passed the judgments/orders in line with the Supreme Court's judgments, as above, the retrenched census employees can be

absorbed only under the scheme framed by the State Government. Hence, the impugned judgment is modified to read that the State Government shall consider the cases of private respondents (writ petitioners) herein on merit and in the light of the scheme as well as Government orders issued towards the compliance of the judgments of Hon'ble the Apex Court as well as the judgments passed by learned Single Judges in line therewith.

This Special Appeal, thus, stands allowed to that extent. "

8. Perusal of the order dated 2.5.2016 passed in special appeal No.522 of 2012 (supra) as well as the order dated 26.2.2013 passed in Special appeal No.110 of 2013 reveals that in the special appeals, no direction was given to respondents to offer lump sum amount to the persons who has attained the age of superannuation and could not be accommodated.

9. Learned counsel for respondents has further submitted that since in compliance of the judgment and order dated 2.5.2016, the respondents have considered the case of the petitioners and have given appointments to petitioners 2, 3, 4, 7, 8, 9, 10 and 13 and since the petitioners 1, 5, 6, 11 and 12 had retired, therefore, as per rules, they could not have been accommodated/appointed. He further submitted that as per instructions of the State Government, under the Scheme, there is no provision for providing lump sum amount to anybody, nor any such amount is proposed in the budget.

Learned counsel for the respondents has relied on the judgment in (1996) 10 SCC 102 **V. Kanakrajan Vs. General Manager South Eastern Railway and others** wherein it has been held that the order of the High Court directing the authorities to consider the question of the appellant's promotion and the authorities refusing to entertain appellant's application for contempt whereby refusing to promote on the ground of unsuitability as per rules was upheld.

Learned counsel for the respondents has further relied on the judgment reported in **(1996) 6 SCC 291 J.S. Parihar Vs. Ganpat Duggar and others** wherein the Hon'ble Supreme Court has held that once there is an order passed by the Government on the basis of the directions issued by the Court, there arises a fresh cause of action to seek redressal in an appropriate forum and this cannot be considered to be willful violation of the order.

10. Relevant para 6 of the judgment is reproduced as under :

"6. The question then is whether the Division Bench was right in setting aside the direction issued by the learned Single Judge to redraw the seniority list. It is contended by Mr. S.K. Jain, the learned Counsel appearing for the Appellant, that unless the learned Judge goes into the correctness of the decision taken by the Government in preparation of the seniority list in the light of the law laid down by three Benches, the learned Judge cannot come to a conclusion whether or not the Respondent had willfully or deliberately disobeyed the orders of the Court as defined Under Section 2(b) of the Act. Therefore, the learned Single Judge of the High Court necessarily has to go into the merits of that question. We do not find that the contention is well founded. It is seen that, admittedly, the Respondents had prepared the seniority list on 2-7-1991. Subsequently promotions came to be made.

The question is whether seniority list is open to review in the contempt proceedings to find out whether it is in conformity with the directions issued by the earlier Benches. It is seen that once there is an order passed by the Government on the basis of the directions issued by the court, there arises a fresh cause of action to seek redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review. But that cannot be considered to be the wilful violation of the order. After re-exercising the judicial review in contempt proceedings, a fresh direction by the learned Single Judge cannot be given to redraw the seniority list. In other words, the learned Judge was exercising the jurisdiction to consider the matter on merits in the contempt proceedings. It would not be permissible Under Section 12 of the Act. Therefore, the Division Bench has exercised the power Under Section 18 of the Rajasthan High Court Ordinance being a judgment or order of the Single Judge; the Division Bench corrected the mistake committed by the learned Single Judge. Therefore, it may not be necessary for the State to file an appeal in this Court against the judgment of the learned Single Judge when the matter was already seized of the Division Bench."

11. Hon'ble Supreme Court in **(2014)3 SCC 373 Sudhir Vasudeva Chairman and Managing Director, Oil and Natural Gas Corporation Limited and others** versus **M. George Ravishekaran and others** has held in para 19 as under :

"The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act, 1971. It is a drastic power which, if misdirected, could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution. This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self-determination of the sweep, meaning and effect of the order in respect of which disobedience is alleged. The Courts must not, therefore, travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self - evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or willful violation of the same. Decided issues cannot be reopened; nor can the plea of equities be considered. The Courts must also ensure that while considering a contempt plea the power available to the Court in other corrective jurisdictions like review or appeal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate, in other jurisdictions vested in the Court, as noticed above."

12. In view of the above, the law in this regard is settled and once there is an order passed by the government on the basis of the directions issued by the Court, a fresh cause of action has arisen for the aggrieved party to avail the appropriate judicial remedy and this cannot be said to be a wilful disobedience of the order and no fresh direction can be given while exercising the power of judicial review in contempt proceedings afresh.

13. In the case in hand, since no direction was issued vide judgment and order dated 2.5.2016 passed in Special Appeal No.522 of 2012 nor any direction was issued in special Appeal No.110 of 2013, therefore, in view of the law laid down by Hon'ble Supreme Court in Sudhir Vasudeva's case (supra), this court being the Court of contempt cannot travel beyond what has been ordered by the writ Court/special appellate court and therefore, I am not inclined to proceed against the contemners for alleged non-compliance of order dated 30.8.2019 passed by the contempt court.

14. Having considered submission of learned counsel for respondents and after going through the judgments of V. Kanakarajan's case (supra) and J.S. Parihar's case (supra) and after taking note of the fact that in compliance of the judgment and order dated 2.5.2016 and order dated 7.9.2019 passed by the State Government, appointments to petitioners 2, 3, 4, 7, 8, 9, 10 and 13 have been given and the petitioners 1, 5, 6, 11 and 12 could not be appointed as per rules as they had already retired, I am of the opinion that the order passed by the District Magistrate declining to consider the case of the petitioners 1, 5, 6, 11 and 12 gives rise to fresh cause of action to the said petitioners for which they can avail the appropriate remedy as advised.

15. No case for wilful and deliberate disobedience has been made out. I am of the opinion that sufficient compliance has been made by the respondents and by no stretch, it can be considered to be a deliberate and wilful violation of the judgment and order dated 2.5.2016.

16. The contempt petition fails and is accordingly dismissed.

(2020)03-05ILR A1022
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.01.2020

BEFORE

THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Revision No. 70 of 2018

Lallan Babu & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Pramod Kumar

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

A. Criminal law- Protection of children from Sexual Offence Act,2012-Section ¾-Code of Criminal Procedure,1973-Section 397/401 & Indian Penal Code,1860-Sections 363,366,376 & - application-Section 319- challenge to-summoning of proposed accused for trial u/s 319 Cr.P.C.-examination-in-chief is sufficient if it satisfactorily proves the presence and role of accused in the crime-complainant himself got examined on oath as PW-1 and victim as PW-2 statement is in support of contents of the FIR-revisionists actively participated in the commission of crime by provoking the victim to go with the accused-mere taking name is not sufficient there must be something more to show implication of person-on mere probability of complicity revisionists have not been summoned but there is appropriate material and evidence to justify summons of revisionists-trial judge has committed no error of law to summon the revisionists for trial.(Para 5 to 17)

B. Accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence-degree of satisfaction of Court for summoning the accused ,the test are

same as applicable for framing charge.Power u/s 319 Cr.P.C. can be exercised by Court against a person in FIR no chargesheet is filed by Police against him and the accused can be summoned only on the basis of examination-in-chief of witness and need not wait for cross-examination etc.(Para 10)

The revision is dismissed. (E-6)

List of Cases Cited:-

1. Anil Arya Vs. St. Of U.P.& ors, Crl. Revision No. 1216 of 2005

2. Hardeep Singh Vs. St. Of Punjab & ors.,(2014) 3 SCC 92

3. Dharam Pal & Ors. Vs. St. Of Hary. & anr. (2004) 13 SCC 9

4. Brijendra Singh Vs. St. Of Raj. (2017) 7 SCC 706

5. Shiv Prakash Mishra Vs. St. Of U.P. & ors. (2019) 7 SCC 806

6. Kailash Vs. St. Of Raj. & anr. (2008) 14 SCC 51

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri Pramod Kumar, learned counsel for the revisionists, learned AGA for the State and perused the material on record.

2. This criminal revision has been filed by accused revisionists Lallan Babu and Smt. Rekha against the order dated 28.11.2017 passed by Additional Sessions Judge / Special Judge, POCSO Act, Court No. 1, Auraiya in Special Sessions Trial No.388 of 2015, State vs. Raj @ Guddu (Case Crime No. 150 of 2015), under Sections 363, 366, 376 I.P.C. and 3/4 POCSO Act, P.S. Phaphund, District Auraiya whereby trial court allowed the application under Section 319 Cr.P.C. made by prosecution and summoned the accused-revisionists to face trial.

3. It has been contended by learned counsel for the revisionists that accused-revisionists are falsely implicated in the present case. They committed no offence. Investigating Officer during investigation did not find any evidence against the revisionists and he did not submit charge sheet. It has been further submitted that accused-revisionists are not named in F.I.R. They have not been charge-sheeted. There names have not come in the statement of witnesses under Section 161 Cr.P.C. but they have been summoned believing the evidence of P.W.-2 Anju Mishra (Victim). It has been further argued that trial Court did not appreciate the evidence in right perspective. The revisionists are the parents of alleged main accused Raj @ Guddu.

4. On the other hand learned AGA refuted the submission of learned counsel for the revisionists and submitted that accused-revisionists are parents of main accused Raj @ Guddu. They have provoked the main accused to commit the crime. PW-1 is not an eye witness. PW-2 is the victim, who supported the prosecution case and proved the involvement of revisionists in the present crime.

5. Brief facts of the case are as under :-

(a) An F.I.R. bearing Case Crime No. 150 of 2015 was lodged by one Awadhesh Kumar (Father of victim) against the accused Raj @ Guddu under Section 363 and 366 I.P.C. stating that his minor daughter (name of victim is withheld by me), aged about 15 years was seduced

and abducted by accused Raj @ Guddu on 3.4.2015 at about 1:00 PM. Matter was investigated by Investigating Officer, who submitted charge sheet against the accused Raj @ Guddu.

(b) During the course of trial, statement of PW-1 Informant and PW-2 victim were recorded. PW-2 supported the prosecution case and disclosed the involvement of revisionists.

(c) PW-2 in her statement has stated that when she went to the shop of accused Raj @ Guddu on 3.4.2015 at about 11:00 AM, his parents (present revisionists) gave Rs.5000/- and provoked to go with Raj @ Guddu to Gujrat, thereafter, she went to Gujrat with Raj where she lived with him for about 2 ½ months.

(d) PW-1 Awadhesh Kumar (Informant) moved an application 39-B under Section 319 stating that victim PW-2 disclosed the involvement of Lallan Babu and Smt. Rekha in the present case and it is necessary to summon them for trial, application was objected by accused Raj @ Guddu by filing his objection / application no. 39-B. After hearing both parties and appreciating the entire record as well as statement of PWs-1 and 2, trial court allowed the application under Section 319 Cr.P.C. and summoned Lallan Babu and Smt. Smt. Rekha for facing trial in the aforesaid sections, relying the statement of PW-2 Victim.

6. Section 319 of The Code Of Criminal Procedure, 1973 reads as under :-

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

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

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

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

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

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

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

7. In **Anil Arya v. State of U.P. and Others, Criminal Revision No. 1216 of 2005, decided on 09.09.2016**, this Court held as under :-

"Whether evidence is correct or not or credible enough or not to sustain conviction and punishment is a matter which would be seen after revisionist put in appearance, lead evidence and thereafter Trial Court examine the entire evidence and record its finding thereon, but at the stage of summoning of revisionist on the basis of aforesaid statement in Trial under

Section 319 Cr.P.C., the probable defence of accused summoned under Section 319 Cr.P.C. cannot be examined for the first time in a revisional jurisdiction by this Court."

8. In **Hardeep Singh Vs. State of Punjab and others 2014 (3) SCC 92**, Court examined following five questions:

"(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in Section 319 (1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

9. The aforesaid questions have been answered in para 117 of judgment as under :-

Question Nos. (i) and (iii) *A. In* ***Dharam Pal and Ors. v. State of Haryana and Anr. 2004 (13) SCC 9,*** *the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.*

Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question No. (ii)

A. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the

evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. (iv)

A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question No. (v)

A. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

10. The aforesaid judgment in fact lay down very clearly that power under Section 319 Cr.P.C. can be exercised by Court against a person not named in First Information Report or no charge-sheet is filed by Police against him and the accused can be summoned only on the basis of examination-in-chief of witness and need not wait for cross-examination etc. With regard to degree of satisfaction of Court for summoning the accused under Section 319 Cr.P.C, Court has said that test are same as applicable for framing charge.

11. The above view was followed in **Brijendra Singh and others Vs. State of Rajasthan (2017) 7 SCC 706** holding:

" ... since it is a discretionary power given to the court Under Section 319 Code of Criminal Procedure and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity."

12. Recently in **Shiv Prakash Mishra Vs. State of Uttar Pradesh and others (2019) 7 SCC 806,** Court relying on the above authorities as also **Kailash Vs. State of Rajasthan and another (2008) 14 SCC 51**, held as under:

"The standard of proof employed for summoning a person as an Accused person under Section 319 Code of Criminal Procedure is higher than the standard of proof employed for framing a charge against the Accused person. The power Under Section 319 Code of Criminal Procedure should be exercised sparingly. As held in Kailash Vs. State of Rajasthan and another (2008) 14 SCC 51, "the power

of summoning an additional Accused Under Section 319 Code of Criminal Procedure should be exercised sparingly. The key words in Section are "it appears from the evidence"."any person"."has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion Under Section 319 Code of Criminal Procedure would be used by the court." (emphasis added)

13. In view of above, it is clear that in order to summon a person under Section 319 Cr.P.C., mere taking of name is not sufficient but there must be something more to show implication of person who has been sought to be summoned.

14. Aforesaid statement of Informant and victim clearly show that revisionists and co-accused Raj @ Guddu were involved in the commission of crime and they also participated in incident. Whether evidence of witnesses is correct or not, credible enough or not to sustain conviction, is a matter which would be seen after revisionists put in appearance, lead evidence and thereafter, Trial Court examines the entire evidence and records its finding thereon. At the stage of summoning of the revisionists on the basis of aforesaid statements for trial, probable defence of accused-revisionists summoned under Section 319 Cr.P.C. cannot be examined for the first time under the revisional jurisdiction by this Court.

16. Looking to the facts of this case and in the light of exposition of law, as discussed above, I find that here is not a case where mere name of revisionists have been taken but details of incident have been given showing the manner in which revisionists have acted and committed crime. Hence, it cannot be said that there is no material whatsoever and also that on mere probability of complicity they have been summoned but there is appropriate material and evidence to justify summoning of revisionists under Section 319 Cr.P.C. and I find no manifest error in the order passed by Court below.

17. The revision lacks merit and is accordingly **dismissed**.

(2020)03-05ILR A1027
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Revision Defective No. 117 of 2020

Gopal @ Ramgopal ...Revisionist (in Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Subedar Misra

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

A. Criminal law-Dowry Prohibition Act,1961- Sections 3/4-Code of Criminal Procedure,1973-Section 397/401, 386 & Indian Penal Code,1860-Sections 498-A, 323,506 & - challenge to-conviction and enhancement of sentence-appeallate court convicted the revisionist u/s 323 IPC, after reversing judgement of acquittal erroneously-there must be an appeal by State against the judgement of acquittal-appellate court without issuing notice and giving an opportunity convicted the revisionist-it is misuse of process of law –

(Para 1 to 8)

It is mandate that Appellate Courte will not enhance sentence unless there is an appeal by State for enhancement. in the instant case, neither appeal by State either for enhancement of sentence or for conviction in offence, for which there was acquittal by trial court.
(Para 4 ,5)

The revision is allowed. (E-6)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This criminal revision under Section 397/401 of Cr.P.C. has been filed by Gopal @ Ram Gopal, against judgment and order dated 1.2.2020, passed by Additional District and Sessions Judge, Court No. 2, Aligarh, in Criminal Appeal No. 33/2019, Gopal @ Ram Gopal Vs. State of U.P., whereby, order dated 25.2.2019, passed by trial Court of Additional Chief Judicial Magistrate, Court NO. 6, Aligarh, in Criminal Case No. 1705 of 2008, State Vs. Gopal @ Ram Gopal, arising out of Case Crime No. 212 of 2008, under Sections 498A, 323, 506 I.P.C. read with Section 3/4 of D.P. Act, Police Station Javan,, District Aligarh, has been enhanced by Appellate Court, with this contention that Appellate Court failed to appreciate facts and law placed before it. Convict appellant was convicted and sentenced for offenses punishable under Section 498-A I.P.C. with six months imprisonment and fine of Rs. 1,000/-, and for offence punishable under Section 4 of D.P. Act, with six months imprisonment and fine of Rs. 2,000/-, and in case of default in payment of fine, he was to undergo additional imprisonment of twenty days. Against, this judgment of conviction and sentence made therein, appeal was filed before Appellate Court of Session Judge, Aligarh, as Criminal Appeal No. 33/2019 (Gopal @ Ram Gopal Vs. State of U.P.) and this appeal was transferred to Court of Additional District and Sessions Judge, Court No. IInd, of Aligarh, wherein, above appeal was dismissed, confirming the judgment of conviction dated 25.2.2019 of trial Court. But, suo motu acquittal under Section 323 I.P.C. was converted into conviction, and sentence awarded were enhanced to one year imprisonment with fine of Rs. 50,000/-, under Section 498-A I.P.C. and in case of default of fine, six months imprisonment and fine of Rs. 10,000/-, with one years rigorous imprisonment under Section 4 of D.P. Act and in default one month rigorous imprisonment, with further sentence of six months rigorous imprisonment with fine of Rs. 1,000/-, and in default one month rigorous imprisonment for offence punishable under section 323 of I.P.C., with a direction for concurrent running of sentences and payment of 60 per cent of total amount as compensation to victim. Whereas, State has filed no appeal against judgment of acquittal, for offence punishable under section 323 of I.P.C. or against quantum of sentence, awarded by trial Court. Hence, appellate Court without issuing any notice and giving any opportunity and without being any appeal by State, has convicted for offence punishable under Section 323 of I.P.C. as well as enhanced sentence from six months simple imprisonment to one year rigorous imprisonment with fine of Rs. 50,000/- and 10,000/-, respectively, for offences punishable under Sections 498A I.P.C. and 4 of D.P. Act. It was apparently, erroneous against provision of Section 386 of Cr.P.C. Hence, this revision with above prayer.

2. Learned counsel for the revisionist vehemently argued that Appellate Court was either to pass a judgment affirming the order of sentence or conviction made by

trial Court, or to set aside it with further direction, if any. But, it may not enhance sentence or may convert acquittal in conviction without any appeal by State or giving any opportunity to convict appellant. It was an appeal by appellant, with prayer for setting aside impugned judgment of conviction and sentence made, therein. But in that appeal, the Appellate Court has convicted, after reversing judgment of acquittal for offence punishable under Section 323 of I.P.C. and enhanced sentence as above.

3. Learned AGA agreed with above situation of law and position of impugned order that it was passed in an appeal filed by convict appellant and no appeal by State was there, regarding enhancement of sentence or appeal against acquittal for offence punishable under Section 323 of I.P.C. was there. There is enhancement of sentence for offences for which there was conviction. This was without any appeal filed by State.

4. Section 386 of Cr.P.C. propounds: -

"386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i)reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence

which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

5. Under sub-Section (III) of "b" of Section 386 of Cr.P.C. written as above, it is mandate that Appellate Court will not enhance sentence unless there is an appeal by State for enhancement of sentence and the same is being here. Against judgment of acquittal, there must be an appeal by State, whereas, admittedly, in present appeal, there was neither appeal by State either for enhancement of sentence or for conviction in offence, for which there was acquittal by trial Court and learned Additional Session Judge, has passed impugned judgment of conviction and sentence under Section 323 of I.P.C., with enhancement of offence punishable under Sections 498-A read with 4 of D.P. Act. It was apparently erogenous and against the provision of law of 'Code' given as above.

6. Hence, apparently, it is misuse of process of law and perversity in the judgment.

7. Hence, this revision is being allowed.

8. Impugned judgment of Appellate Court is being set aside and file is remanded back to District and Sessions Judge, Aligarh, for its hearing afresh.

(2020)03-05ILR A1030
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.05.2020

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Criminal Revision No. 128 of 2020

Shalini Sahai & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Shishir Pradhan

Counsel for the Opposite Parties:
Govt. Advocate, Sri Ashok Kumar Singh

A. Criminal law- Code of Criminal Procedure,1973-Section 397/401, 156(3) & Indian Penal Code, 1860-Sections 506,504, 406,420-challenge to-remedy of revision against the order u/s 156(3)-prospective accused has no locus standi to challenge a direction for investigation of a cognizable case u/s 156(3) Cr.P.C. before cognizance or issuance of process against the accused-accused gets right of hearing only if cognizance is taken or process issued-before that stage any order will be interlocutory in nature-hence, remedy of revision against the order u/s 156(3) is barred u/s 397.(Para 11 to 33)

Orders summoning witnesses, adjouring cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie u/s 397(2) of the 1973 Code. But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court.(Para 27)

The revision is dismissed. (E-6)

List of Cases Cited:-

1. Anil Kumar & Ors. Vs. M.K. Aiyappa & anr. (2013) 10 SCC 705

2. Father Thomas Vs. St. Of U.P. & anr. (2011) 1 JIC 533 (ALL) (FB)

3. Suresh Chand Jain Vs. St. Of M.P. & ors., AIR (2001) SC 571

4. Pratap Vs. St. Of U.P. (1991) 28 ACC 422

5. Bhagwan Samardha Sreepada Vallabha Venkata Vishwandaha Maharaj Vs. St. Of A.P. & ors, JT (1999) 4 SC 537

6. CBI & Anr. Vs. Rajesh Gandhi & anr. (1997) Cr.L.J. 63

7. Bhagwant Singh Vs. Commnr. Of Police, (1985) 22 ACC 246 SC

8. Abdul Aziz Vs. St. Of U.P. (2009) Cri.L.J. 1683

9. Madhu Limaye Vs. St. Of Mah. (1978) 15 ACC 184

10. Amar Nath Vs. St. Of Mah. AIR (1977) SC 2185

11. Emperor Vs. Khwaja Nazir Ahmad, AIR (1945) PC 18

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. The instant criminal revision under Section 397/ 401 of Cr.P.C. has been preferred against the judgment and order dated 28.01.2020 passed in Criminal Misc. Case No.94 of 2020 (Raj Kishore v. Shalini Sahai and another), by which the learned Special Judge, SC/ ST Act, Lucknow has allowed the application moved by opposite party no.2 under Section 156(3) of Cr.P.C. directing the Station House Officer, Gomti Nagar to lodged an FIR and submit report.

2. Submission of learned Counsel for revisionists is that the opposite party no.2 Raj Kishore had moved an application under Section 156(3) of Cr.P.C. against the revisionists on 18.01.2020, which has been allowed by the impugned order. Learned Counsel has further submitted that the impugned order is arbitrary and contrary to the law laid down by the Apex Court.

3. Learned Counsel for revisionists has further submitted that earlier on 25.11.2019, the opposite party no.2 had lodged an FIR against the revisionist Anit Kumar and his wife Sadhna Srivastava have in Case Crime No.1412 of 2019, under Sections 506, 504, 406, 420 IPC at Police Station Gomti Nagar, District Lucknow. The revisionist no.1 being a police officer posted at Police Station Gomti Nagar, District Lucknow was appointed to investigate the matter. During investigation, the revisionist no.1 called both the parties to compromise the dispute regarding construction of house. Learned Counsel has again submitted that the application under Section 156(3) of Cr.P.C. has been moved only in order to put pressure upon the revisionists.

4. Learned Counsel for revisionists has further submitted that while discharging official duty, the revisionist no.1 had never used any word relating to caste against the opposite party no.2 and, therefore, the averments made in the application under Section 156(3) of Cr.P.C. is totally false and fabricated. Learned Counsel again submitted that the impugned order is contrary to law as no first information report can be lodged against any public servant without obtaining sanction from the competent authority for initiation of criminal proceedings. The revisionist no.1 is a public servant and, therefore, she is entitled for protection under Section 197 of Cr.P.C. She cannot be made accused without any sanction by the State Government. Therefore, in these background, the impugned order is liable to be quashed.

5. In support of his arguments, learned Counsel for revisionists has placed reliance in the case of ***Anil Kumar and others v. M.K. Aiyappa and another; (2013) 10 SCC 705.***

6. Per contra, learned A.G.A. and learned Counsel appearing for opposite party no.2 have vehemently opposed the submissions advanced by learned Counsel for revisionists.

7. Learned Counsel appearing on behalf of opposite party no.2 has submitted that the opposite party no.2 is a retired Government Employee and the revisionist no.2 is a contractor, builder and property dealer. The revisionist no.2 entered into an agreement with opposite party no.2 for construction of his house and paid Rs.50 lakhs but deliberately, the revisionist no.2 left the work incomplete. The opposite party no.2 made several request but no heed has been paid. Thereafter having left with no option, the opposite party no.2 moved an application under Section 156(3) of Cr.P.C. and the learned Court below while passing the impugned order on the said application has not committed any error. Learned Counsel has further submitted that the ratio laid down in the case of Anil Kumar (Supra) is not applicable to the instant case because the ration of the said case is applicable on the cases fall under the Prevention of Corruption Act in which there is specific provision under Section 19 but in the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, there is no such provision like Section 19 of the Prevention of Corruption Act.

8. Learned Counsel for opposite party no.2 has further submitted that the Full Bench of this Court in ***Father Thomas v. State of U.P. and another; 2011 (1) JIC 533 (ALL)(FB)*** has held that criminal revision against the order passed under Section 156(3) of Cr.P.C. is not maintainable as the order passed under Section 156(3) is an interlocutory order. Learned Counsel has submitted that under the provisions of Section 19 of the Prevention of Corruption Act, 1988, previous sanction is necessary for taking cognizance of an offence committed by a public servant but for lodging of an FIR, previous sanction is not necessary. Therefore, Section 19 of the Prevention of Corruption Act is not applicable in this case and accordingly, the instant criminal revision is liable to be dismissed.

9. I have heard learned Counsel for the parties and perused the material available on record.

10. In the instant case, the opposite party no.2 had moved an application under Section 156(3) of Cr.P.C. before the learned Magistrate with the allegation that the opposite party no.2 and the revisionist no.2 entered into an agreement for construction of house but the revisionist no.2, who is the contractor/ builder denied to complete the construction work after taking Rs.5,00,000/- (fifty lakhs) from the applicant. An FIR against the revisionist no.2 and his wife was lodged by the opposite party no.2 as Case Crime No.1412 of 2009. The revisionist no.1 is the Investigating Officer of this case. The revisionist no.1 called for both the parties and put pressure on the opposite party no.2 for compromise and on denial, used filthy language by making caste-based remark. The opposite party no.2 tried to lodge an FIR but when FIR has not been lodged, the opposite party no.2 moved the aforesaid application under Section 156(3) of Cr.P.C.

11. The main objection taken by learned Counsel for opposite party no.2 is that an accused has no locus standi before an order of summoning is passed and since an order directing investigation is

interlocutory in nature, such an order is not subject to a revision in view of the statutory bar contained in Section 397(2) of Cr.P.C. The main issues before this Court to adjudicate are as follows:

"(A) Whether the order of learned Magistrate made in exercise of powers under Section 156(3) of Cr.P.C. directing the police to register and investigate is open to revision at the instance of a person against whom neither cognizance has been taken nor any process is issued?

(B) Whether an order made under Section 156(3) of Cr.P.C is an interlocutory order and remedy of revision against such order is barred under sub-section (2) of Section 397 of Cr.P.C.?"

12. Before examining any of the questions framed above, it would be necessary to reproduce the words of section 156 which falls in Chapter XII of Cr.P.C.:

*"**156.** Police officer's powers to investigate cognizable cases.- (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.*

*(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground t*hat the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned."

Issue No.(A)

13. As pointed out in ***Suresh Chand Jain v. State of M.P. and others; AIR 2001 SC 571*** that there is a difference in the position of a prospective accused against whom an order is made under section 156(3) of Cr.P.C. before cognizance is taken by the Magistrate, and an accused against whom investigation has been directed under section 202(1) of Cr.P.C. Although the nature of both the investigations is the same, but the former investigation is carried out by the police, essentially under Chapter XII of the Code which deals with: "Information to the Police and Their Powers to Investigate." The police officer-in-charge of the police station has the same powers for carrying out an investigation under section 156(1), without orders of the Magistrate as the Magistrate can direct under section 156 (3) of the Code. Section 154 (1) of the Code prescribes the steps to be taken on receipt of a report of a cognizable offence by such a police officer. 154(3) gives powers to the Superintendent to issue appropriate directions requiring a station officer to conduct investigation into a cognizable offence. This power is parallel to the power of the Magistrate to issue a similar direction to the Station officer under section 156(3) of the Code. The investigation culminates with the submission of the report by the police under section 173 of the Code. The post-cognizance investigation directed by the Magistrate under section 202(1) although it is of a limited nature at the stage of inquiry and is carried out mainly for helping the Magistrate decide whether or not there is sufficient ground for him to proceed further, but it is an investigation which is carried out on directions of the police after cognizance has been taken by the

Magistrate on a complaint under sections 190(1)(a) and after examination of the complainant under section 200 of the Code.

14. In the case of ***Pratap v. State of U.P.; 1991 (28) ACC 422***, it has been observed that merely because process has been issued against a person, it cannot be said that a decision adversely affecting his rights has been taken, as he has merely been asked to face trial in a Court of law. Therefore no principle of natural justice is infringed if a Magistrate issues process against a person without first affording him an opportunity of hearing. The Code does not contemplate holding two trials, one before the issue of process and the other after the process is issued. The legislature has provided an elaborate procedure for hearing an accused after the trial begins in a Court of law.

15. The thrust of the argument was that if after cognizance when the Court decides to conduct an inquiry under section 200 or 202 Cr.P.C, no right of hearing, beyond the right of the accused to be present personally or through counsel is permitted, where would the question arise of the accused having a right to be heard when an order by the Magistrate only directing the police to investigate a cognizable offence in exercise of powers under section 156(3) Cr.P.C was passed at the pre-cognizance stage.

16. In ***Bhagwan Samardha Sreepada Vallabha Venkata Vishwandaha Maharaj v. State of A.P. and others; JT 1999 (4) SC 537***, it has been held that even after submission of a final report, the police in exercise of powers under section 173 (8) is empowered to further investigate the matter. No obligation is cast at that stage also to hear the accused, as casting such an obligation would unnecessarily place a burden on the Courts to search for all the potential accused and to provide them with an opportunity of being heard before further investigation could be conducted, defeating its purpose.

17. In the case of ***C.B.I. and another v. Rajesh Gandhi and another; 1997 Cr.L.J 63,*** it has been observed that the decision to investigate and the agency which should investigate the offence does not attract the principles of natural justice and the accused has no say in the matter as to who should investigate the offence he is charged with.

18. In ***Bhagwant Singh v. Commissioner of Police; 1985 (22) ACC 246 (SC)***, it was held that after consideration of the report under section 173(2) of the Code, where the Magistrate decides not to take cognizance and to drop the proceedings or reaches a conclusion that there was no sufficient ground for proceeding against some of the persons mentioned in the FIR, the Magistrate must give notice to the informant and provide him with an opportunity to be heard at the time of consideration of the report. Here again no right of hearing has been conferred on an accused when the Magistrate decides to hear the informant on receipt of the report under section 173 (2) of the Code, when he is of the opinion that no ground exists for proceeding against the accused.

19. In the case of Abdul Aziz v. State of U.P.; 2009 Cri.L.J 1683, the court has observed as under:

"Thus at the stage of Section 156(3) Cr. P. C. any order made by the Magistrate does not adversely affect the

right of any person, since he has got ample remedy to seek relief at the appropriate stage by raising his objections. It is incomprehensible that accused cannot challenge the registration of F.I.R. by the police directly, but can challenge the order made by the Magistrate for the registration of the same with the same consequences. The accused does not have any right to be heard before he is summoned by the Court under the Code of Criminal Procedure and that he has got no right to raise any objection till the stage of summoning and resultantly he cannot be conferred with a right to challenge the order passed prior to his summoning. Further, if the accused does not have a right to install the investigation, but for the limited grounds available to him under the law, it surpasses all suppositions to comprehend that he possesses a right to resist registration of F.I.R."

20. From a consideration of the aforesaid laws, it is apparent that even when a complaint is filed under section 190(1) (a) and the Court decides to take cognizance and to adopt the procedure provided for inquiry under section 200 and 202 Cr.P.C, the accused is only permitted to remain present during the proceedings, but not to intervene or to raise his defence, until the order issuing summons is passed. The right of hearing of a prospective accused at the pre-cognizance stage, when only a direction for investigation by the police is issued by the Magistrate under section 156(3) Cr.P.C., can only be placed at a lower pedestal. It is only during the course of trial that the accused has been conferred rights at different stages to raise his defence. As the authorities show, that in the absence of any statutory right of hearing to the prospective accused at the pre-cognizance stage, when the direction to investigate has only been issued by the Magistrate under section 156(3), the accused cannot be conferred with any right of hearing even under any principle of *audi alteram partem.*

21. This Court has also seen that during the stage of investigation the accused has no right of intervention as to the mode and manner of investigation and who should investigate.

22. Even after submission of a final report, either when the police decides to order further investigation under section 173(8) Cr.P.C, or before accepting or rejecting the report, only the informant is required to be heard. The accused is not entitled to be heard even at this stage. In this view it would be unrealistic to confer a right of hearing when only an innocuous direction for investigation is passed by the Magistrate in a case disclosing a cognizable offence., especially when the allied order regarding the decision of a police officer to investigate in exercise of powers under section 156(1) is not vulnerable to challenge in the criminal revision. Also when objections to maintainability of a case are raised on the ground of limitation under section 468 or under section 195 Cr.P.C, the appropriate stage for raising these objections is at the time of cognizance or at the time of framing of charges, and not when a Magistrate issues a direction for investigation under section 156(3) Cr.P.C.

23. In the light of the aforesaid discussion, it is abundantly clear that the prospective accused has no locus standi to challenge a direction for investigation of a cognizable case under Section 156(3) Cr.P.C before cognizance or issuance of

process against the accused. The first issue is answered accordingly.

Issue No.(B)

24. Section 397 (2) of Cr.P.C. reads as follows:

"The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding."

25. Only if cognizance is taken and process issued that the accused gets a right of hearing. Before that stage according to the learned Single Judge, any order, including an order under section 156(3) Cr.P.C, will be interlocutory in nature.

26. n the case of ***Madhu Limaye v. State of Maharashtra; 1978 (15) ACC 184,*** no doubt lays down that orders, such as the order in that case issuing process against the accused could not be described as a final order, but it was also not an interlocutory order, which could have attracted the bar to the maintainability of the criminal revision in view of section 397 (2) of the Code, because if the plea of the accused was rejected on a point which when accepted could have concluded the particular proceedings. Rather according to the said decision it should be described as a type of intermediate order falling in the middle course. In Madhu Limaye's case (Supra) an objection had been raised by the appellant that the cognizance taken by the Sessions Court without commitment of the case to it in exercise of powers under section 199(2) Cr.P.C, on a complaint under section 500 IPC by the Public Prosecutor based on the sanction by the State government under section 199(4) Cr.P.C was incompetent, as no complaint had been made by the aggrieved person Sri A.R. Antulay, the Chief Minister, and the alleged defamatory statements related to acts done in his personal capacity, and not in the discharge of his public duties. If this contention was accepted, it would have resulted in the order of cognizance passed by the Sessions Judge without the case being committed to him, being set aside. Hence this objection would go to the root of the matter, and could not be ignored only by describing the order as interlocutory in nature.

27. In the case of ***Amar Nath v. State of Maharashtra; AIR 1977 SC 2185,*** the Apex Court has held as under:

"6. *Let us now proceed to interpret the provisions of Section 397 against the historical background of these facts. Sub-section (2) of Section 397 of the 1973 Code may be extracted thus :*

"The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding."

The main question which falls for determination in this appeal is as to what is the connotation of the term "interlocutory order" as appearing in sub-section (2) of Section 397 which bars any revision of such an order by the High Court. The term "interlocutory order" is a term of well-known legal significance and does not present any serious difficulty. It has been used in various statutes including the Code of Civil Procedure, Letters Patent of the High Courts and other like statutes. In Webster's New World Dictionary "interlocutory" has been defined as an order other than final decision. Decided cases have laid down that interlocutory

orders to be appealable must be those which decide the rights and liabilities of the parties concerning a particular aspect. It seems to us that the term "interlocutory order" in Section 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revison to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2) of the 1973 Code. But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court."

28. In Amar Nath's case (supra), the order summoning the appellants in a mechanical manner after the police had submitted a final report against them leading to their release by the Judicial Magistrate, and the revision against that order before the Additional Sessions Judge preferred by the complainant had also failed. Even the subsequent complaint by the complainant had been dismissed on merits. Against the latter dismissal of the complaint when the complainant preferred a revision, the Sessions Judge set aside the order of the Judicial Magistrate and ordered further inquiry, whereupon the Magistrate straightaway summoned the appellants for trial. This order which appeared to infringe substantial rights acquired by the appellants was considered an order of moment and not a mere interlocutory order, which would invite the bar to entertaining the revision under S. 397(2) of the Code.

29. An order under section 156(3) Cr.P.C. passed by the Magistrate directing the police officer to investigate a cognizable case on the other hand is no such order of moment, which impinges on any valuable rights of the party. Were any objection to the issuance of such a direction to be accepted (though it is difficult to visualize any objection which could result in the quashing of a simple direction for investigation), the proceedings would still not come to an end, as it would be open to the complainant informant to move an application under section 154(3) before the Superintendent of Police (S.P.) or a superior officer under section 36 of the Code. He could also file a complaint under section 190 read with section 200 of the Code. This is the basic difference from the situations mentioned in Madhu Limaye and in Amar Nath's cases, where acceptance of the objections could result in the said accused being discharged or the summons set aside, and the proceedings terminated. Also the direction for investigation by the Magistrate is but an incidental step in aid of investigation and trial. It is thus similar to orders summoning witnesses, adjourning cases, orders granting bail, calling for reports and such other steps in aid of pending proceedings which have been described as purely interlocutory in nature in Amar Nath (supra).

30. As the direction for investigation passed by the Magistrate under section 156(3) is purely interlocutory in nature, and involves no substantial rights of the parties, we are of the view that the bar under section 397(2) Cr.P.C to the entertainment of a criminal revision can also not be circumvented by moving an application under section 482 Cr.P.C. As observed in State v. Navjot Sandhu, (2003) 6 SCC 641 in paragraph 29:

*"**29.** Section 482 of the Criminal Procedure Code starts with the words "Nothing in this Code". Thus the inherent jurisdiction of the High Court under Section 482 of the Criminal Procedure Code can be exercised even when there is a bar under Section 397 or some other provisions of the Criminal Procedure Code. However as is set out in Satya Narayan Sharma case [(2001) 8 SCC 607 : 2002 SCC (Cri) 39] this power cannot be exercised if there is a statutory bar in some other enactment. If the order assailed is purely of an interlocutory character, which could be corrected in exercise of revisional powers or appellate powers the High Court must refuse to exercise its inherent power. The inherent power is to be used only in cases where there is an abuse of the process of the court or where interference is absolutely necessary for securing the ends of justice. The inherent power must be exercised very sparingly as cases which require interference would be few and far between. The most common case where inherent jurisdiction is generally exercised is where criminal proceedings are required to be quashed because they are initiated illegally, vexatiously or without jurisdiction. Most of the cases set out hereinabove fall in this category. It must be remembered that the inherent power is not to be resorted to if there is a specific provision in the Code or any other enactment for redress of the grievance of the aggrieved party. This power should not be exercised against an express bar of law engrafted in any other provision of the Criminal Procedure Code. This power can*not be exercised as against an express bar in some other enactment."

31. However it is made clear that the initial order for investigation under section 156(3) is also not open to challenge in a writ petition, as it is now beyond the pale of controversy that the province of investigation by the police and the judiciary are not overlapping but complementary. As observed by the Privy Council in paragraph 37 in ***Emperor v. Khwaja Nazir Ahmad, AIR 1945 PC 18*** when considering the scope of the statutory powers of the police to investigate a cognizable case under sections 154 and 156 of the Code, that it would be an unfortunate result if the Courts in exercise of their inherent powers could interfere in this function of the police. The roles of the Court and police are "complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function."

32. In view of above, the order of the learned Magistrate passed in exercise of powers under Section 156(3) of Cr.P.c. directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued and an order made under Section 156(3) of Cr.P.C. is an interlocutory order and remedy of revision against such order is barred under sub-section (2) of Section 397.

33. Accordingly, the criminal revision is hereby ***dismissed.***

(2020)03-05ILR A1039
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.02.2020

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Revision No. 544 of 2020

Anand Kumar Pandey ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Santosh Kumar Shukla

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

A. Criminal law- Code of Criminal Procedure,1973-Sections 397/401-Section 156(3),200-challenge to-application u/s 156(3)-from the reading of application cognizable offence was made out-Court below instead of issuing direction to lodge FIR and investigate, illegally treated as a complaint-app-Court below has not committed procedural irregularity in exercise of its discretionary jurisdiction under section 156(3)-Hence, dismissed. (Para 6 to 40)

B. In its discretionary power,it is open for the magistrate to direct the police to register a criminal case u/s 154 Cr.P.C. and conduct investigation. At the same time, it is open for the Magistrate, where the facts of the case and ends of justice so demand, to take cognizance of the matter by treating it as a complaint and proceed for the "inquiry" u/s 200 and 202 Cr.P.C.(Para 35)

It is not incumbent upon a Magistrate to allow an application u/s 156(3) Cr.P.C. for registration of the case, he can exercise judicial discretion in the matter and can pass order for treating it as complaint or to reject it in suitable cases.

The revision is dismissed. (E-6)

List of Cases Cited:

1. Lalita Kumari Vs. Govt. Of U.P. & ors., (2014) 2 SCC 1

2. Mohammad Yousuf Vs. Smt. Afaq Jahan & anr., (2006) 1 SCC 627

3. R.R. Chari Vs. St. Of U.P., (1951) SC 207

4. Narayandas Bhagwandas Madhavdas Vs. St. Of W.B.,(1959) SC 1118

5. Gopal Das Sindhi & ors. Vs. St. Of Assam & anr.,AIR (1961) SC 986

6. Superintendent and Remembrancer of Legal Affairs,W.B. Vs.Abani Kumar Banerjee,AIR (1950) Calcutta,437

7. Suresh Chand Jain Vs. St. Of M.P. & anr., (2001)2 SCC 628

8. Tula Ram Vs. Kishore Singh, (1977) 4 SCC 459

9. Ram Babu Gupta Vs. St. Of U.P. & ors.,(2001) 43 ACC 50

10. India Carat Pvt. Ltd. Vs. St. Of Karnataka (1989)2 SCC 132

11. Sakiri Vasu Vs. St. Of U.P. & ors., (2008) 2 SCC 409

12. Vinubhai Haribhai & Malaviya & ors. Vs. St. Of Guj.& anr. (2019) SCC Online SC 1346

13. Devarapalli Laxminarayan Reddy & ors. Vs. V. Narayana Reddy & ors.,(1976) 3 SCC 252

14. Vinay Tyagi Vs. Irshad Ali @ Deepak & ors.(2013) 5 SCC 762

15. Ramdev Food Products Pvt. Ltd. Vs. St. Of Guj., (2015) 6 SCC 439

16. Anil Kumar Vs. M.K. Aiyappa, (2013) 10 SCC 705

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

1. Heard Mr. Santosh Kumar Shukla, learned counsel for the revisionist, Mr. Sheetal Prasad Chakarvorty and Mr. P.K. Shahi, learned counsel for the State and perused the record.

2. This criminal revision under section 397/401 Cr.P.C. has been preferred by the revisionist against the impugned order dated 20.12.2019 passed by the learned Chief Judicial Magistrate, Auraiya in Complaint Case No. 4329 of 2019, arising out of Misc. Case No. 268 of 2019 (Anand Kumar Pandey vs. Rani Devi and others), whereby the application moved under Section 156 (3) Cr.P.C. was treated as complaint and proceeded to record the statement under Section 200 Cr.P.C.

3. The brief allegations as alleged in the present case are that the complainant / revisionist filed an application under Section 156(3) Cr.P.C. on 11.06.2019 before the learned Magistrate stating therein that the complainant had purchased land no.127/1 situated at Mauja Manepur, Phaphund, District-Auraiya from the opposite party no.3 and, thereafter, his name entered in the revenue record and he was absolute owner of the said land. Some trees were standing over the said land, but the accused opposite party no.2 to 4 obtained permission from the Forest Department by way of forged affidavit mentioned situation of trees in between Gata No.127/1 and 127/2, which was absolutely wrong. Thereafter, the accused opposite parties with joint conspiracy cut down the said trees situated at Gata No.127/1 only and committed offence of forgery and cheating by way of misrepresenting the correct situation of trees, whereas, the opposite party no.2 had already sold the said land to the complainant in the year 2011. With regard to the same, the complainant tried to lodge a first information report but no report was lodged. He had also sent a registered complaint to the Superintendent of Police, Auraiya even then no action was taken by the police though a cognizable offence has been made out against the accused persons. Therefore, the application under Section 156(3) Cr.P.C. was moved by the complainant/ revisionist before the concerned court below for registration of the first information report.

4. It has been contended by learned counsel for the revisionist that vide order dated 20.12.2019, the concerned court below while disposing of the said application under Section 156 (3) Cr.P.C. has treated the same as complaint and directed it to be registered as complaint case fixing date for recording statement of the complainant under Section 200 Cr.P.C.

5. Learned counsel for the revisionist vehemently submits that from perusal of the application under Section 156(3) Cr.P.C. itself, a cognizable offence was made out and as such, it was required for the concerned court below to direct the police to investigate the matter. However, the learned Magistrate instead of directing for registration of the first information report treated the same as complaint, though cognizable offence is made out against them, therefore, the order passed by the court below is unsustainable in the eye of law.

6. Learned counsel for the revisionist has relied upon the judgment of the Hon'ble Apex Court in the case of ***Lalita Kumari vs. Government of U.P. and Others reported in 2014 (2) SCC 1,*** the Hon'ble

Apex Court has laid down guidelines holding that an obligation is cast on a police officer to register afirstinformationreportunder Section 154 of the Code of Criminal Procedure upon receiving anyinformationrelating to commission of a cognizable offence. It is contended that the Hon'ble Apex Court has categorically held that the registration of F.I.R. is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. Only in acasewhere theinformationreceived does not disclose a cognizable offence, the necessity for a preliminary inquiry may arise which may be conducted only to ascertain whether cognizable offence is disclosed or not. In thatcasealso, once the preliminary inquiry discloses the commission of a cognizable offence, the F.I.R. must be registered.

7. Per contra learned A.G.A. has contended that the order passed by the court below suffers from no error. The learned Magistrate is well within his power to treat the same as complaint. When an application is moved under Section 156 (3) Cr.P.C. it is not necessary to direct in every case to register the first information report, hence in view of the decision of this court in ***Sukhbasi's (supra)*** case the court below has treated the same as complaint.

8. Having heard the learned counsel for the revisionist and perusing the impugned order as well as the complaint, this Court does not find substance in the argument of the learned counsel for the revisionist. To appreciate the legal position in this regard, it is appropriate to have reference to provision of Sections 154 and 156 Cr.P.C before proceeding further. Provision of Sections 154 and 156 Cr.P.C is reproduced as under:-

"154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

"156. Police officer's power to investigate cognizable case.-

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under th
provisions of Chapter XIII.

(2)No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned."

9. Perusal of the provision of Section 156 (3) Cr.P.C shows that a Magistrate is empowered to direct the Station House Officer of the Police Station concerned to investigate the case; qua which a Magistrate is competent to take cognizance under Section 190 Cr.P.C. At this stage, it is also useful to have reference of Section 190 Cr.P.C which is as under:-

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

10. Perusal of aforesaid Section 190 Cr.P.C shows that a Magistrate has a wide power to take cognizance of an offence either on police report or on receipt of the complaint constituting such an offence, or upon information received from any person or even on his own knowledge as well; that such as offence has been committed.

11. Further, perusal of the aforesaid provisions, it is evident that the police can investigate into matters relating to commission of 'cognizable offences' brought to its notice under section 154 CrPC. Officer-in-charge of police station has power to investigate U/s 156(1) Cr.P.C. in such case. Magistrate has power to take cognizance U/s 190 Cr.P.C. on receiving the 'complaint'. Thus the matter relating to section 156 (3) Cr.P.C. relates to power of Magistrate to order investigation by police in matters relating to cognizable offences brought before it through complaint. Complaint has been defined in section 2(d) Cr.P.C. of as follows :-

"complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but does not include a Police report."

Code of Criminal Procedure has given different type of powers to deal with such matters relating to commission of cognizable offences when brought before it.

12. In the case of ***Lalita Kumari vs. Government of U.P. and Others reported in 2014 (2) SCC 1***, the question which

arose for consideration on a reference was "whether a police officer is bound to register a first information report (FIR) upon receiving aninformationrelating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 (in short "Code") or the police officer has the power to conduct a preliminary inquiry in order to test the veracity of such informationbefore registering the same in the context of the question before it.

13. The five judges Bench of Hon'ble Apex Court in the case of ***Lalita Kumari*** (supra), taking note of the provisions contained in Section 154, 156 & 157 in Chapter XII of the Code of Criminal Procedure has held in paragraph nos. 120 to 120.8 as under:-

"120. In view of the aforesaid discussion, we hold:-

120.1 The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2 If the information received does not disclose commission of a cognizable offence but indicates that the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3 If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith (not later than one week) disclosing reasons in brief for closing the complaint and not proceeding further.

120.4 The police officer cannot avoid his duty of registering an offence if cognizable is disclosed. Action must be taken against an erring officer who do not register the FIR if information received by him discloses a cognizable offence.

120.5 The scope of preliminary inquiry is not to verify the veracity or otherwise by the information received but only to ascertain whether the information reveals any cognizable offence.

120.6 As to what type and in which cases the preliminary inquiry is to be conducted, will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are identified as under:-

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all

conditions which may warrant preliminary inquiry.

120.7 While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

*120.8 Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or lead*ing to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

14. Acquainting the above directions issued by the Hon'ble Apex Court in the case of ***Lalita Kumari (supra)***, in the context of the question referred before it, it is evident that all the directions issued therein apply in the matter of receipt of information of commission of a cognizable offence by the police and the stage of "investigation" as defined in Section 2(h) of the Code to be made by the police in exercise of power conferred upon it under Chapter XII of the Code.

15. From a careful reading of the observations and directions issued by the Apex Court in ***Lalita Kumari's (supra)*** case, it cannot be said that they relate in any manner or curtail the power of the Magistrate to make an "inquiry" as defined in Section 2(g) of the Code. The Hon'ble Apex Court has also observed as follows:-

"87. The term "inquiry" as per Section 2(g) of the Code reads as under:

"2.(g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court."

Hence, it is clear that inquiry under the Code is relatable to a judicial act and not to the steps taken by the Police which are either investigation after the stage of Section 154 of the Code or termed as "preliminary inquiry" and which are prior to the registration of FIR, even though, no entry in the General Diary/Station Diary/Daily Diary has been made.

88. Though there is reference to the term "preliminary inquiry" and "inquiry" under Sections 159 and Sections 202 and 340 of the Code, that is a judicial exercise undertaken by the Court and not by the Police and is not relevant for the purpose of the present reference."

16. The question of power of Magistrate to order investigation under Section 156(3) Cr.P.C. came up for consideration before the Hon'ble Apex Court in the case of ***Mohammad Yousuf vs. Smt. Afaq Jahan & another reported in 2006 (1) SCC 627*** wherein the Hon'ble Apex Court has held that the "investigation" under the directions of the Magistrate under Section 156(3) Cr.P.C. falling within Chapter XII contemplates "investigation" by the police authorities. Whether the investigation is started by the police by the registration of FIR on the information received by it or under the order of the Magistrate under Section 156(3) Cr.P.C., it would be same kind of investigation which would end up only with the report contemplated under Section 173 of the Code. But when a Magistrate orders "investigation" under Chapter XII, he does so before he takes cognizance of the offence under Chapter XV of the Code.

It has also held that Chapter XV of the Code which confers power on the Magistrate to order "investigation" under Section 202 of the Code deals with the provisions relating to the steps which a Magistrate may adopt after taking cognizance of an offence on a complaint. Thus, the investigation under Section 202, which falls under Chapter XV, though refers to the power of a Magistrate to direct an investigation by a police officer, but is different from the "investigation" contemplated in Section 156(3) falling within Chapter XII of the Code.

17. The relevant paragraphs nos. 9, 10 & 11 of ***Mohammad Yousuf's (Supra)*** case are to be quoted herein:-

"9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. ***Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further.*** *This can be discerned from the culminating words in Section 202(1) i.e. "or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding".*

10. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

11. The clear position therefore is that ***any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so.*** *After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."*

18. Further it is well settled law as laid down by the Hon'ble Apex Court in the cases of ***R.R. Chari vs the State of Uttar Pradesh reported in AIR 1951 SC 207, Narayandas Bhagwandas Madhavdas vs. State of West Bengal reported in AIR 1959 SC 1118 and Gopal Das Sindhi & others Vs. State of Assam & another reported in AIR 1961 SC 986*** as also the decision of the Calcutta High Court in the case of ***Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Abani Kumar Banerjee reported in AIR 1950 Calcutta 437.***

19. The relevant part of ***Superintendent and Remembrancer of Legal Affair's (supra)*** case is quoted herein below:-

".....What is taking cognizance has not been defined in the Code of Criminal Procedure and I have no desire to attempt to define it. ***It seems to***

me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) of the Cr PC, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter --proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, *he cannot be said to have taken cognizance of the offence." were approved by this Court in R.R. Chari v. State of Uttar Pradesh[1951 SCR 312] . It would be clear from the observations of Mr Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind, e.g. ordering investigation under Section 156(3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence. The observations of Mr Justice Das Gupta above-referred to were also approved by this Court in the case of Narayandas Bhagwandas Madhavdas v. State of West Bengal [1960 (I) SCR 93] . It will be clear, therefore, that in the present case neither the Additional District Magistrate nor Mr Thomas applied his mind to the complaint filed on August 3, 1957, with a view to taking cognizance of an offence. The Additional District Magistrate passed on the complaint to Mr Thomas to deal with it. Mr Thomas seeing that cognizable offences were mentioned in the complaint did not apply his mind to it with a view to taking cognizance of any offence; on the contrary in his opinion it was a matter to be investigated by the police under Section 156(3) of the Code. The action of Mr Thomas comes within the observations of Mr Justice Das Gupta. In the circumstances, we do not think that the first contention on behalf of the appellants has any substance."*

20. Further, in the case of ***Jamuna Singh Vs. Bhadai Shah, reported in AIR 1964 SC 1541*** wherein the Hon'ble Apex Court observed as under:-

".....when on a petition of complaint being filed before him a Magistrate applies his mind for proceeding under the various provisions of Chapter XVI of the Code of Criminal Procedure, he must be held to have taken cognizance of the offences mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation under s. 156(3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence*. It was so held by this Court in R.R. Chari v. State of U. P.(1) and again in Gopal Das v. State of, Assam(2) In the case before us the Magistrate after receipt of Bhadai Sah's complaint proceeded to examine him under s. 200 of the Code of Criminal Procedure. That section itself states that the Magistrate taking cognizance of an offence on a complaint shall at once examine the complainant and the witnesses present, if any, upon oath. This examination by the Magistrate under s. 200 of the Code of Criminal Procedure puts it beyond doubt that the Magistrate did take cognizance of the offences mentioned in the complaint. After completing such*

examination and recording the substance of it to writing as required by s. 200 the Magistrate could have issued process at once under s. 204 of the Code of Criminal Procedure or could have dismissed the complaint under s. 203 of the Code of Criminal Procedure. It was also open to him, before taking either of these courses, to take action under s. 202 of the Code of Criminal Procedure. That section empowers the Magistrate to "postpone the issue of process for compelling the attendance of persons complained against, and either enquire into the case himself or if he is a Magistrate other than a Magistrate of the third class, direct an enquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint." If and when such investigation or inquiry is ordered the result of the investigation or inquiry has to be taken into consideration before the Magistrate takes any action under s. 203 of the Code of Criminal Procedure.

We find that in the case before us the Magistrate after completing the examination under s. 200 of the Code of Criminal Procedure and recording the substance of it made the order in these words :--

"Examined the complaint on s.a. The offence is cognizable one. To S.I. Bakunthpur for instituting a case and report by 12.12.56."

*If the learned Magistrate had used the words "for investigation" instead of the words "for instituting a case" the order would clearly be under s. 202 01' the Code of Criminal Procedure. We do not think that the fact that he used the words "for instituting a case" makes any difference. I**t has to be noticed that the Magistrate was not bound to take cognizance of the offences on receipt of the complaint. He could have, without taking cognizance, directed an investigation of the case by the police under s. 156(3) of the Code of Criminal Procedure. Once however he took cognizance he could order investigation by the police only under s. 202 of the Code of Criminal Procedure and not under s. 156(3) of the Code of Criminal Procedure**. As it is clear here from the very fact that he took action under s. 200 of the Code of Criminal Procedure, that he had taken cognizance of the offences mentioned in the complaint, it was open to him to order investigation only under s. 202 of the Code of Criminal Procedure and not under s. 156(3) of the Code. It would be proper in these circumstances to hold that though the Magistrate used the words "for instituting a case" in this order of November 22, 1956 he was actually taking action under s. 202 of the Code of Criminal Procedure, that being the only section under which he was in law entitled to act."*

21. As to what would mean "by taking cognizance" has been clarified by the Apex Court in the case of ***R.R. Chari vs. the State of Uttar Pradesh reported in AIR 1951 SC 207.*** The relevant paragraph Nos. 8 & 9 of the said judgment read as under:-

"8. In Gopal Marwari v. Emperor (1), ***it was observed that the word 'cognizance' is used in the Code to indicate the point when the Magistrate or a Judge first takes judicial notice of an offence. it is a different thing from the initiation of proceedings.*** *It is the condition precedent to the initiation of proceedings by the Magistrate. The court noticed that*

the word 'cognizance' is a word of somewhat indefinite import and it is perhaps not always used in exactly the same sense.

"9. After referring to the observations in Emperor v. Sou-rindra Mohan Chuckerbutty (2), it was stated by Das Gupta J. in Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee (3) as follows :-

"What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190 (1) (a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter-- proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under section 156 (3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

In our opinion that is the correct approach to the question before the court."

22. Further the aforesaid view had been noted with approval by the Apex Court in the case of ***Narayandas Bhagwandas Madhavdas vs. State of West Bengal reported in AIR 1959 SC 1118*** by observing as under:-

".....It is, however, argued that in Chari's case this Court was dealing with a matter which came under the Prevention of Corruption Act. It seems to us, however, that makes no difference. It is the principle which was enunciated by Das Gupta, J., which was approved. ***As to when cognizance is taken of an offence will depend upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuing of a search warrant for the purpose of an investigation or of a warrant of arrest for that purpose cannot by themselves be regarded as acts by which cognizance was taken of an offence.*** *Obviously, it is only when a Magistrate applies his mind for the purpose of proceeding under s. 200 and subsequent sections of Chapter XVI of the Code of Criminal Procedure or under s. 204 of Chapter XVII of the Code that it can be positively stated that he had applied his mind and therefore had taken cognizance."*

23. Thereafter, the Full Bench of this Court in the case of ***Ram Babu Gupta Vs. State of U.P. & others reported in 2001 (43) ACC 50*** has held that it is not possible to hold that when an application is moved before the Court only for exercise of powers under Section 156(3) Cr.P.C., it will remain an application only and would not be in the nature of the complaint. It was held that in any case, the Magistrate has to apply his mind on the allegations in the complaint to use his powers under Section 156(3) Cr.P.C. It was, thus, held that:-

"on receiving a complaint the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the

police station for being registered and investigated. The order of the Magistrate must indicate application of mind. If the Magistrate takes cognizance; he proceeds to follow the procedure provided in Chapter XV of Cr.P.C."

24. In ***India Carat Pvt. Ltd. vs. State of Karnataka reported in 1989 (2) SCC 132,*** considering the provisions as contained in Chapter XIV, Chapter XV and Chapter XVI of the Code, it was observed in paragraph 13' as under:-

"13. From the provisions referred to above, it may be seen that on receipt of a complaint a Magistrate has several courses open to him..... .....Yet another course open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down under Section 200 or Section 202, he may order an investigation to be made by the police under Section 156(3). When such an order is made, the police will have to investigate the matter and submit a report under Section 173(2). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(c) and issue process straightaway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. ***If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complaint and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued."***

25. The question regarding the power of Magistrate to order investigation under Section 156(3) Cr.P.C. further came up for consideration before the Apex Court in the case of ***Sakiri Vasu vs. State of U.P. & Ors. reported in 2008 (2) SCC 409;*** wherein it is observed that Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII of the Code. In case where the Magistrate finds that the police has not done its duties of investigating the case at all or has not done it satisfactorily, he can issue direction to the police to do the investigation properly and can also monitor the same.

26. It was held therein that although Section 156(3) Cr.P.C. is very briefly worded but there is an implied power with the Magistrate under Section 156(3) Cr.P.C. to order registration of a criminal case and/or to direct the officer in charge of the police station concerned to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same.

27. The above view taken in ***Sakiri Vasu's (supra)*** case is supported by the reasoning therein that even though these powers have not been expressly mentioned in Section 156(3) Cr.P.C., they are implied

in the said provision as when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. Relevant paragraph Nos. 18, 19 & 20 of the aforesaid judgement are noted as under:-

"18. It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.

19. The reason for the rule (doctrine of implied power) is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his Statutory Construction (3rd edn. Page 267):-

If these details could not be inserted by implication, the drafting of legislation would be an indeterminable process and the legislative intent would likely be defeated by a most insignificant omission.

20. In ascertaining a necessary implication, the Court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein."

28. The abovenoted views have been considered in a latest decision judgment of the Hon'ble Apex Court in the case o***f Vinubhai Haribhai and Malaviya & Ors. vs. State of Gujarat & Anr. Reported in 2019 SCC Online SC 1346*** while dealing with the power of the Magistrate to order further investigation under Section 173(8) Cr.P.C. of the Code after the charge sheet is filed and cognizance is taken. The argument there was that the Magistrate would have no power to order further investigation into an offence after he takes cognizance of the offence on submission of the charge-sheet on the direction issued by it under Section 156(3) of the Code. Dealing with the said argument, it was observed that the power of a Magistrate under Section 156(3) of the Code is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. Relevant paragraph nos. 23 and 24 of the aforesaid judgment are quoted as under:-

23. ***It is thus clear that the Magistrate's power under Section 156(3) of the CrPC is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a "proper investigation" takes place in the sense of a fair and just investigation by the police - which such Magistrate is to supervise - Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report is received by him under Section 173(2)****; and which power would continue to ensure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the "investigation" referred to in Section 156(1) of the CrPC would, as per the definition of "investigation" under Section 2(h), include all proceedings for collection of evidence conducted by a police officer; which would undoubtedly include*

proceedings by way of further investigation under Section 173(8) of the CrPC.

24. However, Shri Basant relied strongly on a Three Judge Bench judgment in ***Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors. (1976) 3 SCC 252.*** *This judgment, while deciding whether the first proviso to Section 202 (1) of the CrPC was attracted on the facts of that case, held:*

"17. Section 156(3) occurs in Chapter XII, under the caption : "Information to the Police and their powers to investigate"; while Section 202 is in Chapter XV which bears the heading: "Of complaints to Magistrates". The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub- section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, ***Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding".*** *Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him." This judgment was then followed in Tula Ram & Ors. v. Kishore Singh (1977) 4 SCC 459 at paragraphs 11 and 15."*

29. It may further be relevant to quote paragraph nos. 25 & 26 of Vinubhai's (supra) case, which read as under:-

25. Whereas it is true that Section 156(3) remains unchanged even after the 1973 Code has been brought into force, yet the 1973 Code has one very important addition, namely, Section 173(8), which did not exist under the 1898 Code. As we have noticed earlier in this judgment, Section 2(h) of the 1973 Criminal Procedure Code defines "investigation" in the same terms as the earlier definition contained in Section 2(l) of the 1898 Criminal Procedure Code with this difference - that "investigation" after the 1973 Code has come into force will now include all the proceedings under the CrPC for collection of evidence conducted by a police officer. "All" would clearly include proceedings under Section 173(8) as well. Thus, when Section 156(3)

states that a Magistrate empowered under Section 190 may order "such an investigation", such Magistrate may also order further investigation under Section 173(8), regard being had to the definition of "investigation" contained in Section 2(h).

26. Section 2(h) is not noticed by the aforesaid judgment at all, resulting in the erroneous finding in law that the power under Section 156(3) can only be exercised at the pre-cognizance stage. The "investigation" spoken of in Section 156(3) would embrace the entire process, which begins with the collection of evidence and continues until charges are framed by the Court, at which stage the trial can be said to have begun. For these reasons, the statement of the law contained in paragraph 17 in Devarapalli Lakshminarayana Reddy (supra) cannot be relied upon.

(emphasis added)

30. In ***Ramdev Food Products Private Ltd. vs. State of Gujarat, reported in 2015 (6) SCC 439,*** the Apex Court after considering the provisions in Chapter XII, Chapter XIV and Chapter XV has considered the law laid down by the Apex Court in ***Lalita Kumari's (supra)***. The relevant paragraph nos. 19 and 22 of the aforesaid case are herein under:-

"19. Thus, this Court has laid down that while prompt registration of FIR is mandatory, checks and balances on power of police are equally important. Power of arrest or of investigation is not mechanical. It requires application of mind in the manner provided. Existence of power and its exercise are different. Delicate balance had to be maintained between the interest of society and liberty of an individual. Commercial offences have been put in the category of cases where FIR may not be warranted without enquiry.

22. Thus, we answer the first question by holding that the direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. ***In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Category of cases falling under Para 120.6 in Lalita Kumari (supra) may fall under Section 202. Subject to these broad guidelines available from the scheme of the Code, e****xercise of dis*cretion by the Magistrate is guided by interest of justice from case to case."

31. Further in the case of ***Anil Kumar vs. M.K. Aiyappa reported in (2013) 10 SCC 705,*** the Hon'ble Apex Court has held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C. Relevant paragraph no.11 is as under:-

"11. A Special Judge is deemed to be a Magistrate under Section 5(4) of the PC Act and, therefore, clothed with all the magisterial powers provided under the Code of Criminal Procedure. ***When a***

private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under Section 190 Cr.P.C. or proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156(3) Cr.P.C. The Magistrate, who is empowered under Section 190 to take cognizance, alone has the power to refer a private complaint for police investigation under Section 156(3) Cr.P.C."

32. Further another judgment of Hon'ble Apex Court in the case of ***Madhao v. State of Maharashtra reported in (2013) 5 SCC 615***; wherein the Apex Court held that magistrate had not exceeded his power nor violated any of the provisions contained in the Code. It is also settled position that any judicial magistrate before taking cognizance of the offence can order investigation under Section 156(3) of the Code. Relevant paragraph nos.13, 14, 15 & 16 of the said judgment is as under:-

13. When a magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. ***As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3).***

14. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:-

(a) ***He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the r****equirements of Section 200 and record the evidence of the complainant or his witnesses.*

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

15. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

16. Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the

*Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint file*d before him and take action under Section 190 of the Code."

33. After perusing the whole scheme of Code of Criminal Procedure as well as the law settled by the Hon'ble Apex Court in the aforesaid judgments, it is evident that if a person has a grievance that his FIR has not been registered by the police, his first remedy is to approach the Superintendent of Police with written application under Section 154(3) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. In case of S.P. also does not still registered FIR, no proper investigation is done, in such a case, the aggrieved person can approach concerned Magistrate under Section 156(3) Cr.P.C. On receipt of the complaint, however, several courses are open to the Magistrate:-

(i) That a Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code.

(ii) Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:

(a) He can peruse the complaint and ***if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.***

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

(iii) In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

(iv) Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190.

34. Thus, the above discussion pertaining to the power of the Magistrate under Section 156(3) Cr.P.C. in Chapter XII read with Section 190 in Chapter XIV of the Code leaves no room for doubt that there is nothing in the Code of the Criminal Procedure, which curtails or puts any embargo on the power of the Magistrate to make an "inquiry" as defined under Section 2(g) of the Code or to order for "investigation" defined under Section 2(h)

of the Code, in dealing with the application under Section 156(3) Cr.P.C., i.e. in exercise of the power conferred upon it under Chapter XII or Chapter XIV of the Code to satisfy itself about the veracity of the allegations of commission of a criminal offence made therein.

35. In its discretionary power, it is open for the Magistrate to direct the police to register a criminal case under Section 154 Cr.P.C. and conduct investigation. At the same time, it is open for the Magistrate, where the facts of the case and the ends of justice so demand, to take cognizance of the matter by treating it as a complaint and proceed for the "inquiry" under Section 200 and 202 Cr.P.C.

36. It cannot be said nor it could be demonstrated that in each case, without application of its independent mind, the Magistrate shall issue simply direction to lodge a FIR and investigate the matter on an application filed under Section 156(3) Cr.P.C. The power to conduct a preliminary inquiry into the report of commission of criminal offence, conferred on the Magistrate within the provisions of the Code of Criminal Procedure has not been curtailed by any of the observations made by the Apex Court in the case of Lalita Kumari's (supra).

37. However, it is pertinent to note that while exercising its discretionary power under Section 156(3) Cr.P.C., the Magistrate like any other Court of discretionary jurisdiction is to act fairly and consciously and ensure that the discretion conferred upon it is exercised within the limits of judicial discretion. The entire emphasis is to act in an unbiased and just manner, strictly in accordance with law, to find out the truth of the case which shall come before it. It is a Magistrate who is the competent authority to take cognizance of an offence and it is his duty to decide whether on the basis of the record and documents produced, an offence is made out or not and if made out, what course of law should be adopted.

38. Keeping the above principles, if I test the same with the direction issued by the magistrate for treating the revisionist's application under Section 156(3) of the Code as complaint case and facts of these cases, it cannot be said that the Court concerned has committed illegally in exercise of its discretionary jurisdiction under Section 156(3) Cr.P.C. or it has exceeded in its jurisdiction in any manner or has exercised jurisdiction not vested in it in law. It cannot be said also that any material injustice has been caused to the applicant on account of the decision of the Court below to treat the application under Section 156(3) Cr.P.C. as a complaint for the purpose of deciding whether or not there is sufficient ground for proceeding, rather than directing the police to register an FIR and investigate under Section 154 of the Code.

39. In view of the above discussions, there is no illegality or infirmity in the impugned order dated 20.12.2019 passed by the concerned Magistrate, which would warrant interference by this Court in exercise of its revisional jurisdiction.

40. The revision is, thus, found devoid of merits and hence **dismissed.**

(2020)03-05ILR A1056
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No. 1107 of 1996

Mushtaq Ali @ Guddu & Ors. ...Revisionists
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionists:
Sri H.N.Sharma, Sri P.K. Singh

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

A. Criminal law- Dowry Prohibition Act, 1961-Sections ¾-Code of Criminal Procedure, 1973-Section 397/401 & Indian Penal Code,1860-Sections 323/34, 498-A, 506 - challenge to-punishment awarded-revisionists found guilty of demand of dowry and committing cruelty upon victim-revisionists claim for leniency in the matter of punishment awarded taking their advanced age-pendency of matter for 23 years has helped the revisionists in deferring punishment-revisionists are not entitled for benefit of section 4 of the Act 1958.(Para 17 to 42)

Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. Exonerating a guilty person due to any reason whatsoever has caused more damage to the society since easy acquittal has resulted in encouraging them to break law with impunity.((Para 23 to 29)

The revision is dismissed. (E-6)

List of Cases Cited:-

1. Babu & ors. Vs. St. Of U.P. (2007) 9 ADJ 107

2. Sanjay Kumar Vs. St. Of U.P. (2012) 8 SCC 537

3. Rajendra Pralhadrao Wasnik Vs. St. Of Mah., AIR (2012) SC 1377

4. Hazara Singh Vs. Raj Kumar & ors., (2013) 9 SCC 516

5. Shailesh Jasvantbhai & Anr. Vs. St. Of Guj. & ors. (2006) 2 SCC 359

6. Ahmed Hussein Vali Mohammad Saiyed & Anr. Vs. St. Of Guj., (2009) 7 SCC 254

7. Jameel Vs. St. Of U.P.,(2010) 12 SCC 532

8. Guru Basavaraj @ Benne Settapa Vs. St. Of Karnataka, (2018) 8 SCC 734

9. Gopal Singh Vs. St. Of UK, (2013) 3 JT 444

10. Ram Prakash Vs. St. Of H.P.,AIR (1973) SC 780

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

1. This Criminal Revision under Sections 397/ 401 Cr.P.C has been preferred by Mushtaq Ali @ Guddu, Guljar, Abdul Majeed and Samim, accused-appellants, against judgment and order dated 14.08.1996, passed by Sri U.S. Tripathi, the then Sessions Judge, Kanpur Dehat, dismissing appeal of Appellant-Revisionists against judgment dated 08.12.1995 passed by 03rd Additional Civil Judge / Magistrate, Kanpur Dehat in Criminal Case No. 221 of 1995. By the judment and order dated 08.12.1995, learned Magistrate had found all the four Accused-Revisionists guilty under Section 323 read with Sections 34, 498-A, 506 IPC and Section 3 read with Section 4 of Dowry Prohibition Act, 1961 *(hereinafter referred to as "D.P. Act, 1961").* Each of them were convicted and sentenced under Section 323

IPC read with Section 34 IPC to undergo six month's imprisonment; under Section 498A IPC, 1 ½ years imprisonment; under Section 506 IPC two years imprisonment and under Section 3 read with Section 4 of D.P. Act, 1961, three month's simple imprisonment". All the sentences were directed to run concurrently.

2. Prosecution case in brief is that Smt. Raisa Begum, sister of Complainant - Mohammad Nafis was married to Accused, Mushtaq Ali @ Guddu on 30.04.1991. Smt. Raisa Begum had gone to her-in-laws house with jewelry received in dowry and cash of Rs.17,000/-. After a few days of marriage, all the four Accused-Revisionists started exerting pressure on her to bring T.V and cash from her parental house. Smt. Raisa expressed her inability to bring cash and T.V, whereupon accused started beating and torturing, even kept her starving. Information of this situation was sent by complainant's sister through postal inland letter, but members of her parental home continued to advise her to spend life by conciliating and adjusting with her in-laws. On getting information about serious problems and torture subjected to her sister, Complainant, Mohammad Nafis alongwith his relatives Zafer-U-deen and Munna reached the residence of accused in village Makanpur on 24.04.1993 at about 11:00 a.m. Seeing her brother, Smt. Raisa Bano started lamenting loudly and complained that her in-laws used to beat her and pressurized for bringing T.V and cash; did not offer food or cloth and also tried to set her on fire after pouring kerosene oil but any how she escaped.

3. At the time of filing of complaint Raisa was pregnant. She requested her brother to take her with him lest the accused would kill her. When Complainant requested accused, Nafis to send his sister with him, all Accused-Revisionists started beating Complainant with kicks and fists and also threatened that only dead-body of Complainant's sister would be sent out of their house. Despite repeated requests by Raisa, Accused-Revisionists locked her in a room in front of Complainant and his relatives. Thereafter Complainant went to Police Station Bilhor, for lodging a report, but report was not lodged, therefore, Complainant filed complaint on 27.04.1993.

4. Statements of Nafis under Section 200 Cr.P.C and his sister Raisa Begum under Section 202 Cr.P.C. were recorded and all the four accused were summoned. Thereafter charge was framed against Accused-Revisionists under Sections 324/34, 498-A, 504, 506 I.P.C and 3/4 D.P. Act, 1961.

5. In support of case, Complainant has examined Smt. Raisa Begum as P.W 1, Jamruddin as P.W 2 and Complainant himself as P.W. 3 under Section 244 Cr.P.C. On the basis of evidence, charge was amended and Accused-Revisionists were charged under Sections 323/34, 498-A, 504, 506 I.P.C and Section 3/4 D.P. Act, 1961. Consequent upon framing of amended charge, prosecution examined P.W-1 Raeesa Begum, P.W-2 Jafaruddin and P.W 3 Nafis under Section 246 Cr.P.C.

6. Accused-Revisionists were examined under Section 313 Cr.P.C. They denied the charge and claimed trial. In support of defence, accused produced D.W - 1, Saiyyad Ali Nabi, and D.W. - 2, Ali Akhtar.

7. After going through the evidence available on record and hearing arguments

of learned counsel for the parties, learned Magistrate recorded judgement of conviction against all accused and sentenced them as detailed above by judgment and order dated 08.12.1995. The appeal filed by Accused-Revisionists before Sessions Judge, did not find favour and it was dismissed vide judgment and order dated 14.08.1996, which is impugned in this Revision.

8. Since Accused-Revisionist-3, Abdul Majeed @ Chhanga died on 07.12.2015, revision stood abated-qua Revisionist-3 vide order of this Court dated 18.09.2019.

9. I have heard Sri P.K. Singh, learned counsel for Revisionists-1, 2 and 4 and perused the material available on record.

10. Learned counsel appearing for Revisionists submitted that one of the Revisionist is 60 years of age and mother of Mushtaq Ali is also in advanced age and there is no specific allegation against her, therefore case of Revisionists can be segregated and period of sentence be reduced. It has also been submitted that Revisionists may be granted benefit of Probation of Offenders Act, 1958 (hereinafter referred to as "Act, 1958").

11. Learned A.G.A. supporting the judgment in question argued that prosecution witnesses have clearly supported and proved case of prosecution and learned counsel for Revisionists having failed to point out any manifest error or illegality therein, no interference is called for in this revision considering the nature of allegations and offences found proved against Revisionists.

12. As per record, PW-1, Smt. Raisa Begum, the victim and sister of Complainant, has very categorically stated that for demand of dowry and non satisfaction thereof, she was treated with cruelty so much so that at one occasion Accused-Revisionists attempted to set her on fire by pouring kerosene oil and when she escaped somehow, later she was allowed to appear in Court when she promised with mother-in-law, i.e., Accused-Revisionist 4, that she will depose in their favour. She has also said very categorically that father-in-law used to exhort and said that victim PW-1, Smt. Raisa Begum, be beaten.

13. PW-2, Jamruddin is a witness who had participated in marriage, known to family of Complainant and was aware of complaint of victim that she used to be tortured and treated with cruelty for non satisfaction of demand of dowry by Revisionists.

14. Complainant, PW-3, Mohd. Nafees is the brother of victim. He has also supported prosecution case.

15. Nothing otherwise could be extracted from cross-examination of above witnesses and, therefore, in my view, aforesaid witnesses have deposed clearly, their statement is creditworthy, which has relied by Court below to prove the charge levelled against Revisionists in trial.

16. It is in this backdrop this Court has to examine, "whether Revisionists-1, 2 and 4 deserves any leniency in the matter of sentence" as argued by learned counsel for Revisionists; and "do they deserves to be granted benefit of Act, 1958".

17. Revisionists have been found guilty of demand of dowry and for non satisfaction of demand of dowry committing cruelty upon victim Smt. Raisa Begum and also an attempt to burn her by pouring kerosene oil. The offence founded on demand of dowry and non satisfaction thereof is not only quite serious but a curse. It is an evil spread in society wherein victim is always a woman. A woman is subjected to cruelty and torture for non satisfaction of dowry, i.e., for materialistic reasons. Decades and centuries have passed witnessing approach of in-laws of bridegroom of demanding dowry as if it is their birth right and obligation on the part of bride side to satisfy such demand. Time and again it has been deprecated and condemned, being always against civilized society. Even legislature has come forward to make stringent laws in this respect. Unfortunately the tentacles of disease are so deep embedded that instead of being reduced, we find its excess in most part of society, irrespective of caste, creed and religion. Those who support dowry, claim it to be an ancient tradition and means to help newly wedded couple to settle in their life. They forget that responsibility for a descent life of couple, is on both sides and cannot be claimed to be an obligation only on the part of bride's parents. Dowry is a root and host of social atrocities against woman. The custom of presenting dowry is the crudest expression of male dominance in society. I do not propose to write an essay on the subject since now it cannot be doubted that demand of dowry and cruelty for non satisfaction thereof is a blot on society and cannot be allowed to perpetuate in a civilized society, hence legislation made to prevent it must not only be implemented with widest amplitude but those who are guilty should be dealt with stern action and appropriate punishment should be improved so that it may not only be punitive to the violators but also a preventive lesson to others.

18. Demand of dowry from bride and her parents and torture of bride for non satisfaction can also be said to be violation of human rights in a big way. It is also a gender bias and discrimination towards woman. Whenever a demand of dowry is made to a bride and she resist for whatever reason, may be including financial scarcity and poverty of her parents, the ultimate result is adverse on bride which also cause loss of her self esteem and downgrade of status.

19. In a case where a bridegroom or his family members have committed offence of demanding dowry and committing cruelty and torture upon bride for non satisfaction of said demand, Court should adopt and ensure a zero tolerance policy against offenders and ensure enforcement of law strictly, stringently and without showing any leniency to such offenders.

20. Looking to the facts of this case, in the backdrop of above discussion, it cannot be doubted that Revisionists are guilty of committing one of the most heinous crime against woman and they deserve to be dealt with iron hands.

21. The contention of learned counsel for revisionists that Respondent-4 has no role in the matter and there is no specific allegation is incorrect inasmuch as victim herself has said clearly that her mother-in-law alongwith others was constantly pressurizing her to satisfy demand of dowry and also treated her with cruelty for non satisfaction thereof.

22. So far as advance age of Revisionists-1 and 4 is concerned, it cannot

be overlooked that cannon of law which determine punishment to Accused-Revisionists up to the level of Appellate Court declared verdict in 1996 but pendency of matter for the last 23 years in this Court has helped Revisionists in deferring punishment so as now to claim that taking their advance age, some leniency in the matter of punishment be shown. Pendency of revision in this Court cannot be allowed to help offender.

23. A criminal offence is considered as a wrong against the State, and, society in particular, even though it is committed against individual(s). This Court in **State of U.P. Vs. Babu and others 2007(9) ADJ, 107 (DB)** has said:

"The duty of the Court of law is heavy in the sense that it should ensure that no innocent should be punished but simultaneously it is also under an obligation to see that no guilty person should escape from the clutches of law by taking advantage of so-called technicalities as this will not only lead to further serious threats to the entire society but may also shake the confidence of public at large in the system of dispensation of justice. Our experience has shown that ***exonerating a guilty person due to any reason whatsoever has caused more damage to the society since it has multiplied the occurrence of crime as well as has also produced more criminals attracting them to commit crime since easy acquittal has resulted in encouraging them to break law with impunity.*** *It will be useful to remind with the words of caution as observed by the Hon'ble Apex Court (Krishna Ayer J.) in Shiva Ji Sahabrao Bobade (supra) emphasizing to keep balance between the individual liberty and evil of acquitting guilty persons. The Court observed that we should remind ourselves of necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape.* ***The Courts having duty of judicial review owe the public accountability of such system. The golden thread of proof beyond reasonable doubt should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt.*** *The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community.* ***The evil of acquitting a guilty person light-heartedly goes much beyond the simple fact that just one guilty person has gone unpunished****. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumption against indicted persons and more severe punishment of those who are found guilty. Too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. Miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of innocent." (emphasis added)*

24. The above observations were made on the question of conviction but, in my view, once the prosecution has succeeded to prove its case and conviction is upheld by all the Courts, if its

consequence is allowed to be diluted by modifying punishment to the extent of having no consequence merely on the ground of time consumed in legal remedy, whatsoever, it would make a mockery of entire criminal system of justice since victim and his family i.e. the real suffers, as also the society, have no control over such proceedings and delay occurred therein.

25. Commenting upon sentencing policy, in **State of U.P. Vs. Sanjay Kumar 2012 (8) SCC 537**, Court said that punishments should reflect the gravity of offence and also criminal background of convict. The graver the offence and longer the criminal record, more severe is the punishment to be awarded. By laying emphasis on individualised justice, and shaping the result of crime to the circumstances of offender and needs of victim and community, restorative justice eschews uniformity of sentencing. In para 21 of the judgment, Court further said:

*"**Undue sympathy to impose inadequate sentence would do more harm to the public system to undermine the public confidence in the efficacy of law** and society could not long endure under serious threats" (English translation by Court)*

26. Court further said that it is the duty of Courts to award proper sentence, having regard to the nature of offence and the manner in which it was executed or committed, etc. Courts should impose a punishment befitting the crime so that Courts are able to accurately reflect upon public abhorrence of the crime. It is the nature and gravity of crime, and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. Imposition of sentence without considering its effect on social order, in many cases, may be in reality, a futile exercise.

27. In **Rajendra Pralhadrao Wasnik Vs. State of Maharashtra AIR 2012 SC 1377,** Court said:

"Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole."

28. In **Hazara Singh Vs. Raj Kumar and others (2013) 9 SCC 516**, Court referred to its earlier decision in **Shailesh Jasvantbhai and another Vs. State of Gujarat and others (2006) 2 SCC 359** and quoted with approval, following passage:

*"... undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, t**he duty of every court to award proper sentence having regard to the nature of the offence** and the manner in which it was executed or committed etc."*

(emphasis added)

29. In **Ahmed Hussein Vali Mohammed Saiyed and Anr. Vs. State of Gujarat 2009 (7) SCC 254,** Court said:

*"99. The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to law by imposing appropriate sentence. It is expected that the **courts would operate the sentencing system so as to impose such sentence, which reflects the conscience of***

the society and the sentencing process has to be stern where it should be. ....

100. Justice demands that ***courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime****. The court must not only keep in view the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. The* ***court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society*** *to which both the criminal and the victim belong." (emphasis added)*

30. In **Hazara Singh Vs. Raj Kumar and others (supra),** the Court in para 17 also said:

"We also reiterate that ***undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine*** *the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The Court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment." (emphasis added)*

31. In the matter of awarding punishment multiple factors have to be considered by this Court. Law regulates social interests, arbitrates conflicting claims and demands. Security of individuals as well as property of individuals is one of the essential functions of the State. The administration of criminal law justice is a mode to achieve this goal. The inherent cardinal principle of criminal administration of justice is that the punishment imposed on an offender should be adequate so as to serve the purpose of deterrence as well as reformation. It should reflect the crime, the offender has committed and should be proportionate to the gravity of offence. Sentencing process should be stern so as to give a message to the offender as well as the person like him, roaming free in the society, not to indulge in criminal activities but also to give a message to society that an offence if committed, would not go unpunished. The offender should be suitably punished so that society also get a message that if something wrong has been done, one will have to pay for it in proper manner, irrespective of time lag.

32. Further sentencing process should be stern but tampered with mercy where-ever it is so warranted. How and in what manner element of leniency shall prevail, will depend upon multifarious reasons including the facts and circumstances of individual case, nature of crime, the matter in which it was committed, whether preplanned or otherwise, the motive, conduct, nature of weapon used etc. But one cannot lose sight of the fact that undue sympathy to impose inadequate sentence would do more harm to justice system as it is bound to undermine public confidence in the efficacy of law. The society cannot long endure such serious threats. It is duty of court to give adequate, proper and suitable sentence, having regard to various aspects, some of which, are noticed above.

33. In **Ahmed Hussein Vali Mohammed Saiyed and another Vs. State of Gujrat (supra),** Court confirmed that:

*"**any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run** and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system". (emphasis added)*

34 . In **Jameel Vs. State of Uttar Pradesh, 2010 (12) SCC 532**, the Court held that:

*"It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to **impose a sentence commensurate with the gravity of the offence."***
(emphasis added)

35. In **Guru Basavaraj @ Benne Settapa Vs. State of Karnataka, 2012 (8) SCC 734**, Court said that:

"The cry of the collective for justice, which includes adequate punishment cannot be lightly ignored."

36. In **Gopal Singh Vs. State of Uttarakhand, 2013 (3) JT 444,** the Court said that:

*"**Just punishment is the collective cry of the society**. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence" (emphasis added)*

37. Thus, I do not find any reason to show leniency for any Revisionists considering nature of crime committed by them.

38. Now coming to second question, "whether Revisionists are entitled for benefit under Act, 1958"; learned counsel for Revisionists could not dispute that Section 3 thereof would have no application in the present case. Benefit, therefore, is claimed by requesting Court to exercise its power under Section 4 of Act, 1958.

39. I find that Section 4 of Act, 1958 imposes an obligation upon Court to have regard to the circumstances of case including nature of offence and character of offender. The word "may" in Section 4 has been held as not to be read as must in **Ram Prakash vs. State of Himachal Pradesh, AIR 1973 SC 780.**

40. Looking to the nature of offence, I do not find it appropriate to import Section 4 of Act, 1958 in the case in hand so as to grant any benefit to Revisionists-1, 2 and 4.

41. In view of above discussion, I answer both questions against Revisionists.

42. Revision lacks merit. Dismissed accordingly.

43. Interim order, if any, stands vacated.

(2020)03-05ILR A1064
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.02.2020

BEFORE

THE HON'BLE MANISH MATHUR, J.

Criminal Revision No. 1234 of 2018

Jiya-Uddin (Minor) ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Punit Kumar Shukla, Amitchaudhary (amicus curiae)

Counsel for the Opposite Parties:
Govt. Advocate

A. Criminal Law- Juvenile Justice (Care and Protection of Children) Act 2015-section 12, 15 and 18(3)- Code of Criminal Procedure,1973-Section 397/401 & Indian Penal Code,1860-Sections 376 application-grant of bail to juvenile-rejection of bail by lower court-However, Section 12(1) provides for bail to a child in conflict with law-section 15 and 18(3) are not ejusdem generis with that of section 12-hence, preliminary assessment is not required to be made at the time of considering bail application u/s 12 of the Act-accused-juvenile granted bail on his father furnishing a personal bond with two sureties.(Para 3 to 35)

Section 12(1) of juvenile justice act provides for If release is likely to bring that person into association with any known criminal or be exposed to any moral, physical or psychological danger or the person's release would defeat the ends of justice. Board shall record the reasons for denying bail.(Para 22)

The revision is allowed. (E-6)

List of Cases Cited:-

1. Radhika(juvenile) Vs. St. Fo U.P. Crl. Appeal No. 4418 of 2019

2. Mangesh Rajbhar Vs. St. Of U.P. & Anr. (2018) 6 ADJ 60

3. Santosh Vs. St. Of U.P. & Ors. Crl. Appeal No. 5814 of 2018

4. Bharat Aluminium Co. Vs. Kaiser Aluminium Technical Services (2012) 9 SCC 552

5. Shiv Shakti Cooperative Housing Society

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard Mr. Amit Chaudhary, learned amicus curiae, Mr. Punit Kumar Shukla, learned counsel for revisionist and Mr. Aniruddh Kumar Singh, learned Additional Government Advocate appearing on behalf of State. As per report of Chief Judicial Magistrate dated 17.12.2018, notices were served personally upon Opposite Party no.2 but no one has put in appearance on his behalf.

2. Present criminal revision has been filed against order dated 04.05.2018 passed by Juvenile Justice Board, Sitapur in Criminal Miscellaneous Case No.57 of 2017 bearing Case Crime No.153 of 2017, under Section 376 IPC, Police Station Mishrikh, District Sitapur. Under challenge is also the order dated 25.08.2018 passed by IIIrd Additional Sessions Judge, Sitapur in Criminal Appeal No.42 of 2018 upholding the order of rejection. Present case is where the revisionist was aged between 16 to 18 years, i.e. revisionist was aged about 16 years one month and 21 days.

3. Learned AGA at the very outset has submitted that the Juvenile Justice (Care and Protection of Children) Act has undergone a major change in the year 2015

specifically with regard to Sections 15 and 18 of the said Act which would have a bearing on consideration of bail application filed by a child in conflict with law under Section 12 of the said Act. It has been submitted that Section 15 now provides for a preliminary assessment into heinous offences by the Juvenile Justice Board and in case of a heinous offence alleged to have been committed by a child who has completed or is above the age of 16 years, a preliminary assessment regarding his mental and physical capacity and ability to understand consequences of offence which he allegedly committed is required prior to consideration of bail application of such a child i.e. filed under Section 12 of the Act. Learned counsel has drawn attention to Section 2(33) of the Act in which "heinous offences" have been described as those which include offences for which minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more. The upshot of arguments raised by learned AGA therefore is that while considering a bail application of such a child who has completed or is over the age of 16 years as on the date of occurrence of incident, not only the factors indicated in Section 12 of the Act are required to be seen but a preliminary assessment as contemplated under Section 15 and consequent orders passed under Section 18(3) of the Act are also required to be considered by the Board prior to passing any final order on a bail application filed by such a child under Section 1

4. Learned counsel has relied upon judgment rendered by this Court in the case of ***Radhika (Juvenile) vs. State of U.P. in Criminal Appeal No.4418 of 2019*** and other connected matters. Reliance has also been placed on the judgment rendered by this Court in the case of ***Mangesh Rajbhar vs. State of U.P. & Another*** reported in ***2018(6) ADJ 60.***

5. Mr. Amit Chaudhary, learned Amicus Curiae assisted by Mr. Punit Kumar Shukla, learned counsel for revisionist has refuted the submissions advanced by learned AGA with the submission that provisions of Sections 15 and 18(3) of the Act are completely different from provisions indicated in Section 12 of the Act. Attention is drawn to Section 18 Sub-section (3) whereby the Juvenile Justice Board after preliminary assessment under Section 15 is required to pass an order that there is need for trial of the child as an adult but the said provisions are not to be found in Section 12 which has been kept completely separate from the changed provisions incorporated in the Act. As such, it has been submitted that the bail application of a child in conflict with law who has completed or is over the age of 16 years as on the date of incident is required to be seen only in terms of provisions of Section 12 of the Act without any reference to Sections 15 and 18(3) of the Act. Learned counsel has relied upon the judgment rendered by this Court in the case of ***Santosh vs. State of U.P. & Ors.*** rendered in ***Criminal Appeal No.5814 of 2018.***

6. Upon consideration of submissions advanced by learned counsel for parties and perusal of record, it is evident that in case of a child in conflict with law as defined under Section 2(13) of the Act who is alleged to have committed an offence and has either completed or is over the age of 16 years, application for bail is required to be filed under Section 12 of the Act which is as follows:-

"12. Bail to a person who is apparently a child alleged to be in conflict with law.-*(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the*

police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

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

(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

7. Under Section 15 of the Act, a preliminary assessment into heinous offences is required to be made by Juvenile Justice Board and is particularly relevant in case of heinous offence alleged to have been committed by a child who has completed or is aged more than 16 years. In such a situation, the Board is required to conduct a preliminary assessment regarding his mental and physical capacity to commit such offence, ability to understand the consequences of offence and circumstances under which he has allegedly committed the offence. The said assessment is required to be made in order to ensure compliance of provisions of Section 18(3) of the Act. Sections 15 and 18 are as follows:-

"15. Preliminary assessment into heinous offences by Board.-*(1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18:*

Provided that for such an assessment, the Board may take the ***assistance of experienced psychologists or psycho-social workers or other experts.*** *Explanation.?For the purposes of this section, it is clarified that preliminary* ***assessment is not a trial, but is to assess the capacity*** *of such child to commit and understand the consequences of the alleged offence.*

(2) Where the Board is satisfied on preliminary assessment that the matter

should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.

18. ***Orders regarding child found to be in conflict with law.-****(1) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,?*

(a) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;

(b) direct the child to participate in group counselling and similar activities;

(c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

(d) order the child or parents or the guardian of the child to pay fine: Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;

(e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;

(f) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;

*(g) direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counselling, behaviour m****odification therapy, and psychiatric*** *support during the period of stay in the special home:*

Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

(2) If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to?

(i) attend school; or

(ii) attend a vocational training centre; or

(iii) attend a t*herapeutic centre; or*

(iv) prohibit the child from visiting, frequenting or appearing at a specified place; or

(v)undergo a de-addiction programme.

(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the ***Children's Court*** *having jurisdiction to try such offences."*

8. A conjoint reading of Sections 15 and 18(3) of the Act makes it evident that it is only when a heinous offence as defined under Section 2(33) of the Act is alleged to have been committed by a child who has completed or is above the age of 16 years that a preliminary assessment is required to be made. The wordings of said section make it apparent that such a preliminary assessment is required in order to enable passing of order in accordance with provisions of Section 18(3) of the Act. Proviso to Sub-section (1) of Section 15 enables the Board to take assistance of experienced psychologists or psycho-social workers or other experts. Explanation thereof also clarifies the fact that the preliminary assessment is not a trial but is only in order to assess the capacity of such child to commit and understand the consequences of alleged offence.

9. Sub-section (2) of Section 15 provides that where the Board is satisfied on a preliminary assessment that the matter should be disposed of by the Board, then the procedure, as far as may be for trial in summons case under the Code of Criminal Procedure, 1973 is required to be followed.

10. The entire purpose of a preliminary assessment under Section 15 of the Act is only to enable the Board to pass relevant orders under Section 18 (3) of the Act which provides that the Board after preliminary assessment may pass an order that there is need for trial of the said child as a result and consequently may order transfer of trial of case to the Children's Court having jurisdiction.

11. It is a relevant factor that the preliminary assessment required to be made under Section 15 of the Act is only as a guide for the purposes of passing of relevant orders by the Board under Section 18(3), which in its turn is only to enable the Board to pass an order that there is need for **trial** of the said child as an adult. In case such an order is passed treating the child as an adult, the Board is required to order transfer of the **trial** of the case to Children's Court. It is thus evident that the entire purpose of passing an order by Board under Section 18(3) is for the purposes of trial. Neither Section 15 nor Section 18(3) of the Act indicates that such provisions are to be followed even in case of consideration of an application for bail under Section 12 of the Act. It is also a relevant fact that despite aforesaid provisions having been incorporated in Sections 15 and 18, there is no such consequential provision in Section 12 of the Act pertaining to grant of bail to such a child.

12. With regard to interpretation of statute, it is settled law that statute is an edict of the legislature and where the words of statute are clear without any ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to innovate or take upon itself the task of altering the statutory provisions by breathing into

the provisions, words which have not been expressly incorporated by the legislature.

13. It is only in case where the words of statute are ambiguous or a reading of which clearly indicates that it is a case of 'casus omissus' that the court can interpret the provisions incorporated in statute. Hon'ble the Supreme court referring to various pronouncements in the case of ***Bharat Aluminium Company versus Kaiser Aluminium Technical Services Inc***. reported in (***2012) 9 SCC 552*** has held that the court must proceed on the footing that the legislature intended what it has said. Even where there is a 'casus omissus' it is for the others than the courts to remedy the defect. The relevant paragraph in the case of ***Bharat Aluminium Company (supra)*** is as follows:-

"65. Mr Sorabjee has also rightly pointed out the observations made by Lord Diplock in Duport Steels Ltd. [(1980) 1 WLR 142 : (1980) 1 All ER 529 (HL)] In the aforesaid judgment, the House of Lords disapproved the approach adopted by the Court of Appeal in discerning the intention of the legislature; it is observed that: (WLR p. 157 C-D)

"... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our Constitution it is Parliament's opinion on these matters that is paramount." (emphasis supplied)

In the same judgment, it is further observed: (WLR p. 157 F)

*"... But if this be the case it is for Parliament, not for the judiciary, to decide whether any c*hanges should be made to the law as stated in the Acts...." (emphasis supplied)"

14. The principles with regard to 'casus omissus' and its implementation have also been dealt with by Hon'ble the Supreme Court in the case of ***Shiv Shakti Cooperative Housing Society*** in which the relevant paragraphs are as follows:-

"19. It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. (See Institute of Chartered Accountants of India v. Price Waterhouse [(1997) 6 SCC 312 : AIR 1998 SC 74] .) The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford

v. Spooner [(1846) 6 Moo PCC 1 : 4 MIA 179] courts cannot aid the legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See State of Gujarat v. Dilipbhai Nathjibhai Patel [(1998) 3 SCC 234 : 1998 SCC (Cri) 737 : JT (1998) 2 SC 253] .) It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. [See Stock v. Frank Jones (Tipton) Ltd. [(1978) 1 All ER 948 : (1978) 1 WLR 231 (HL)]] Rules of interpretation do not permit courts to do so, unless the provision as it stands is meaningless or of a doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn, L.C. in Vickers Sons and Maxim Ltd. v. Evans [1910 AC 444 : 1910 WN 161 (HL)] , quoted in Jumma Masjid v. Kodimaniandra Deviah [AIR 1962 SC 847] .)"

"23. Two principles of construction -- one relating to casus omissus and the other in regard to reading the statute as a whole -- appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J. in Artemiou v. Procopiou [(1966) 1 QB 878 : (1965) 3 All ER 539 : (1965) 3 WLR 1011 (CA)] (All ER p. 544 I), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result", we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. Per Lord Reid in Luke v. IRC [1963 AC 557 : (1963) 1 All ER 655 : (1963) 2 WLR 559 (HL)] where at AC p. 577 (All ER p. 664 I) he also observed: "This is not a new problem, though our standard of drafting is such that it rarely emerges."

15. As per Maxwell's interpretation of statutes, the four main rules to interpret a statute are the literal, golden, mischief and the integrated approach, known as the purposive approach. While the literal rule uses plain ordinary meaning of words, the golden rule is an extension thereof and is brought into play only where the literal rule creates an absurdity.

16. Regarding, the purposive approach, Lord Denning in the case of Notham vs London Borough of Barnet (1978)1 WLR 220 has held the purposive approach being one that will promote general legislative purpose underlying the provisions.

17. In addition to aforesaid statutory interpretations, three rules are also required to be kept in mind which are; ejusdem generis- meaning of same kind, Noscitur a sociis- meaning a word is known by the company it keeps, and expressio unius est

exclusio aterius - meaning where express mention of one thing excludes other.

18. With regard to literal and purposive interpretation of statute, it is seen that statement of objects and reasons of the Act indicate that the legislation was required to be enacted in view of several issues such as incidence of abuse of children in institutions, inadequate facilities, quality of care and rehabilitation measures in homes, high pendency of cases etc. due to which enactment of the legislation was required to *ensure proper care, protection, development, treatment and social integration of children in difficult circumstance by adopting a child friendly approach keeping in view the best interest of the children in mind.*

19. Upon applicability of the literal rule of interpretation of statute read with the purposive intention, it is clear that the legislation was enacted keeping in view the best interest of the child in mind in order to ensure their proper care and social re-integration, which cannot be served by keeping the child interminably under custody while awaiting the result of detailed evaluation under Section 15 and consequent order under Section 18(3) of the Act.

20. Considering the fact that provisions of Section 15 read with Section 18(3) of the Act are not to be found in Section 12 of the Act, it cannot be said that the provisions incorporated in Section 15 and Section 18(3) are ejusdem generis with that of Section 12.

21. In the present case, it is easily seen that the wordings of all the three sections separately are quite clear and unambiguous therefore not requiring any additional supplement of words. The legislature in its wisdom has clearly not amended Section 12 of the Act as a consequence to provisions incorporated in Sections 15 and 18(3) of the Act. As such, the provisions of Sections 15 and 18 (3) cannot be read into Section 12 of the Act. As a consequence, it cannot be said that a preliminary assessment under Section 15 is required to be made at the time of consideration of bail application under Section 12 of the Act.

22. This Court in the case of ***Santosh*** (supra) has also held as follows:

"9. It is pertinent to mention here that Section 12 of the Juvenile Justice (Care and Protection of Children) Act has not been amended so far as the parameters and yardstick for granting bail to the juvenile-accused is concerned. Therefore, while rejecting the bail application of such juvenile, it cannot be the criteria that the alleged offence is of serious and heinous nature. The order must show that the grant of bail to the juvenile accused is against his interest as there is possibility of his being associated with known criminals, or there is some sort of moral, physical or psychological danger to him or there is likelihood of end of justice being defeated. All these conditions have been incorporated in law in order to ensure justice to the juvenile."

23. In the case of ***Radhika (Juvenile)*** (supra), this Court was considering the question as to whether appeal filed under Section 101(5) of the Act is an appropriate remedy for appellants after getting their respective bail application rejected by Children's Court/ Special Sessions Judge, Protection of Children From Sexual Offences Act. Second question pertained to

whether while deciding application of a juvenile between the age group of 16 to 18 years, the seriousness, gravity of offence and respective role in commission of crime would also be a determining factor while releasing them on the proceedings opted by them. Learned Single Judge while deciding the second question has clearly held that while deciding bail of such a delinquent ranging between the age group of 16 to 18 years, it would be discretionary upon the Court to take into account factors regarding his mental, physical capacity, ability to understand the gravity of a heinous offence and respective participation in crime and circumstances for the particular grave and serious offence in addition to grounds provided under Section 12 (proviso) of the Act. It has been held that all these factors too are determinative factors while adjudicating the bail applications of juvenile offenders in the age group of 16 to 18 years since not considering the said factors would reduce the object of present legislation to naught.

24. This Court in the case of ***Mangesh Rajbhar*** (supra) after considering provisions of Sections 15 and 18 of the Act has also held that (gravity of offence is certainly relevant though not decisive. It is this relevance amongst the other factors where gravity of offence committed works and serves as a guide to grant or refuse bail in conjunction with other relevant factors mentioned in proviso to Section 12(1) of the Act particularly on the ground that release of such a juvenile would defeat the ends of justice). It has further been held that orders under Section 18 although are concerned with final orders to be made while dealing with the case of juvenile can serve as a guide to exercise of power for grant of bail to juvenile.

25. The aforesaid two judgments have clearly taken into account the conditions required to be considered while adjudicating the bail application of juvenile under Section 12 of the Act. Particular emphasis has been laid upon the third condition that release of such a juvenile would defeat the ends of justice. It is under this provision of the proviso that both the judgments have held that gravity of charges and circumstances, under which a juvenile has allegedly committed an offence, has been held to be required to be seen at the time of consideration of bail application.

26. Once seen in the light of proviso to Section 12 of the Act, particularly the conditions indicated in Section 12 that the release of a juvenile between the age of 16 to 18 years and accused of a heinous offence would defeat the ends of justice, definitely the gravity of charges leveled against the person would be required to be seen since the words would 'defeat the ends of justice' cannot be seen in isolation or in a vacuum. In order for the Board or the Court of competent jurisdiction to arrive at a conclusion that release of a juvenile accused of heinous offence would defeat the ends of justice, necessarily the gravity of charges and circumstances, surrounding involvement of juvenile in the alleged heinous offence would be a material factor.

27. Keeping the aforesaid in mind, however it is made clear that the aforesaid factors that are to be required to be kept in mind would be completely different from the preliminary assessment required to be made under Section 15 of the Act. The factors regarding gravity of charge and circumstances surrounding a heinous offence is only for the purpose of understanding whether release of such a juvenile would defeat the ends of justice. For consideration of a bail application under Section 12 of the Act, a complete preliminary assessment under Section 15 of the Act is neither required to be done nor considered.

28. In the backdrop of aforesaid, present criminal revision is being adjudicated in the absence of any such report under Section 15 of the Act.

29. In the present case, the juvenile has been accused under Section 376 IPC. Learned counsel for revisionist has submitted that as per reading of the first information report, incident is said to be of 24.5.2017 when the revisionist is said to have outraged the modesty of daughter of complainant. Learned counsel for revisionist submits that medical examination was conducted on the very same day but does not corroborate the allegations levelled under Section 376 IPC. It has also been submitted that in the trial, the prosecutrix has already turned hostile. It has been submitted that revisionist is in custody since 26.5.2017 and more than two and half years have passed since then.

30. Learned AGA appearing on behalf of State has opposed the bail application on the ground that a perusal of medical report will make it apparent that the medical examination was conducted on the very same day and clearly indicates injuries upon the prosecutrix. It has also been submitted that revisionist was named in the FIR which was corroborated in the statement recorded under Section 161 Cr.P.C.

31. Upon consideration of factual situation and submissions advanced by learned counsel for parties, it is apparent that revisionist at the time of occurrence of alleged incident was aged more than 16 years. Although the charge levelled against revisionist is quite grave being under Section 376 IPC but it is also a relevant factor that trial has not yet concluded and evidence is ongoing. Revisionist has been in custody for more than two and half years since 26.05.2017.

32. The report of District Probation Officer, states that the revisionist does not have any criminal history and has studied uptill Class IX. Nothing adverse regarding his social behaviour has been indicated in the said report upon questioning of villagers.

33. A perusal of orders impugned indicates that bail has been rejected only considering the gravity of charges levelled against revisionist without seriously adverting to the provisions of Section 12 of the Act required to be considered for purposes of bail. There is no material on record to indicate that upon release from bail, the revisionist would be brought into association with any known criminal or would be exposed to moral physical or psychological danger. That his release would defeat the ends of justice cannot be seen in isolation only with regard to gravity of charges but has to be considered in terms of the report of District Probation Officer as well. Neither of the orders impugned nor any material on record indicate that release of revisionist would defeat the ends of justice.

34. In view of fact that there is no material on record to indicate that release of revisionist would bring him into association with any known criminal or would expose him to moral physical psychological danger or would defeat the ends of justice, the revision is ***allowed*** and order dated 04.05.2018 passed by Juvenile Justice Board, Sitapur in Criminal Miscellaneous Case No.57 of 2017 bearing Case Crime No.153 of 2017, under Section 376 IPC, Police Station Mishrikh, District Sitapur rejecting bail application of

Revisionist and judgment and order dated 25.08.2018 passed by IIIrd Additional Sessions Judge, Sitapur in Criminal Appeal No.42 of 2018 are hereby set aside.

35. Let revisionist ***Jiya-Uddin*** be enlarged on bail in Criminal Miscellaneous Case No.57 of 2017 bearing Case Crime No.153 of 2017, under Section 376 IPC, Police Station Mishrikh, District Sitapur subject to executing personal bond by his father/ guardian along with two sureties in the like amount to the satisfaction of the court/board concerned. The father/ guardian shall also furnish an undertaking that he will keep the revisionist-applicant under his effective control and shall make every endeavour to ensure that the revisionist should not commit any illegal or immoral act and the revisionist should not join the association with any known criminal.

36. Before parting with the case, this Court would like to appreciate the assistance rendered by Mr. Amit Chaudhary, learned counsel, who was appointed amicus curiae in this matter vide order dated 21.1.2020. Registry is directed to pay Rs.20,000/- as fee to him for rendering assistance to this Court. Senior Registrar, High Court shall ensure compliance of same.

(2020)03-05ILR A1074
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2020 & 11.02.2020

BEFORE

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

Criminal Revision No. 4033 of 2019
&
Crl. Misc. Correction Application No. 2 of 2020

Rakesh Dhar Tripathi ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sushma Singh, Sri Dileep Kumar, Sri Manish Singh

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

A. CriminalLaw- Prevention of Corruption Act,1988-Sections 13(1)(e) r/w 13(2)- Code of Criminal Procedure,1973-Section 397/401 - application-rejection of discharge application by trial court-two contradictory report of the Investigating agency-one report is in favour of accused while another is against him-relying upon two contradictory reports is the subject matter of evidence-Prima facie there is sufficient evidence against the accused-earlier report cannot be ignored altogether unless there is an order to that effect of any higher court-However revisionist was found to have spent only 4% more than his income while the judgement of Apex Court provides exemption upto 10%-trial court recorded at the stage of framing charge, there is no necessity to make in-depth appreciation of the evidence-it would be appropriate to frame charge against the accused to reach the truth.(Para 6 to 15)

At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage.(Para 11)

The revision is dismissed. (E-6)

List of Cases Cited:-

1. Vinay Tyagi Vs. Irshad Ali,(2013) 5 SCC 762

2. Mauvin Godinho Vs. St. Of Goa, (2018) 3 SCC 358

3. Rakesh Mishra Vs. St. Of M.P. (2015) 13 SCC 8

4. Amit Kapoor Vs. Ram Chandra,(2012) 9 SCC 460

5. Krishnanand Agnihotri Vs. St. Of M.P.,(1976) Law Suit SC 504

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

1. Heard Sri Dileep Kumar, learned Senior Advocate assisted by Sri Manish Singh, learned counsel for the revisionist, Sri Attrey Dutt Mishra, learned A.G.A. and perused the record.

2. The instant revision has been preferred against the judgment and order dated 03.08.2019 passed by Special Court (MP/MLA), Allahabad of 2019 (State vs. Rakesh Dhar Tripathi), arising out of Case Crime No. 107 of 2013, under section 13 (1) (e) read with section 13 (2) of the Prevention of Corruption Act, Police Station Mutthiganj, District Allahabad whereby discharge application of the revisionist has been rejected.

3. Submission made by the learned counsel for the revisionist is that it is apparent that the evidence collected by the Investigating Officer has not been taken into consideration while rejecting the discharge application. No reason has been assigned to form an opinion that a case existed against the revisionist to frame charge. At the stage of considering the discharge application, sufficient material for framing charge has to be there on record and not simply a prima-facie case. The discharge application has been rejected illegally on the ground that the sanction for prosecution has been accorded and that the court has already taken cognizance on police report/charge sheet submitted under section 173 (2) Cr.P.C. The trial court has completely ignored the supplementary police report filed under section 173 (8) Cr.P.C. with the permission of the Court, which has been filed after approval of the State Government. The supplementary police report completely exonerated the revisionist from accusation that he possessed disproportionate assets while holding post of Cabinet Minister of Govt. of U.P. during the check period. The non-consideration of the police report is against the ratio of the judgment of Hon'ble Supreme Court in Vinay Tyagi vs. Irshad Ali. The evidence which has been collected by the prosecution does not show that any offence has been committed by the revisionist. It is settled position of law that at the stage of consideration of discharge application, the Court ought to proceed with an assumption that materials brought on record by the prosecution are true and therefore in the present case, it is observed that there is no evidence found against the accused-revisionist regarding commission of offence. It is further mentioned that reasons are bound to be recorded while passing the order unless it is specifically excluded by the Legislation and in the present case, the trial court is not found to record reason for rejecting the discharge application. The learned Special Judge has recorded in the impugned order that there is presumption of commission of offence against the accused-revisionist without looking to the fact that such presumption at the stage of consideration of discharge can only be made on the basis of evidence collected during the investigation.

4. It would be pertinent to mention here the grounds which were taken by the revisionist before the court below seeking discharge. In the said application dated 04.02.2017 it has been mentioned that there was no dispute with respect to the income and expenditure of the revisionist rather the sole dispute was of the fact that the documentary evidence which was provided from the side of the revisionist in order to show his income, were ignored due to several technical reasons which was improper. How-so-ever strong doubt may exist but the doubt will never take place of proof. In case diary at page 99-K/224 a mention has been made of final enquiry (DFR) and on the basis of those documents, it was apparent that an amount of Rs.50,00,000/- was taken as debt by the revisionist but the same was not added in income only because while holding post of Cabinet Minister in U.P. Govt., its information was not given to the Vidhan Sabha Adhyaksh nor any mention was made of the same in affidavit filed at the time of election, while the expenditure of Rs.40,00,000/- has been added under the head of expenditure. It is against the principle of natural justice as well as provisions of section 13 (1) (e) of the Prevention of Corruption Act because the transaction, which has taken place, was through account using cheque. Non-inclusion of the said amount in the head of income of the revisionist was absolutely erroneous which needed to be added to his income. Similarly, the wife of the revisionist Smt. Pramila Tripathi had taken debt on various dates between the period 2005 to 2010 through account payee cheque to the tune of Rs.67,150,000/- which was to be returned after sale of the property but the said amount could not be returned because of litigation, the verification of those income is apparent from the paper no. 95 Ka/235 of the case diary and also a mention is made about it in the final enquiry report at page-45. Smt. Pramila Tripathi has been filing income tax return and she admits ownership of the said income and lives jointly with her husband. The said amount ought to have been added in the income of the accused-revisionist, which has not been done. Non-giving of information with respect to the said income to the Vidhan Sabha Adhyaksha may be violation of the rules, in respect to which action may be taken under appropriate provision, but the said income cannot be ignored from being taken into consideration. Therefore, if both the above mentioned incomes be added to the total income of the revisionist that would stand at Rs.1,17,15,000/-. Further, it is mentioned that the marriage of the daughter of the revisionist namely, Pragya Tripathi was performed on 22.02.2008 in which the expenditure incurred has been shown by the Investigating Officer on the basis of conjecture but the same has not been added under the head of expenditure as in usual in every marriage, gifts are given and for that the register pertaining to gift received was also checked by the Investigating Officer, which contained lot of amount given by various persons, when same is added, it came to Rs.11,00,850/- but the said amount has not been added in the income of the revisionist. Further, it is mentioned that the Investigating Officer has mentioned in evidence that Smt. Pramila Tripathi wife of the accused-revisionist had given her house No.2-A, Kapoor Road, Allahabad on rent to one Pradeep Srivastava on 1.10.2009 and House No.2, Block "C', Tulsiani Enclave, Allahabad was given to Ratan Singh from 16.12.2009 and Plot No.1/67, Ruchi Khand, Gomti Nagar, Lucknow was given on rent to Mohd. Shami since 01.01.2003. On the basis of documentary evidence and

the agreement executed, during the check period, total amount of rent received stood at Rs.1,69,200.00 + Rs.3,54,888.00 + Rs.1,94,400.00, i.e total Rs.7,18,488/- while on the basis of oral evidence of the owner and the tenants of the said property, the said amount comes to Rs.7,66,400/-. This amount has not been added in the income of the revisionist and has been ignored by saying that about this no information was given which has been mentioned in Enquiry report (PDR) at page-40 of the case diary, paper no. 95K/191. Further, it is mentioned that the daughter of the revisionist namely, Pallavi Tripathi had paid income tax in the year 2008-09 to the tune of Rs.4460/-, in the year 2009-2010 Rs.32600/- and in the year 2010-11 to the tune of Rs.1,52,700/ and in the same year 2010-11 she also paid Rs.9089/- therefore, total amount paid as income tax was Rs.1,89,509/-, the said amount has been shown in the expenditure but the amount in respect of which the said income tax was paid i.e. Rs.5,70,350/-, was not added in the income of the revisionist, which ought to have been done. Further, it is mentioned that if the entire amount mentioned in the above three heads, which comes to Rs.24,37,600/- which if be added to the amount given in paragraph no. 6 i.e. Rs.1,17,15,000/-, the total amount/income would be Rs.1,41,52,600/-, which is more than the disproportionate expenditure shown of Rs.1,35,38,351.60. Thus, in comparison to the income, the expenditure is not on the higher side and therefore, no offence under section 13 (1) (e) and 13 (2) of P.C. Act is made out prima-facie against the revisionist, therefore, the accused-revisionist deserves to be discharged.

5. The said application was moved before the trial court, whereon the trial court has passed the impugned dated 03.08.2019 mentioning therein that after perusal of the file, it transpired that the Investigating Officer had submitted charge-sheet against the accused-revisionist under section 13 (1) (e) and 13 (2) of the P.C. Act on which cognizance was taken by the Court on 12.4.2016. It also transpires that as per prosecution version, against the revisionist, an FIR was got registered by Ram Subhag Ram, Inspector, U.P. Vigilance Establishment, Allahabad. In investigation, it was found that the revisionist while holding the post of Education Minister in State of U.P. had total income from all known sources to the tune of Rs.49,49,928/- and during the same period, he had purchased properties and spent money to the tune of Rs.02,67,08,605/-. Thus during the check period, the revisionist had spent Rs.2,17,58,677/- more than of his known sources of income, no plausible explanation could be given by the revisionist in respect of the same and hence he was prima-facie found guilty of owning assets disproportionate to his known sources of his income. On the basis of the said fact, a case under section 13 (1) e) and 13 (2) of P.C. Act was registered at P.S. Mutthiganj on 18.6.2013 and the investigation thereof was assigned to Vigilance Establishment, Varanasi, which was conducted by Inspector Bharat Ratna Varshney, who collected evidence in this matter. After retirement of Sri Varshney on 03.09.2015, further investigation was conducted by Inspector Prakash Singh and having found sufficient evidence against the revisionist, he has submitted charge-sheet against him on 14.3.2016 under section 13 (1) (e) and 13 (2) of P.C. Act which was forwarded to the Court by the then S.P. Sri Ram Pal Gautam of Vigilance Establishment, whereon the then Presiding Officer/Special Judge (Prevention of

Corruption Act), Varanasi took cognizance on 12.4.2016 and issued summons against the accused on 14.11.2016. The revisionist appeared before the Court and moved bail application which was rejected and was sent to jail. Thereafter, the revisionist approached High Court by filing Bail Application No.42237 of 2016 which was allowed vide order dated 18.1.2017 conditionally and was released from jail on 19.1.2017.

6. Further, it is mentioned in the said order that in the meantime after cognizance having been taken on the charge-sheet and during hearing of the matter, a report was sent to the Court at the time when discharge/charge stage was there in the case by Hawaldar Singh Yadav, Inspector, Vigilance Establishment to the effect that a representation was moved by the revisionist before the Government on 30.08.2017 praying therein that further investigation may be got done on several points, based on that, Vigilance Department IV of State of U.P. passed an order on 7.5.2018 for further investigation to be conducted in this matter under section 173 (8) Cr.P.C., in reference to which a prayer was made before the Special Judge (Prevention of Corruption Act) to grant permission. By further investigation, during the check period (May 2007 to 31.12.2011) property earned worth Rs.1,11,94,402/- and the expenditure worth Rs.62,76,174/- thus total expenditure during check period was found to be 1,74,70,576/- and during this period income was found to be Rs.1,68,23,615 which was Rs.6,46,961/- more than the income, which in terms of percentage is 3.845% i.e 4% more while as per Hon'ble Supreme Court there was exemption to the extent of 10% and hence offence under section 13 (1) (e) and 13 (2) of P.C. Act would not be made out. The said report was forwarded by S.P., U.P. Vigilance Department, Shailendra Kumar Yadav on 30.3.2019. Further it is recorded in the impugned order that it is apparent from the said report that by supplementary report filed from the side of prosecution, the revisionist was found to have spent only Rs.6,46,961/- more than his income which was approximately 4% more and hence in view of the judgment of Hon'ble Supreme Court which provided exemption upto 10%, no offence would be found to be made out against the revisionist. The trial court has recorded that at the stage of framing charge, there was no necessity to make any in-depth appreciation of the evidence provided and only prima-facie evidence is to be seen as to whether the same was sufficient for framing of charge or not. Large number of citations have been relied upon by the trial court in the impugned judgment and has opined that he is of the view that there was sufficient evidence against the accused-revisionist to frame charge under section 13 (1) (e) and 13 (2) of the P.C. Act and accordingly dismissed the discharge application of the revisionist.

7. I would like to rely upon the judgment rendered in **Vinay Tyagi vs. Irshad Ali, (2013) 5 SCC 762,** which too has been relied upon by the learned counsel for the revisionist. There were two questions framed for consideration in this case which are as follows:-

Question 1

1.1. Whether in exercise of its powers under Section 173 of the Code of Criminal Procedure, 1973 (for short "the Code"), the trial court has the jurisdiction to ignore any one of the reports, where there are two reports by the same or

different investigating agencies in furtherance of the orders of a court? If so, to what effect?

Question 2

1.2. Whether the Central Bureau of Investigation (for short "CBI") is empowered to conduct "fresh"/"reinvestigation" when the cognizance has already been taken by the court of competent jurisdiction on the basis of a police report under Section 173 of the Code?

8. Answer to the above questions has been given in paragraph nos. 53 and 54 of the said judgment, which are as follows:-

"53. The court of competent jurisdiction is duty-bound to consider all reports, entire records and documents submitted therewith by the investigating agency as its report in terms of Section 173(2) of the Code. This rule is subject to only the following exceptions:

(a) Where a specific order has been passed by the learned Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof;

(b) Where an order is passed by the higher courts in exercise of its extraordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on "fresh investigation" or "reinvestigation" or any part of it be excluded, struck off the court record and be treated as non est."

"54. No investigating agency is empowered to conduct a "fresh", "de novo" or "reinvestigation" in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned Magistrate.

9. It is apparent from the above position of law that in case there come on record several reports from the side of prosecution by way of supplementary report under section 173 (8) Cr.P.C., all these reports need to be taken into consideration by the trial court at the time of trial which include framing of charge. It is also apparent that earlier report filed from the side of prosecution, which holds the accused prima-facie guilty, cannot be ignored unless further investigation has been directed to be made by higher Court such as High Court and Hon'ble Supreme Court to that effect. In the case at hand, it is apparent that further investigation had been conducted at the instance of the accused-revisionist and after such further investigation made into the matter, an exoneration report has been filed in favour of the accused from the side of the prosecution, which has been ignored by the trial court and has come to the conclusion that there is sufficient evidence on record to frame the charge against the accused-revisionist under the above-mentioned sections. I do not find infirmity in the said order particularly keeping in view that in the initial report submitted from the side of the prosecution incriminating material was gathered against the accused-revisionist but in subsequent supplementary report it is being submitted from the side of the prosecution that there was some calculation

mistake as several incomes and expenditures were omitted from being taken into consideration while submitting the first report. But keeping in view the position of law that the earlier report cannot be ignored altogether unless there is an order to that effect of any higher Court such as High Court or Hon'ble Supreme Court, therefore, the trial court appears to have been guided by the principle that there is one report on record in favour of the accused while there is another report also going against him, in such a situation, which of the two reports should be relied upon is the subject matter of evidence and therefore, holding that there is sufficient evidence prima-facie against the accused-revisionist, does not appears to be a wrong view. Here there is also not the case that prosecution has obtained any order to get the first report to be over looked/excluded.

10. I would also like to cite case laws of Hon'ble Supreme Court with respect to the position of law relating to framing of charge/discharge, which are as follows:

"1. Mauvin Godinho vs. State of Goa, (2018) 3 SCC 358, Paragraph no. 12 of which is as follows:

12. At the outset it would be pertinent to note the law concerning the framing of charges and the standard which courts must apply while framing charges. It is well settled that a court while framing charges under Section 227 of the Code of Criminal Procedure should apply the prima facie standard. Although the application of this standard depends on facts and circumstance in each case, a prima facie case against the accused is said to be made out when the probative value of the evidence on all the essential elements in the charge taken as a whole is such that it is sufficient to induce the court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. [Refer Sajjan Kumar v. CBI[Sajjan Kumar v. CBI, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , State v. A. Arun Kumar [Statev. A. Arun Kumar, (2015) 2 SCC 417 : (2015) 2 SCC (Cri) 96 : (2015) 1 SCC (L&S) 505] and Statev. S. Selvi [State v. S. Selvi, (2018) 4 SCC 641 : (2018) 1 Scale 5] .]

"2. State of M.P. vs. Rakesh Mishra, (2015) 13 SCC 8, Paragraph no. 7 of which is as follows:

*7. The major argument advanced by the State of Madhya Pradesh before us has been that the High Court traversed beyond the permissible limit while deciding the legality of order framing charges, being a pre-trial stage. Various authorities have been cited before us to prove that point. However, it would suffice to say that the law on this point is crystal clear that only charge-sheet along with the accompanying material is to be considered at the stage of framing of charges, so as to satisfy whether a prima facie case is made out. It has to be the subjective satisfaction of the court framing charges. In our opinion, the High Court has only examined the material before it against the prevailing law to reach its c*onclusions. Thus, the impugned judgment may not be assailable on this ground."

11. In the case of **Amit Kapoor vs. Ram Chandra, (2012) 9 SCC 460**,

Supreme Court has held that even in the case of strong doubt, charge can be framed. Para no. 19 of the said judgment is quoted as under:

"At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage."

12. In view of above position of law, it is apparent that if there is even serious doubt about the accused being involved in commission of offence that would be sufficient to frame charge against the accused. In the present case, there being two reports on record one exonerating the accused while other being inculpatory report against him, makes it a doubtful case which would certainly require a charge to be framed against the accused-revisionist.

13. From the side of the learned counsel for the revisionist reliance has been placed on the judgment of Hon'ble Supreme Court rendered in **Krishnanand Agnihotri vs. State of Madhya Pradesh, 1976 LawSuit (SC) 504,** paragraph no. 33 of which is as follows:

"It will, therefore, be seen that as against an aggregate surplus income of Rs. 44,383.59 which was available to the appellant during the period in question, the appellant possessed total assets worth Rs.55,732.25, the assets possessed by the appellant were thus in excess of he surplus income available to him, but since the excess is comparatively small, it is less than ten per cent of the total income of Rs.1,27,715.43, we do not think it would be right to hold that the assets found in the possession of the appellant were disproportionate to this known sources of income so as to justify the raising of the presumption under sub-section (3) of section 5. We are of the view that on the facts of the present case the High Court as well as the Special Judge were in error in raising the presumption contained in sub-section (3) of section 5 and convicting the appellant on the basis of such presumption."

14. By relying upon the above citation, much stress has been laid by the learned counsel for the revisionist that since difference of income and expenditure has been bridged to a great extent and the same has come to be below 4% while as per the law laid-down in the above mentioned case the difference of upto 10% would be condonable and in view of that there was no reason for the accused to face trial. I do not agree with the said argument because the judgment which has been relied upon has been passed in appeal after full consideration of the evidence which had been brought on record while in the present case, it is elementary stage of the case when charges are yet to be framed. Moreover, I am of the view that there being two contradictory reports of the Investigating agency, it would be appropriate to frame charge against the accused revisionist in this case to reach the truth.

15. Accordingly, I do not find any infirmity in the impugned judgment. This revision deserves to be dismissed and is accordingly dismissed.

(2020)03-05ILR A1082
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.01.2020

BEFORE

THE HON'BLE DINESH PATHAK, J.

Criminal Revision No. 4683 of 2019

Sushil Kumar Dwivedi ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Indra Kumar Chaturvedi (Senior Adv.), Sri Amar Nath Tripathi, Sri Ram Milan Dwivedi

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

A. Criminal law-Code of Criminal Procedure,1973-Section 397/401 & Indian Penal Code,1860-Sections 286, 386, 392, 504, 411-application-release of firearms kept in police custody during the trial-provision of section 451 CrPc attracted-court below illegally averted the provision of section 451 Crpc-retention of seized property during trial or inquiry serves no purpose-identity of firearms and being licensee, entitlement of revisionist is not under cloud.

(Para 10 to 30)

B. Section 457 Cr.P.C. is applied in those matters where seizure of the property by police officer is reported to Magistrate but such property is not produced before the criminal court during an inquiry or trial, whereas u/s 451 Cr.P.C. seized property is produced before any criminal court during an inquiry or trial and question of custody of property pending decision of inquiry or trial should be decided under this section.(Para 20)

The revision is allowed. (E-6)

List of Cases Cited:-

1. Sunder Bhai Ambala Desai Vs. St. Of Guj. AIR (2003) SC 638

2. Smt. Basavva Kom Dyamangouda Patil Vs. St. Of Mysore & ors. (1977) 4 SCC 358

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Sri I.K. Chaturvedi, learned Senior Counsel assisted by Sri Amar Nath Tripathi, holding brief of Sri Ram Milan Dwivedi, learned counsel for the revisionist and learned A.G.A for the State.

2. Rejoinder affidavit filed today by the learned counsel for the revisionist, is taken on record.

3. The instant criminal revision is preferred challenging the order dated 18.11.2019 passed by learned Additional Sessions Judge/Special Judge, (D.A.A.), Banda in Criminal Misc. Case No. 128 of 2019 (State Vs. Pankaj Gautam), rejecting the release application dated 27.08.2019 under Sections 451 and 457 Cr.P.C filed by revisionist for releasing his firearm Rifle No. 10A-B 05878-315 N.P. Bore and three life cartridges and Pistol No. R.P. 213879-32 Bore and four life cartridges, in Sessions Trial No. 70 of 2019, under sections 286/386/392/504/411 I.P.C, Police Station Atarra, District Banda.

4. The factual matrix of the case shows that on 06.06.2019 Sheelman (informant) son of Ayodhya Prasad, driver of truck no. U.P.-44-AT 3202, was driving truck loaded with sand from Lahotera Ghat P.S. Naraini to Sultanpur and, near the Atarra Galla Mandi, the tyre of truck was busted/flat tyred. While cleaner of truck, Ravi, was replacing the busted tyre, at about 10:30 p.m. one white Maruti Car bearing registration no. U.P.-78-B 1059 reached there and two persons (accused) stepped out from the car, one of them had a

pistol in his hand and the other person, wearing white kurta, had a rifle. Both used abusive language against mother and sister of the informant on the pretext that he had over loaded the truck with sand. At the relevant point of time, another truck bearing registration no. U.P.-44-AT-3201 driven by Mahesh Kashyap, who was accompanied with the informant, also reached there. Accused persons had demanded money from both drivers. While they asked for receipt of money, accused persons fired from the rifle and snatched Rs. 1,500/- each from both the drivers.

5. With respect to the aforesaid incident, an F.I.R was lodged by driver Sheelman on 07.06.2019 at about 3:41 a.m. registered as case crime no. 128 of 2019, under sections 286/386/392/504 IPC, Police Station Atarra, District Banda.

6. As per prosecution case, revisionist along with co-accused were arrested on 07.06.2019 at about 4:30 p.m; firearms and cartridges were recovered from them. Investigation Officer submitted charge sheet dated 11.06.2019 against both the accused persons under sections 286, 386, 392, 504 and 411 IPC.

7. It is submitted by learned counsel for the revisionist that alleged incident took place on 06.06.2019 at about 10:30 p.m and the F.I.R was lodged on 07.06.2019 at 3:53 a.m whereas the arrest and recovery have been shown at about 4:30 a.m which shows the probability of false case in which revisionist has illegally been implicated. Revisionist is an army personnel and, original license holder and, has never been convicted in any criminal case. There is no criminal history of revisionist and the antecedents of the revisionist are through-out good. There is no previous complaint with respect to the misuse of firearms. Even, till date, to the best of his knowledge, no cancellation proceeding has been initiated with respect to the firearms in question which was renewed from time to time. It is further submitted that revisionist has got the licenses of firearms to protect the property and life of his family members. The firearms and cartridges in question are kept in maalkhana of concerned police station and there is every likelihood of their destruction in absence of proper maintenance, which will cause irreparable loss to the revisionist. It is also submitted that no identification parade has been conducted to ascertain the involvement of revisionist in the commission of crime.

8. Per contra, learned A.G.A has submitted that the revisionist has rightly been prosecuted in the present matter and the impugned order has rightly been passed on the basis of police report. It is further contended that during investigation, Investigating Officer has collected sufficient credible evidence showing complicity of applicant/revisionist in the commission of offence. The rifle and pistol used in commission of crime are case property and further a report for cancellation of license has already been sent to the District Magistrate.

9. Perused the record and carefully considered the rival submissions made by learned counsel for the parties.

10. Revisionist has moved an application for release of his firearms under sections 451 and 457 Cr.P.C. Before discussing the merits of the instant revision, the scope of section 451 and 457 Cr.P.C is required to be discussed in light of the present matter.

11. Provisions as embodied under section 451 Cr.P.C entrust a duty upon the Court to pass orders for custody or disposal of case property during an inquiry or trial. The provision of section 451 Cr.P.C is reproduced below:-

451. Order for custody and disposal of property pending trial in certain cases- *When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody or such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.*

Explanation.-For the purposes of this section, "property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody.

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

12. A bare perusal of section 451 Cr.P.C clearly denotes that it enable the Court to pass appropriate order with respect to seized property, such as:

(i) For proper custody of property pending conclusion for inquiry or trial.

(ii) Pass order to sale the property or otherwise dispose of, after recording such evidence as it think necessary.

(iii) If property is subject to speedy and natural decay or if it is otherwise expedient so to do, to dispose of the same.

13. It is noteworthy to state that our police stations are flooded with seized articles and there is always possibility of misappropriation, misplace, replace, and damage of property which are seized and kept in police custody pending conclusion of an inquiry or trial. Noticing paucity of space in police stations, which are flooded with seized articles, and to reduce the scope of misappropriation of amount or replace/misplace of valuable articles or damage of property, goods, perishable product/commodities which are seized and kept in police custody pending conclusion of inquiry or trial, the Hon'ble Supreme Court had made certain observation, in the matter ***"Sunder Bhai Ambala Desai Vs. State of Gujarat reported in AIR 2003 SC 638",*** to avoid such circumstances and held that power under 451 Cr.P.C should be exercised promptly and at earliest.

14. Relevant paragraph nos. 7, 11, 12, 13, 14 and 17 of the case of **Sunder Bhai Ambala Desai (Supra)** is quoted below:

7. In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:--

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation;

2. Court or the police would not be required to keep the article in safe custody;

3. If the proper panchnama before handing over possession of article is

prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and

4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

11. With regard to valuable articles, such as, golden or silver ornaments or articles studded with precious stones, it is submitted that it is of no use to keep such articles in police custody for years till the trial is over. In our view, this submission requires to be accepted. In such cases, Magistrate should pass appropriate orders as contemplated under Section 451 Cr.P.C. at the earliest.

12. For this purpose, if material on record indicates that such articles belong to the complainant at whose house theft, robbery or dacoity has taken place, then seized articles be handed over to the complainant after:--

(1) preparing detailed proper panchnama of such articles;

(2) taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and

(3) after taking proper security.

13. For this purpose, the Court may follow the procedure of recording such evidence, as it thinks necessary, as provided under Section 451 Cr.P.C. The bond and security should be taken so as to prevent the evidence being lost, altered or destroyed. The Court should see that photographs of such articles are attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over. Still however, it would be the function of the Court under Section 451 Cr.P.C. to impose any other appropriate condition.

14. In case, where such articles are not handed over either to the complainant or to the person from whom such articles are seized or to its claimant, then the Court may direct that such articles be kept in bank lockers. Similarly, if articles are required to kept in police custody, it would be open to the SHO after preparing proper panchnama to keep such articles in a bank locker. In any case, such articles should be produced before the Magistrate within a week of their seizure. If required, the Court may direct that such articles be handed over back to the Investigating Officer for further investigation and identification. However, in no set of circumstances, the Investigating Officer should keep such articles in custody for a longer period for the purpose of investigation and identification. For currency notes, similar procedure can be followed.

17. In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.

15. In the aforesaid case, Hon'ble Supreme Court has observed that object of

the Code seems to be that any property which is in the control of Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always act under the direct control of Court and take orders from it at every stage of an inquiry or trial. Thus, the Court exercises an overall control on the action of Police Officers in every case where it has taken cognizance.

16. With respect to the custody of seized property pending trial, Hon'ble Supreme Court has made precise observations in the matter of ***"Smt. Basavva Kom Dyamangouda Patil Vs. State of Mysore and Others reported in (1977) 4 SCC 358"*** Para no. 4 of the aforesaid judgment is quoted below:-

4. "The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject matter of an offence is seized by the police, it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is sought to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the Court or should be in its custody. The object of the Code seems to be that any property which is in the control of the court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always acts under the direct control of the Court and has to take orders from it at every stage of any inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the Police Officers in every case where it has taken cognizance."

17. In the matter of ***Smt. Basavva Kom Dyamangouda Patil (Supra)*** Hon'ble Supreme Court has dealt with the matter where case property pending trial is stolen or destroyed. Hon'ble Supreme Court has observed that where property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its Officers has taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so required, order payment of value of property.

18. Phrase **"if it is otherwise expedient so to do"** as embodied under section 451 Cr.P.C connotes wider expression giving ample power to the learned Magistrate to protect the property which is custodia legis. Once the property is produced before the Magistrate, he considers as to whom it should be handed over for safe custody pending the conclusion of inquiry or trial. Section 451 Cr.P.C provides an interim measure regarding the custody of property which

has been seized during the investigation of crime. Word **"expedient"** shows that, in case, retention of property in Court would be more expensive and there being gradual damage pending trial, some order regarding interim custody has to be passed if some one come forward to take custody of property pending trial or inquiry.

19. Scope of Section 451 Cr.P.C has been made comprehensive, which includes all kind of material and documents produced before the Court or is in its custody and same may have been used for the commission of any offence or regarding which an offence appears to have been committed. The explanation gives a wider meaning of word "property" than it ordinarily has.

20. In my opinion, section 457 Cr.P.C is not fully applicable in the present matter, inasmuch as, it is applying in those matters where seizure of the property by police Officer is reported to Magistrate but such property is not produced before the criminal court during an inquiry or trial, whereas under section 451 Cr.P.C seized property is produced before any criminal court during an inquiry or trial and question of custody of property pending decision of inquiry or trial should be decided under this section.

21. **The provision of section 457 Cr.P.C is reproduced below:-**

"457. Procedure by police upon seizure of property:(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2). If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

22. In this view of the matter, under section 457 Cr.P.C, the seized property by the police is not produced before the Magistrate and the Magistrate has the power to decide who is the person entitled for its possession. Though Section 451 and 457 Cr.P.C. fall under Chapter XXXIV of the Cr.P.C. captioned as "Disposal Of Property", the scope of these sections are different.

23. In the present matter guns in question are confiscated by police and produce before the Magistrate which has been kept in police custody during the trial, therefore, provisions as embodied in section 451 Cr.P.C is attracted in the present matter.

24. It is admitted to the parties that revisionist is a license holder of both the firearms in question i.e. rifle and pistol, which is evident from the photo copy of the licenses annexed as Annexure no. 6 to the affidavit. In the same case crime number,

revisionist has already been enlarged on bail vide order dated 26.07.2019 passed by this Court in Criminal Misc. Bail Application No. 29979 of 2019.

25. Revisionist is an Army personal and during his service period he has been granted license for both the aforesaid firearms and till date, to the best of his knowledge, no cancellation proceeding, for the said firearm license, has been initiated against him. In paragraph no. 8 of the counter affidavit it has simply stated that a report has been sent to the District Magistrate to initiate cancellation proceeding of firearms license in question but there is nothing on record to show that any proceeding has been initiated against the revisionist. Learned counsel for the revisionist submitted that up-till now the revisionist has not received any summon/notice relating to the case for cancellation of firearms license and no identification parade has been conducted to assertion the involvement of present revisionist, inasmuch as alleged offence is said to have been commissioned in night at about 10:30 p.m. Revisionist is a respectful and law abiding person and has obtained firearms to protect his life and property. As per submissions made by learned Senior Counsel, revisionist was never involved in the accomplishment of the alleged crime as mentioned in the F.I.R and, even, the forensic report has not been called for to ascertain the alleged involvement of firearms in question.

26. Be that as it may, the court below has illegally averted the intent of the legislation enshrined under section 451 Cr.P.C and has illegally rejected the application for release of firearms in question in a cursory manner, only relying upon the prosecution case and the police report depicting the safety of firearms in police custody. In the instant matter, where identity of firearms and, being licensee, entitlement of Sushil Kumar Dwivedi (revisionist) is not under cloud, it cannot be said that police custody is the "proper custody" of such property pending conclusion of the trial. Firearms are fragile and keeping it unattended for long period of time without proper care and maintenance, will put it in vulnerable condition and cause a progressive reduction in its quality.

27. Though firearms are safe in police station, the plausibility of it's being misused or misplaced or lost cannot be averted. Retention of seized property for indefinite period waiting result of inquiry or trial, will serve no purpose. Hon'ble Supreme Court in the matter of ***"Smt. Basavva Kom Dyamangouda Patil (Supra)*** observed that property, subject of offence, seized by the police, it ought not to be retained in the custody of the court or of the police for any time longer than what is absolutely necessary.

28. In the facts and circumstances of the present case, after considering the rival submissions of the parties and perusal of record, I feel it expedient in the interest of justice that it will of no use to keep the firearms in question, in the police custody, over the years till the trial is concluded. Therefore, it would be better to release the aforesaid firearms and give it in the custody of revisionist (Sushil Kumar Dwivedi) who is the valid license holder of the aforesaid firearms.

29. Accordingly, as discussed above, without commenting on merits of the case under trial, the instant revision is **allowed** and order dated 18.11.2019 passed by

learned Additional Sessions Judge/Special Judge (D.A.A.), Banda is hereby quashed.

30. The Court below is hereby directed to release the firearms in question, viz Rifle No. 10A-B 05878-315 N.P. Bore and three life cartridges and Pistol No. R.P. 213879-32 Bore and four live cartridges which are confiscated by the police in Case Crime No. 128 of 2019 (State Vs. Pankaj Gautam) in Sessions Trial No. 70 of 2019, under Sections 286/386/392/504/411 I.P.C, Police Station Atarra, District Banda, upon furnishing an appropriate bond by the present revisionist and guarantee to the satisfaction of the court below, ensuring the ownership and return of said firearms, if required, at any point of time.

(2020)03-05ILR A1089
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.01.2020

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 1787 of 2020

M/s Atul Rahul Agro Pvt. Ltd. ...Petitioner
Versus
Director Krishi Utpadan Mandi Parishad Kisan Mandi Lko. & Anr. ...Respondents

Counsel for the Petitioner:
Suresh Chandra Gupta

Counsel for the Respondents:
N.C. Mehrotra

Civil Law-Two trucks seized transporting 35o quintals rice-Petitioner filed an appication for compounding the offence-offence compounded subject to payment of compensation and mandi fee and development cess-amount paid-trucks released-not open to challenge the seizure and compounding order thereafter-W.P. dismissed with cost. (E-9)

Cases cited:

1. Prestige Lights Ltd. v. S.B.I., (2007) 8 SCC 449

2. K.D. Sharma v. SAIL, (2008) 12 SCC 481

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. Heard Sri Suresh Chandra Gupta, learned counsel for the petitioner and Sri N.C. Mehrotra, learned counsel for the respondents.

2. This petition has been filed praying inter alia the following reliefs:

(a) issue a writ, order, direction in the nature of quashing the impugned order dated 07.12.2019 passed by opposite party no. 1 vide the revision no. 1063/2019 in the interest of justice contained in Annexure No. 1

(b) issue a writ, order, direction in the nature of certiorari quashing the impugned order dated 13.06.2019 passed by opposite party no. 2 and release the amount of Rs 4,71,227/- and direct the opposite parties to refund the money with interest @ 18% in the interest of justice contained in Annexure No. 9, 10 & 11.

(c) issue a writ, order, direction in the nature of mandamus and commanding the opposite parties to pay Rs 60,000/- as demurrage and Rs 50,000/- as Advocate fees.

3. Briefly stated, the facts are these: On 29.05.2019 at about 07:00 p.m., the officials of Krishi Utpadan Mandi Samiti, Ghaziabad (for short the "Mandi Samiti'), intercepted two trucks bearing registration

nos. HR 69 D 2960 and HR 69 C 4239, at NHAI Galalpurwa Toll Plaza. Each truck was laden with 350 quintals of rice which was being transported by the petitioner from Bahraich to Delhi without valid papers as required under The Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (for short "the Adhiniyam'). The officials, after confiscating the vehicles and the rice under section 36 of the Adhiniyam prepared a seizure memo and made a report to the Chief Judicial Magistrate, Ghaziabad. Two criminal cases bearing Nos. 23518/2019 & 23519/2019 were instituted against the petitioner and the truck drivers namely Ravi Yadav and Jagtan Singh.

4. On 13.06.2019, before the court in seisin of the case could proceed with the complaint, the petitioner filed an application before the Mandi Samiti for compounding the offence. The Mandi Samiti, by its order dated 13.06.2019 passed under section 37-A(1) of the Adhiniyam acceded to the prayer and compounded the offence against the petitioner and the truck drivers, subject to payment of Rs 4,71,226/- (Rs 34,038 towards mandi fee and development cess and Rs 2,00,000/- towards composition fee with regard to truck no. HR 69 D 2960 and Rs 37,188 towards mandi fee and development cess and Rs 2,00,000/- towards composition fee with regard to truck no. HR 69 C 4239). On 13.06.2019 itself, the petitioner deposited the amount with the Mandi Samiti through RTGS. As soon as the payment was made, the trucks and the goods seized were released in favour of the petitioner. Subsequently, by two separate but identical orders passed by the Chief Judicial Magistrate the criminal proceedings initiated against the petitioner and the two truck drivers were dropped. One such order dated 26.06.2019 passed in Case No. 23519 of 2019 is reproduced below:

"26/06/19 परिवाद प्रस्तुत परिवादी के अधिवक्ता उपस्थित उनकी तरफ से कथन किया गया की मामले का शमन अधिनियम की धारा – 37 ए0 के तहत किया जा चुका अतः वो मामले को आगे नही चलाना चाहते है। सचिव कृषि उत्पादन मण्डी समिति श्री सत्य पाल गंगवार की रिपोर्ट पत्रांक कृ0उ0म0स0 सचल दल 2019–209 दिनांक 13/06/19 को अवलोकन बयान किया। आधार पर्याप्त अतः धारा 37 (2) के तहत कार्यवाही समाप्त की जाती है।"

5. On 28.08.2019, the petitioner filed a revision (bearing Revision No. 256 of 2019, M/s Atul Rahul Agro Private Limited Vs. Secretary, Krishi Utpadan Mandi Parishad) under section 32 of the Adhiniyam before the Director, Rajya Krishi Utpadan Mandi Parishad, U.P., respondent no.1 herein, against the order dated 13.06.2019, inter alia, contending that the rice was being transported on valid papers. The said submission did not find favour with the respondent no. 1 and the revision was rejected as not maintainable by an order dated 07.12.2019. The respondent no. 1 held that once the petitioner had admitted his guilt and the offence had been compounded on the request of the petitioner itself, and the goods alongwith the trucks have been released, the challenge to the order compounding the offence was not maintainable. The relevant portion of the order date 07.12.2019 is extracted below:

"प्रश्नगत निगरानी मे बहस के समय निगरानीकर्ता फर्म के अधिवक्ता एवं विपक्षी मण्डी समिति, गाजियाबाद की ओर से सचिव उपस्थित हुए। उभय पक्षों को न्यायालय मे विस्तार से सुना गया और उनके द्वारा दाखिल अभिलेखों का अवलोकन किया गया। निगरानीकर्ता ने उ0 प्र0

कृषि उत्पादन मण्डी अधिनियम 1964 की धारा–37 के अन्तर्गत प्रार्थना–पत्र दिनांक 13.06.2019 मण्डी समिति के समक्ष प्रस्तुत किया था, जिसमे निगरानीकर्ता ने अपना अपराध स्वीकार करते हुए देय मण्डी शुल्क, विकास सेस तथा शमन शुल्क लेकर माल एवं वाहन को छोड़ने के लिए आदेश पारित करने हेतु मण्डी समिति से प्रार्थना की थी। निगरानीकर्ता की ओर से प्रस्तुत प्रार्थना–पत्र पर विचारोपरान्त मण्डी समिति ने आदेश दिनांक 13.06. 2019 द्वारा निगरानी फर्म पर मण्डी शुल्क, विकास सेस तथा शमन शुल्क अधिरोपित किया था। निगरानीकर्ता ने मण्डी समिति द्वारा पारित आदेश दिनांक 13.06.2019 के अनुपालन मे अधिरोपित की गयी धनराशि को मण्डी समिति मे जमा कर दिया है और उक्त क्रम मे निगरानीकर्ता के दोनों ट्रकों को माल सहित छोड़ दिया है। चूँकि निगरानीकर्ता ने अपने अपराध को स्वीकार कर लिया है और मण्डी समिति, गाजियाबाद द्वारा पारित आदेश दिनांक 13. 06.2019 के अनुपालन मे अधिरोपित कुल धनराशि रू0 4,71,226.00 रसीद संख्या– 0304537 दिनांक 13.06.2019 एवं रसीद संख्या– 0304538 दिनांक 13.06.2019 द्वारा मण्डी समिति, गाजियाबाद मे जमा कर दी गयी है।

अतः उक्त वर्णित तथ्यों के परिप्रेक्ष्य मे निगरानीकर्ता द्वारा दाखिल निगरानी पोषणीय न होने के कारण खारिज की जाती है। प्रश्नगत आदेश की प्रति निगरानीकर्ता फर्म एवं सभापति/सचिव मण्डी समिति, गाजियाबाद को प्रेषित की जाये।"

6. The orders dated 13.06.2019 and 07.12.2019 are under challenge in the present petition.

7. Sri Suresh Chandra Gupta, the learned counsel for the petitioner has submitted that there was no evasion of any mandi fee and it was on account of the breakdown of truck No. HR 69 D 2960 that the trucks reached the toll on 29.05.2019. The counsel submits that the paper accompanying the said trucks were in order but in order to harass the petitioner and for extraneous consideration the trucks were seized by the officials of the Mandi Samiti. The counsel has contended with vehemence that since seizure of rice and the trucks was not reported to the Chief Judicial Magistrate forthwith, as contemplated under the proviso to section 36(1) of the Adhiniyam, the entire proceedings against the petitioner are liable to be set aside. He has further contended that in terms of section 37-A(1) reproduced in paragraph 15 of the petition, the maximum composition fee which could be charged from the petitioner was Rs 20,000/- with regard to one offence and as such the imposition of Rs 2,00,000/- towards composition fee was without jurisdiction. No other submission has been made.

8. Sri N.C. Mehrotra, learned counsel appearing on behalf of the respondents, on the other hand, has supported the impugned orders. He has submitted that the rice was being transported by the petitioner without valid papers. He has submitted that the goods were seized and on receiving the application from the petitioner for compounding of offence, the same was compounded and as such it is not open to the petitioner to challenge the seizure. The counsel has submitted that the composition fee charged from the petitioner is in accordance with section 37-A(1) of the Adhiniyam. He has submitted that the petitioner has tried to mislead the Court by quoting unamended section 37-A in the writ petition. The petition according to him is liable to be dismissed with heavy cost.

9. The petitioner has challenged the levy of Rs 2,00,000/- on the strength of section 37-A(1) of the Adhiniyam, reproduced by him in paragraph 15 of the petition. Paragraph 15 of the petition are extracted below:

15. That "section-37 A Composition of offence-(1) A market committee or its sub-committee or with the authorisation by a resolution of a committee, its Chairman, may accept from

any person who has committed or is reasonably suspected or having committed an offence punishable under this Act in addition to the fee or other amount recoverable from him, a sum of money not exceeding rupees 53(Twenty thousand) by way of composition fee and compound the offence."

10. Sri N.C. Mehrotra has submitted that section 37-A(1) reproduced in paragraph 15 of the petition is an unamended section. He has submitted that by U.P. Act 24 of 2018, Section 37-A of the Adhiniyam has been amended. Amended section 37-A is reproduced below:

37-A. Composition of offences.- (1) A market committee or its sub Committee or with the authorization by a resolution of a committee, its Chairman, may accept from any person who has committed or is reasonably suspected of having committed an offence punishable under this Act in addition to the fee or other amount recoverable from him, *a sum of money equal to ten times the sum of market fee and development cess assessed due on the equivalent agricultural produce in accordance wíth the explanation given in the proviso to sub-rule (1) of Rule 66 of the Uttar Pradesh Krishi Utpadan Mandi Niyamavali, 1965 or Rupees Two Lakh*, whichever is less and for other offence, a sum of money not exceeding rupees twenty thousand by way of composition fee and compound the offence.

(2) On the composition of any offence under sub-section (1) no proceeding shall be taken or continued against the person concerned in respect of such offence, and if any proceedings in respect of that offence have already been instituted against him in any Court, the composition shall have 9the effect of his acquittal.

(emphasis supplied)

11. The major contention of the learned counsel for the petitioner is that the maximum fee which could be levied towards composition fee was Rs 20,000/-. The very foundation of this argument is unstable as the learned counsel for the petitioner has been relying on the unamended provisions of the Adhiniyam which did not provide for the composition fee of Rs Two Lakhs. The amended provisions, as applicable to the present matter, expressly provide for compounding of offences punishable under the Act on the payment of *a sum of money equal to ten times the sum of market fee and development cess assessed due on the equivalent agricultural produce in accordance wíth the explanation given in the proviso to sub-rule (1) of Rule 66 of the Uttar Pradesh Krishí Utpadan Mandi Niyamavali, 1965 or Rupees Two Lakh*, whichever is less. Thus, the petitioner's challenge to the authority of the market committee's power to charge Rupees Two Lakhs is absolutely misconceived.

12. Neither the application moved by the petitioner for compounding nor the order passed by the Mandi Samiti thereon has been brought on record. A copy of memo of revision dated 28.08.2019 preferred by the petitioner against the compounding order dated 13.06.2019 is also not on record. A perusal of annexure no. 6, which is alleged to be the memo of revision, shows that it is in fact a letter addressed to the Director Mandi Samiti requesting him to direct the concerned officials not to harass the petitioner. On top of the said letter, the following heading has been written by hand.

"Under the inherent and supervisory powers under Section 32 of the U.P. Krishi Utpadan Mandi Adhiniyam, 1984"

13. A perusal of Section 37-A as quoted by the petitioner in Paragraph 15 of the writ petition (reproduced above) on one hand, and Section 37-A as amended on the other, clearly shows that Section 37-A has been wrongly quoted by the petitioner. It is also to be noted that in spite of the amended provision being brought to the notice of the learned counsel for the petitioner, he has continued to rely upon the unamended provision to argue that a maximum composition fee of Rs 20,000/- could have been charged from the petitioner. The failure to bring the relevant documents such as the application for compounding and the memo or revision, and the overall conduct of the petitioner shows that the petitioner has not come before this Court with clean hands. The petitioner is thus guilty of suppression, concealment, misrepresentation of facts and attempting to mislead this Court.

14. In exercising its discretionary power under Article 226 and 227 of the Constitution, this Court is not just a Court of law, but is also a Court of equity and a person who invokes the writ jurisdiction of this Court is duty-bound to place all the facts before the Court without any reservation. It is well settled that in exercising jurisdiction under Article 226 of the Constitution, this Court always keeps in mind the conduct of the party invoking such jurisdiction. If the petitioner does not disclose full facts or suppresses relevant material or is otherwise guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits. In *Prestige Lights Ltd. v. State Bank of India*, (2007) 8 SCC 449, the Apex Court has observed that the said rule has been evolved in larger public interest to -

"deter unscrupulous litigants from abusing the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

(emphasis supplied)

15. In *K.D. Sharma v. Steel Authority of India Limited*, (2008) 12 SCC 481, the Apex Court reiterated that the petitioners approaching this Court under Article 226 of the Constitution must disclose all the material facts without any qualification. It was held as under:-

"38. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of writ courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because "the court knows law but not facts".

39. If the primary object as highlighted in Kensington Income Tax Commrs. [(1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA)] is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."

(emphasis supplied)

16. In light of the petitioner's deliberate attempts at misleading this Court and the judgments of the Apex Court cited above, the present petition is liable to be dismissed on this ground alone.

17. Even on merits, the present writ petition is liable to be dismissed.

18. Admittedly, on 13.06.2019, after the goods and the trucks were seized and criminal cases were instituted against the petitioner, the petitioner moved an application before the Mandi Samiti admitting the commission of offence and expressing his desire to pay the requisite mandi fee and development cess along with penalty if any. The request of the petitioner was acceded to and the Mandi Samiti, through its order dated 13.06.2019, compounded the offence subject to the payment of a total sum of Rs 4,71,226/- (Rs 2,34,038 with regard to truck no. HR 69 D 2960 and Rs 2,37,188 with regard to truck No. HR 69 C 4239). The very same day the petitioner deposited the said amount in the Mandi Samiti through RTGS, and thereafter, the goods and the trucks were released and the criminal proceedings initiated against the petitioner and the two truck drivers were dropped.

19. The petitioner accepted the order passed by the Secretary mandi and in pursuance thereto deposited a sum of Rs 4,71,226/- through RTGS in the criminal cases initiated instituted against him and on that basis, both the trucks of the petitioner were released and the criminal cases instituted against the petitioner were dropped.

20. In the aforesaid background, once the petitioner has admitted his guilt and has opted for compounding of the same, and has further deposited the penalty imposed upon him and has had the trucks released after getting the criminal cases instituted against him withdrawn, it is not open to the petitioner to turn around and challenge the seizure and order compounding the offence. The revision preferred by the petitioner against the compounding order dated 13.06.2019 passed by the Secretary, Mandi Samiti, has rightly been dismissed by the respondent no.1 as not maintainable.

21. The revision preferred by the petitioner against the said order has rightly been dismissed by the Director, Mandi Samiti.

22. Thus, in addition to suppression, concealment and attempts at misleading this Court, the writ petition is also totally misconceived and is accordingly dismissed with exemplary cost of Rs 2 lakhs.

23. The petitioner is directed to deposit the cost with the Senior Registrar of this Court at Lucknow within six weeks from today. The cost so deposited shall be remitted to the Mediation and Conciliation Centre of this Court. In case, the cost is not deposited by the petitioner within the time granted to him for the purpose, the same shall be realized from him as arrears of land revenue.

(2020)03-05ILR A1095
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.03.2020

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 2391 of 2016

Ram Sanwarey Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rohit Tripathi

Counsel for the Respondents:
C.S.C., Balram Yadav, Neeraj Chaurasiya

Civil law-Petitioner resorted-deliberate misrepresentation-fraud upon court-W.P. dismissed with cost of Rs.50,000/- (E-9)

Cases cited:

1. Shrisht Dhawan Vs. Shaw Bros., (1992) 1 SCC 534

2. S.P. Chengalvaraya Naidu Vs. Jagannath, (1994) 1 SCC 1

3. Ram Chandra Singh Vs. Savitri Devi & ors., (2003) 8 SCC 319

4. St. of U.P. & anr. Vs. T. Suryachandra Rao, (2005) 6 SCC 149

5. Dalip Singh Vs. St. of U.P. & ors., 2010 (2) SCC 114

6. Hari Narain Vs. Badri Das AIR 1963 SC 1558,

7.Welcome Hotel Vs. St. of A.P. (1983) 4 SCC 575

8. G. Narayanaswamy Reddy Vs. Govt. of Karnataka (1991) 3 SCC 261

9. Prestige Lights Ltd. Vs. S.B.I. (2007) 8 SCC 449

10. Sunil Poddar Vs. U.O.I. (2008) 2 SCC 326

11.K.D. Sharma Vs. S.A.I.L. (2008) 12 SCC 481

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

1. Heard learned counsel for the parties.

2. This writ petition has been filed by the petitioner, who alleges himself to be the Manager since 1990 of Kedar Nath Shikshan Sansthan, a Society established in 1977 and renewed from time to time thereafter, against the order dated 31.12.2015 passed by the respondent no.4-the Deputy Registrar, Firms, Societies & Chits, Head Quarters, Lucknow, in which he has directed the registration of list of members of the Committee of Management of the Society on the basis of documents submitted by the respondent nos.7 and 8 as the Manager and the President respectively of the Society.

3. The petitioner has further challenged the order dated 13.09.2011 passed by the respondent no.3 by which allegedly a modified list of membership of the Executive Committee of the Society has been registered, which was submitted by the respondent no.7 through an application dated 09.09.2011.

4. It has been submitted that the orders impugned have been passed on the basis of fraud played by the private respondents in collusion with the Deputy Registrar, Firms, Societies & Chits, Faizabad and the Deputy Registrar Headquarters Lucknow. By the orders impugned, the respondent no.4 has affirmed the petitioner's expulsion from the post of the Manager as well as from the primary membership of the Society. It has been submitted that the action of the respondent nos.7 and 8 is without issuing any notice or affording any opportunity of hearing.

5. It has been submitted that a dispute came into being with the induction of Smt. Girija Singh, respondent no.8 on account of death of one Dr. Ram Kumar Tripathi, who was the founder member. Smt Girja Singh was elected as the President on the death of the sitting President of the Society on 19.05.2002 for the remaining term.

6. It has been submitted that the respondent no.8 soon after her election on the post of the President started inducting her relatives as members of the Society as well as its Executive Committee. The petitioner was opposed to such conduct and therefore the respondent no.7 posing as as the Manager, on the instructions of the respondent no.8, submitted an application for registration of list of members of the Executive Committee of the Society for the year 2011-12.

A copy of the letter dated 09.09.2011 and the accompanying list of members of Executive Committee has been filed as annexure - 3 & 4 to the writ petition.

7. In paragraph-9 of the petition, the petitioner states that no fresh elections had taken place and the respondent no.7 could not have been elected as the Manager of the Society in place of the petitioner, therefore, the conduct of the respondent no.3 in registering the list submitted by the respondent no.7 by his order dated 13.09.2011 was also an act of fraud and collusion.

8. It has been further submitted that the respondent no.3 did not issue any notice inviting objections before passing the order dated 13.09.2011, registering the amended list of Executive Members.

9. In paragraph-11 of the writ petition, the petitioner has stated that the reconstitution of the Executive Committee as reflected in the covering letter dated 09.09.2011 registered on 13.09.2011, was dubious and illegal. Consequently, in order to give it a colour of legitimacy, an Agenda was circulated on 17.10.2011 for a meeting of the General Body of the Society which was to be held on 29.10.2011. In the Agenda notice, no item relating to the issue of expulsion of the petitioner from the post of Manager or the Primary Membership of the Society was mentioned. By manipulating and forging the minutes of the meeting, an item concerning the petitioner's expulsion was added in the minutes. A copy of the minutes of the meeting dated 29.10.2011 has been filed as annexure-6 to the writ petition. It has been stated that the minutes of the meeting dated 29.10.2011 are completely silent on the list of Executive Committee Members submitted on 09.09.2011 and the order passed on 13.09.2011. When the reconstituted list of members of the

Executive Committee, following the meeting dated 29.10.2011, was submitted for registration, the respondent no.3 issued notice to the petitioner on 19.11.2011. The petitioner submitted his objection on 01.12.2012 saying that the petitioner's expulsion was without any notice and completely fraudulent exercise.

10. It has been further submitted that since the Deputy Registrar, Faizabad, was related to the respondent no.8, the petitioner moved a transfer application before the respondent no.2 and the matter was transferred to the respondent no.4. After the matter was transferred to Lucknow, the petitioner and respondent no.8 again submitted the written submissions.

11. The petitioner also requested for personal hearing and for permitting him to produce certain documents like the proceedings register, the agenda register, the fee register, the income and expenditure register and the membership receipts, but all such requests were ignored and the respondent no.4 passed the order impugned without recording any finding on the effect of the order dated 13.09.2011, by which the reconstituted Executive Committee was registered by the respondent no.3 even prior to the meeting of the General Body, which allegedly expelled the petitioner from the post of the Manager and from primary membership of the Society.

12. It has been submitted by Sri Rohit Tripathi, learned counsel for the petitioner, during the course of arguments, that although the order passed by the Deputy Registrar dated 31.12.2015 runs into 33 pages, it does not deal with the arguments made by the petitioner that the General Body meeting dated 29.10.2011 was a completely fraudulent exercise to cover up the expulsion of the petitioner carried out by the respondent no.7 and 8 even before holding of the meeting, as is evident from the letter dated 09.09.2011 and the order passed on 13.09.2011.

13. Sri Rohit Tripathi, learned counsel for the petitioner, has vehemently argued on the basis of page nos. 53, 54 and 55 of the writ petition that it is evident that the reconstituted Committee of Management registered by the order dated 13.09.2011 mentions the respondent no.7 as the Manager instead of the petitioner, even before the petitioner was ousted in the alleged General Body meeting held on 29.10.2011.

14. A counter affidavit was filed on behalf of the State-respondents. It was specifically denied that the amended list of Executive Committee submitted by the Deputy Secretary contained the name of respondent no.7 as Manager. It was further submitted that the petitioner was expelled from the Society due to continuous absence from the meetings of the Society.

15. A counter affidavit was also filed by Sri Balram Yadav, on behalf of the private respondent nos.7 and 8 stating therein that no fraud was committed at all as alleged. The petitioner was expelled from the primary membership of the society and also from the post of Manager as he was not attending the meetings of the General Body or of the Executive Council for the past more than one year and had not deposited the prescribed membership fee. His membership had already come to an end automatically as per Bye-law no.6 of the Bye-laws of the society filed as C.A.-2 to the counter affidavit. It was further submitted that there is no provision in the

bye-laws to give notice to a Member for expulsion from the membership of the Society, who does not deposit membership fee and who does not attend three consecutive meetings of the Executive Body.

16. The Agenda dated 17.10.2011 clearly stated that any other issue can be raised for discussion in the General Body meeting proposed to be held, with the approval of the President. The issue of misconduct of the petitioner and one Sripati Singh was raised after approval of the President in the meeting held on 29.10.2011 and thereafter, the proposal to expel them was put to vote and approved by the General Body.

17. During the course of arguments by the counsel for the parties, the discrepancy in the list submitted by letter dated 09.09.2011 as was pointed out by Sri Rohit Tripathi, learned counsel for the petitioner, was disputed by Sri Balram Yadav, learned counsel for the respondent, who expressed doubt with regard to the correctness of the annexure filed with the writ petition.

18. This court passed an order on 04.09.2019 which is being quoted here in below:-

"Shri Balram Yadav, while answering to the query made by the Court earlier, has produced before this Court a copy of list of Committee of Management submitted by Shri Radhey Raman Dubey as Dy. Manager on 09.09.2011 for the year 2011-12.

From a perusal of the said list, it is apparent that it contains the name of the petitioner-Ram Sanwarey Yadav, as a Manager of the Institution and it has been signed by Smt. Girija Singh, Surjit Singh, Radhey Raman Dubey, Deomani and some others. However, Shri Balram Yadav has pointed out the page nos.53, 54, and 55 of the writ petition to show that a different list has been annexed with the covering letter being the same i.e. of 09.09.2011 showing Radhey Raman Dubey as Manager and removing the name of Shri Ram Sanwarey Yadav to buttress the arguments made by the petitioner that the decision to oust the petitioner from the Committee of Management was taken before 09.09.2011 and the intent is visible in the said list whereas the actual resolution for removal of Shri Ram Sanwarey Yadav was passed on 29.10.2011. Shri Balram Yadav, has also pointed out that the certified copy of the letter dated 09.09.2011 which has been filed as Annexure at page no.53 shows the same to have been obtained in 2013 certified copy of the Page nos.54 & 55 seem to have been obtained on 25.02.2012. They relate to different documents and they have been combined to show that they relate to one document.

Since it is the insistence of the petitioner that no such manipulations has been done and it is the certified copy of Page no.522 of the record of the Office of Dy. Registrar, Firms, Societies & Chits, Faizabad. Let the record of the office of the Dy. Registrar be produced on 18.09.2019 to enable the Court to come to a definite conclusion with regard to the list submitted through the covering letter dated 09.09.2011 and the list submitted after 29.10.2011, again for the year 2011-12 by Mr. Raghvendra Pratap Singh.
List this matter on 18.09.2019."

19. When the matter was taken up for hearing again on 18.09.2019, this court passed the following order:-

"In pursuance of the order passed earlier by this Court, the record has been produced by the learned Standing Counsel sent from the office of the Deputy Registrar, Firms Societies and Chits, Faizabad (now Ayodhya).

The letter dated 9.9.2011 can be found at Page no.98 of the record, which has been sent by Sri Radhey Raman Dubey of Kedar Nath Shikshan Sansthan, Sonegaon, Akbarpur, District Ambedkar Nagar, in which, it has been stated that the applicant wishes to get the list of members of the Committee of Management for the year 2011-12 registered in the office of the Deputy Registrar. The list submitted as Annexure shows Ram Sanwarey Yadav as Manager of the Samiti and it has been signed by Smt. Girija Singh, Surjit Singh, Rishabh Dev Singh, Dev Mani Verma, Radhey Raman Dubey, Neetu Singh, Ram Asrey Mishra and thumb impression of one Samsira is also appended thereto. A letter dated 11.11.2011 is also on record, which has been sent by Raghvendra Pratap Singh as Deputy Secretary of the Samiti. It informs the Deputy Registrar that a General Body meeting was held on 29.10.2011 and the Committee of Management has been reconstituted thereafter. A copy of the Minutes of the meeting held on 29.10.2011 as well as the amended list of Committee of Management for the year 2011-12 has been prayed to be registered. In the amended list annexed along with the said letter, Radhey Raman Dubey has been shown as Manager and Rajesh Pratap Singh has been shown as Deputy Manager and Raghvendra Pratap Singh as Deputy Secretary.

It is evident from the record that the contention raised by the learned counsel for the petitioner on the basis of pleadings that the Deputy Manager Radhey Raman Dubey had submitted a list even before the meeting held on 29.10.2011, removing the name of Ram Sanwarey Yadav as Manager of the Samiti is incorrect.

Sri Rohit Tripathi has very fairly stated that his client has misinformed him and that his client perhaps was also confused.

Sri Baldev Yadav appearing for the contesting respondents has said that all of the pleadings in the writ petition are based on this apparent inconsistency in the record. There is a deliberate attempt on misrepresentation of correct facts before this Court.

Having heard learned counsel for the parties, judgment is reserved."

20. It is apparent from the perusal of the pleadings on record filed by both the parties and from the record produced by the learned Standing Counsel as available in the office of the Deputy Registrar, Faizabad, that the petitioner resorted to deliberate misrepresentation amounting to fraud being played upon the court.

21. In **(1992) 1 SCC 534** (Shrisht Dhawan Vs. Shaw Bros.) the Supreme Court in paragraph 20 has held as under:

"20. Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct."

22. In **(1994) 1 SCC 1** (S.P. Chengalvaraya Naidu Vs. Jagannath) the Supreme Court in paragraph 5 has held as under:

"5.The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest

litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

23. In (2003) 8 SCC 319 (Ram Chandra Singh Vs. Savitri Devi and Others) the Supreme Court has held as under:

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentations may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous."

24. In **(2005) 6 SCC 149** (State of U.P. and Another Vs. T. Suryachandra Rao) it was held by the Supreme Court in paragraph-8 as under:

"8. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied."

25. In ***Dalip Singh Vs. State of U.P. and others***, reported in ***2010 (2) SCC 114,*** the Hon'ble Supreme Court has observed that "materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new

creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

26. It referred to several judgments of the Supreme Court like ***Hari Narain Vs. Badri Das*** *AIR 1963 SC 1558,* ***Welcome Hotel Vs. State of A.P.*** *(1983) 4 SCC 575,* ***G. Narayanaswamy Reddy Vs. Govt. of Karnataka*** *(1991) 3 SCC 261,* ***Prestige Lights Ltd. Vs. S.B.I.*** *(2007) 8 SCC 449,* ***Sunil Poddar Vs. Union Bank of India*** *(2008) 2 SCC 326 and* ***K.D. Sharma Vs. Steel Authority of India Limited*** *(2008) 12 SCC 481,* to observe that *".....the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the writ court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim....."*

27. This Court has considered the case of the petitioner on the basis of the pleadings made in the writ petition, the arguments raised before this Court both by the learned counsel for the petitioner and the respondents and it finds that the petitioner resorted to deliberate mis representation to invoke the jurisdiction of this Court.

28. This writ petition is therefore ***dismissed*** with a cost of Rs.50,000/-. The cost shall be deposited by the petitioner in the Registry of this Court within one month from today, which shall be forwarded by the Registry to the Child Welfare Committee, Lucknow, to be utilized for the welfare of children in need of care and protection. In case of failure to deposit the aforesaid cost by the petitioner, the Senior Registrar shall request the District Magistrate, Faizabad, to recover the amount from the movable and immovable properties of the petitioner as arrears of land revenue.

(2020)03-05ILR A1101
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.05.2020

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 3392 of 2018

Smt. Manju Devi ...Petitioner
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:
Mohammad Aslam Khan, Indrajeet Shukla, Nitin Srivastava

Counsel for the Respondents:
C.S.C., Amrendra Nath Tripathi, Jai Kumar, Santosh Kumar Tripathi

Civil Law-Transfer of Property Act-section 52-Transferee pendente lite-not void abinitio-transfer subject to-rights of the parties finally determined-if transferee pendente lite an prove-decree obtained on collusion -by plaintiff and original defendant-transferee entitled to file Recall

Application or Appeal-Petitioner entitled to file First Appeal.
Gaon sabha and State Government-not parties to compromise-trial court could not have decreed suit in their abssence-compromise decree -bad-impugned judgment and order quashed-W.P. allowed.

Held, the Explanation under Order XXIII Rule 3 of C.P.C. provides that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of this Rule. This Explanation gives a requirement that a compromise should be lawful to become binding. In a Suit under Section 229-B of the U.P.Z.A. and L.R. Act, the State Government and the Gaon Sabha are necessary parties. If they do not join in the compromise, then it is not a lawful compromise. (Para 52)

This Court has perused Section 341 and the Schedule attached to the Act and finds that there 29 is a specific provision of Second Appeal given in Column-6 against an order passed by the Divisional Commissioner in First Appeal. Because of the specific provision given in the Schedule to the Act and also for the reason that under Section 341(3), both substantive and procedural provisions have been given in the Act itself, which is a special Act, the provisions of the CPC, a general Act would not apply**.** (para 54) (E-9)

Cases cited:

1.Raja Ram & anr. Vs. Deputy Director of Consolidation, Siddharth Nagar & ors., 2006 (101) RD 121;

2.Shiv Prasad Vs. Deputy Director of Consolidation, Ghazipur & ors., 2006 (101) RD 624;

3. Surendra Nara Vs.in Dubey Vs. Deputy Director of Consolidation, 1973 RD 328

4.Smt. Phenki Vs.Board of Revenue, Allahabad & ors., 2011 Allahabad Civil Journal 2057;

5. Saral Tiwari alias Jagdish Tiwari Vs. Board of Revenue, U.P. at Allahabad & ors., 2007(103) RD 54

6.Sita Ram Vs. Sia Ram, an order of the Board of Revenue, reported in 1995 RD 161

7. Hardevinder Singh Vs. Paramjit Singh, 2013 AIR SCW 447

8. Deposit Insurance and Credit Guarantee Corporation Vs. Raghupathi Ragavan & ors., 2015 Allahabad Civil Journal 2084

9. Smt. Lal Dei through LRs & ors.Vs. Deputy Director of Consolidation, Varanasi & ors., 2005 Allahabad Civil Journal 1908

10. M/s. Jethanand and Sons Vs. the St. of U.P. AIR 1961 SC 794

11. Mani Ram & ors.Vs. Viresh Kumar & ors., 1985 RD 375

12. Jagdish & ors. Vs. Shaukeen & ors., (2006) 100 RD 175

13. Saral Tiwari @ Jagadish Tiwari Vs. Board of Revenue, U.P. at Allahabad & ors., (2007) 103 RD 54

14. Raja Ram & anr. Vs. Joint Director of Consolidation, 13 Allahabad & ors., AIR 1993 Allahabad 72

15. Guruswamy Nadar Vs. P. Lakshmi Ammal, (2008) 5 SCC 796 and Smt. Ram Peary and others Vs. Gauri & ors., 14 AIR 1978 Allahabad 318

16. Y. Sleebachen & ors.Vs. St. of TN & anr., (2015) 5 SCC 747 (distinguished)

17. Jag Ram & anr. Vs. Deputy Director of Consolidation, Gonda & ors.: Writ Petition No.459 (Consolidation) of 2002, decided today i.e. 28.05.2020

18. Parsottam Vs. Narottam; 1970 ALJ 505

19.State of Maharashtra Vs. Ramdas Shrinivas Nayak, (1982) 2 SCC 463

20. Raj Kumar Vs. Sardari Lal & ors., 2004 AIR SCW 470

21. A Nawab John & ors.Vs. V.N. Subramaniyam, 2012 AIR SCW 4248

22. Thomson Press (India) Ltd. Vs. Nanak Builders and Investors Pvt. Ltd. & ors. 2013 (5) SCC 397

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

1. This writ petition has been filed by the petitioner praying for quashing of the order passed by the opposite party no.1 dated 11.1.2018, upholding the order dated 30.7.2014 passed by the opposite party no.2, and for consequential reliefs.

2. The dispute relates to four plots of land situated in village Laxmanpur, Pargana, Tehsil and District Gonda.

3. It has been stated in the writ petition that initially the four plots of land were recorded in the name of Smt. Ram Raji, widow of Sheetla Prasad. On the death of Smt. Ram Raji, the name of Smt. Sampata, wife of Shiv Prasad being the only daughter, was recorded by the Supervisor, Kanoongo through PA-11 entry. On 6.7.1974, Bhikhu, Ram Sumran and Ram Kumar filed a suit under Section 229B/209 of the U.P.Z.A. and L.R. Act against Sampata by impleading the State of U.P. and the Gaon Sabha as parties and claiming Bhumidhari rights on the basis of an unregistered Will dated 5.9.1972, alleged to have been executed by Smt. Ram Raji and in the alternative, claimed to be heirs of Smt. Ram Raji being the nephews of her Late husband Shiv Prasad, and denying the existence of Sampata as a daughter of Ram Raji and Sheetla Prasad. The suit was contested by Sampata, who pleaded that she is the only daughter of Smt. Ram Raji and had inherited the property in dispute. The suit was also contested by the State of U.P. by filing written statement.

4. Initially, the trial court decreed the suit by judgment and order dated 20.1.1977 against which order, Sampata filed an Appeal, which was allowed on 6.12.1979 and the suit was dismissed. Against the order dated 6.12.1979, the plaintiffs filed a Second Appeal, which was allowed by judgment and order dated 18.10.1995. The Board of Revenue set aside the order passed by the Additional Commissioner in Appeal and remanded the matter to the Sub Divisional Officer, Tarabganj, Gonda (hereinafter referred to as "the opposite party no.2'). After remand of the suit to the opposite party no.2, the plaintiffs died and were substituted by their legal heirs. Similarly, the defendant Sampata also died and was substituted by her legal heir Kallu Ram, whose name had been recorded in PA-11 by the Supervisor, Kanoongo. Kallu Ram, whose name was recorded in the revenue records as Bhumidhar, executed two Sale Deeds on 31.7.2010 and 6.7.2012 in favour of the petitioner and one Sushila Devi. Kallu Ram also executed a Power of Attorney in favour of the Suraj Lal, husband of Smt. Manju Devi, authorizing him to prosecute the declaratory Suit, which was pending before the opposite party no.2 on behalf of the defendant Kallu Ram. In the meantime, the other purchaser, Smt. Sushila Devi transferred her share of purchased land through a registered Sale Deed on 17.1.2014 in favour of Smt. Manju Devi.

Kallu Ram after executing a Power of Attorney in favour of the husband of the petitioner on 31.7.2010 also executed another Power of Attorney on 21.2.2014 in favour of one Ayodhya Prasad. In the suit that was pending before the opposite party no.2, the plaintiffs made an application before the Collector, Gonda for transfer of the case to another Court and the said

application was allowed on 7.7.2014 and the case was transferred from the Court of Sub Divisional Officer, Sadar, Gonda to the Court of Sub Divisional Officer, Tarabganj, Gonda. The record was received on 18.7.2014 and the Court fixed the date of 7.8.2014. The new Power of Attorney holder Ayodhya Prasad filed an application before the opposite party no.2 for preponing the date, which had earlier been fixed as 7.8.2014. The application was allowed and new date was fixed as 23.7.2014. It has been submitted that all this was done behind the back of the petitioner/her husband. After getting the date preponed, Ayodhya Prasad filed a collusive compromise between the plaintiffs and Kallu Ram, who had already sold off all his property and had no right or title or interest left in the same. On the basis of this compromise dated 23.7.2014 entered into by the new Power of Attorney on behalf of Kallu Ram, and the plaintiffs, Kallu Ram abandoned the entire claim in favour of the plaintiffs Bhikhu, Ram Kumar and Ram Sumran and others, and stated that they may be declared as Bhumidhar of the land in dispute. The declaratory Suit was decreed by opposite party no.2 on 30.7.2014, in terms of the compromise.

5. On coming to know of this compromise Decree, the petitioner filed an appeal before the Commissioner, which was allowed on 14.10.2015 and the matter was remanded to the opposite party no.2 to decide afresh after framing issues and after affording opportunity of hearing to all concerned.

6. Being aggrieved by the order passed by the Appellate Court, the opposite party no.3 filed a Second Appeal, which was allowed at the admission stage by the opposite party no.1 without serving the opposite parties therein, on the ground that the transfer was made by Kallu Ram during the pendency of the suit, where there was already a stay order in favour of the plaintiffs, hence, the Sale Deed was void. Further, the transferer Kallu Ram had not filed any Appeal against the judgment dated 30.7.2014 and the transferee *pendente lite* had no right to file such an appeal.

7. In Para-21 of the writ petition, it has been specifically stated that during the pendency of the suit, there was no restraint order passed by the trial court. It has also been submitted that a Suit for Declaration under Section 229-B of the Act could not have been decreed in terms of the compromise when the State of U.P. and the Gaon Sabha, who were parties to the suit, did not join in the compromise.

8. Learned counsel for the petitioner has placed reliance upon judgments rendered by this Court in *Raja Ram and another versus Deputy Director of Consolidation, Siddharth Nagar and others,* ***2006 (101) RD 121****; Shiv Prasad versus Deputy Director of Consolidation, Ghazipur and others,* ***2006 (101) RD 624****; Surendra Narain Dubey versus Deputy Director of Consolidation,* ***1973 RD 328****; Smt. Phenki versus Board of Revenue, Allahabad and others,* ***2011 Allahabad Civil Journal 2057****; Saral Tiwari alias Jagdish Tiwari versus Board of Revenue, U.P. at Allahabad and others,* ***2007(103) RD 54****; and Sita Ram versus Sia Ram, an order of the Board of Revenue, reported in* ***1995 RD 161****,* to buttress his arguments.

9. It has been submitted that any person who is aggrieved by the judgment could have filed an appeal and, therefore,

the ground taken by the Board of Revenue in its order impugned, is misconceived.

10. Learned counsel for the petitioner has submitted that in ***Hardevinder Singh versus Paramjit Singh, 2013 AIR SCW 447,*** and in ***Deposit Insurance and Credit Guarantee Corporation versus Raghupathi Ragavan and others, 2015 Allahabad Civil Journal 2084,*** the Supreme Court has held that even if the appellant was not a party in the learned Court below, but he was adversely affected by the judgment and he could file an application for grant of leave and prefer an appeal before the Appellate Court. Additionally, reliance has also been placed upon judgment rendered by this Court in ***Smt. Lal Dei through LRs and others versus Deputy Director of Consolidation, Varanasi and others, 2005 Allahabad Civil Journal 1908.***

11. It has further been submitted by Sri Mohd. Arif Khan, learned Senior Advocate appearing for the petitioner, that a Second Appeal before the Board of Revenue against an order of remand passed in First Appeal was not maintainable.

12. Learned counsel for the petitioner has placed reliance upon the judgment rendered by the Supreme Court in ***M/s. Jethanand and Sons versus the State of U.P. AIR 1961 SC 794,*** where the Supreme Court has held that an order is final if it amounts to a final decision relating to the rights of the parties in a dispute in civil proceedings. If after the order of remand, the civil proceedings still remain to be tried and the rights in dispute between the parties have still to be determined by the trial court, the order is not a final order within the meaning of Article 133 of the Constitution of India and the order remanding the case is not a judgment, Decree or final order against which, a regular Second Appeal would lie.

13. It has been submitted by the petitioner's counsel that the order of remand, which was passed by the Additional Commissioner was an order passed under Rule 23A of Order XLI of the Code of Civil Procedure (hereinafter referred to as "CPC') and against such an order of remand, only FAFO would lie before the Board of Revenue and for the said proposition of law, learned counsel for the petitioner has placed reliance upon a judgment rendered by this Court in ***Mani Ram and others versus Viresh Kumar and others, 1985 RD 375.***

14. It has been further argued that under Section 341 of the U.P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as "U.P.Z.A. and L.R. Act'), the provisions of the CPC are applicable on the proceedings under the Act, unless expressly provided otherwise. Elaborating his argument, learned counsel for the petitioner submitted that a perusal of Schedule-II attached to the U.P.Z.A. and L.R. Act and Item no.34 would show that in such a case, a regular Second Appeal would not lie.

15. In the counter affidavit filed by the private respondents, the writ petition has been opposed as not being maintainable on behalf of Manju Devi, as she purchased the land in dispute *pendente lite*. It has been submitted that the Sale Deeds executed by Kallu Ram were void, as the matter was *subjudice* before the Revenue Courts for declaration of his rights over the property in question and there was already a stay on the sale of the property. The petitioner had knowledge of the pending litigation, as her

husband was given Power of Attorney by Kallu Ram on 31.7.2010 to prosecute the suit pending in the Court of Sub Divisional Officer, Gonda. The petitioner made no attempt to get impleaded as a party to the said suit. Kallu Ram revoked the Power of Attorney given to the husband of the petitioner and executed a fresh Power of Attorney on 21.2.2014, appointing Ayodhya Prasad and the subsequent Power of Attorney being valid, Ayodhya Prasad rightly moved an application on behalf of Kallu Ram for settling the dispute on the basis of a compromise entered into between the legal heirs of the erstwhile plaintiffs and the legal heir of the erstwhile defendant.

16. It has been submitted that the petitioner had no right to challenge the compromise Decree dated 30.7.2014 as Kallu Ram did not challenge such compromise Decree. The appeal was wrongly entertained by the Additional Commissioner and the order dated 14.10.2015 was without jurisdiction, therefore, the respondents filed a Second Appeal, which was rightly entertained and allowed by the Board of Revenue. The petitioner was neither a person aggrieved nor had filed any application seeking leave to file appeal. The respondents had continued possession of their share of the property in question.

17. In the course of arguments, Sri Amarendra Nath Tripathi, appearing for the private respondents has refuted the argument raised by the learned counsel for the petitioner that no Second Appeal against an order of remand *simpliciter* was maintainable under Order XLI Rule 23A of the CPC.

18. Learned counsel for the respondents has read out Section 341 of the U.P.Z.A. and L.R. Act to say that the provisions of the CPC shall be applicable to the proceedings under the Act, unless otherwise provided for.

19. Learned counsel for the respondents has read out Section 331 also of the U.P.Z.A. and L.R. Act and has pointed out that the competent Courts are mentioned in Column-4 of Schedule-II, which have been designated to deal with certain types of Suits as mentioned in the Schedule. Reference has also been made to Column-5, which deals with first Appellate Court and thereafter, Section 331(4) of the Act has been read out to show how and where a Second Appeal can be filed against an order of the first Appellate Court i.e. before a Court mentioned in Column-6 of Schedule-II. It has been submitted that since the U.P.Z.A. and L.R. Act has substantive as well as procedural provisions, no forum of appeal could be created by the CPC, which is not provided in the U.P.Z.A. and L.R. Act itself.

20. Learned counsel for the respondents has placed reliance upon judgment rendered in ***Jagdish and others versus Shaukeen and others, (2006) 100 RD 175,*** to argue that the provisions of CPC would not be applicable when there is a specific provision contained in U.P.Z.A. and L.R. Act with regard to filing of Suit under Section 229-B for declaration of Bhumidhari or Sirdari rights or for ejectment under Section 209.

21. It has further been submitted that if the counsel for the petitioner is relying upon the CPC instead of U.P.Z.A. and L.R. Act, then under Section 96(3) of the CPC, no appeal against a compromise Decree could have been filed. Therefore, the First Appeal filed by the petitioner before the Court of Additional Commissioner was also not maintainable. In the alternative, if the learned counsel for the petitioner says

that Section 96(3) is not applicable, then Order XLI Rule 23A would also not be applicable.

22. Learned counsel for the respondents has also pointed out that the argument with regard to the State of U.P. and the Gaon Sabha being essential signatories to the compromise under Section 229-B of the Act is also misconceived. A suit under section 229-B of the Act is only for those rights as are conferred under the Act itself. No new right was being asked for, by the plaintiffs. Ram Raji, the widow of Sheetla Prasad was already a Bhumidhar and the dispute related only to succession of a recorded tenure holder as it was claimed by the plaintiffs that Sampata was not the daughter of Ram Raji and Sheetla Prasad. It was nobody"s case that the Gaon Sabha and the State Government were not the owners of the land in question.

23. Learned counsel for the respondents has placed reliance upon *Saral Tiwari alias Jagadish Tiwari versus Board of Revenue, U.P. at Allahabad and others,* ***(2007) 103 RD 54*** and *Raja Ram and another versus Joint Director of Consolidation, Allahabad and others,* ***AIR 1993 Allahabad 72,*** to buttress his argument that the requirement of the State or Gaon Sabha being a party in a Compromise is only when fresh rights are claimed from the State or the Gaon Sabha.

24. Additionally, it has been argued that the Sale Deeds were executed on 31.7.2010 and 6.7.2012 by Kallu Ram and a Power of Attorney in favour of husband of the petitioner was also executed on 31.7.2010, giving him the authority to prosecute the pending Suit for Declaration in the Court of the Sub Divisional Officer, as is evident from the language of the Power of Attorney itself. It is evident that the Sale Deeds were subsequent to the filing of the Suit and, therefore, subservient to the rights of the defendant therein. The property was purchased by the petitioner during pendency of the Suit and during currency of an interim stay on alienation of property by the Court concerned, therefore, the doctrine of *lis pendens* under Section 52 of the Transfer of Property Act would apply.

25. Learned counsel for the respondents has also placed reliance upon *Guruswamy Nadar versus P. Lakshmi Ammal,* ***(2008) 5 SCC 796*** *and Smt. Ram Peary and others versus Gauri and others,* ***AIR 1978 Allahabad 318,*** to buttress his argument.

26. Learned counsel for the respondents has submitted that the subsequent Power of Attorney executed in favour of Ayodhya Prasad was validly executed by Kallu Ram and in the said Power of Attorney, the earlier one was specifically revoked. It is not the case of the petitioner that the Power of Attorney issued in favour of the husband of the petitioner was irrevocable. Moreover, the subsequent Power of Attorney was a registered one, whereas the earlier Power of Attorney made out in favour of Suraj Lal was an unregistered document. Moreover, the Power of Attorney was made out in favour of Suraj Lal in 2010 and in favour of Ayodhya Prasad in 2014, and that for four long years, no application for impleadment was filed by Manju Devi despite knowledge of the pending Suit at the time when the Sale Deed had been executed. The recorded tenure holder was already dead and Kallu Ram had been impleaded as the defendant, but his right had not yet been

confirmed. Also, the suit was pending since 1974 and the compromise was filed in 2014. In between, forty years had elapsed, but no attempt was made by the defendant to produce any evidence that Sampata was the daughter of the recorded tenure holder Ram Raji.

27. It has also been submitted by the respondents' counsel that Kallu Ram could have sold only that over which, he had ownership. The ownership of the plot in question was not declared by the competent Court. Kallu Ram only had a PA-11 entry in his name, which conferred no right. The mutation proceedings had indeed been decided in favour of Sampata in 1974, but mutation itself does not confer any right, title or interest in the property in question when a regular Declaratory Suit has been filed, which is pending.

28. It has further been submitted that when the Appeal was filed by Manju Devi before the Additional Commissioner against the compromise Decree, saying that no compromise Decree could have been validly made without the Gaon Sabha and the State Government being signatories to the compromise, neither the Gaon Sabha nor the State Government filed any Appeal against the compromise Decree. If they were aggrieved, they did not challenge the order and it became final against them also. It has been argued that the Gaon Sabha and the State Government were only proforma parties and had no stake in the pending Declaratory Suit, as is evident from their subsequent conduct.

29. It has also been submitted by the learned counsel for the respondents that the compromise was filed on 23.7.2014 and the Suit was decreed on 30.7.2014. No objections were filed, either by Manju Devi or the Gaon Sabha or the State Government to the said compromise. If the compromise Decree had been passed without their knowledge, the proper remedy would have been to file an application for recall of the order and the First Appeal was not maintainable by Manju Devi alone.

30. Learned counsel for the respondents has also argued that if the compromise was collusive in nature, it could have been challenged in a separate Suit by the petitioner and the First Appeal was not maintainable.

31. Learned counsel for the respondents has placed reliance upon a judgement rendered in ***Y. Sleebachen and others versus State of Tamil Nadu and another, (2015) 5 SCC 747,*** to say that against a compromise Decree, the party aggrieved should have approached the Court of first instance and it was not open to it to file an appeal.

32. Learned Senior Counsel appearing for the petitioner, in rejoinder, has submitted that Section 229-B of the U.P.Z.A. and L.R. Act relates to declaration of right against the recorded tenure holder. Sub-section (3) by its language itself makes it clear that the State Government and the Gaon Sabha are necessary parties. Notice under Section 80 of CPC/Section 106 of the U.P. Panchayat Raj Act is necessary. The Declaratory Suit filed against the recorded tenure holder i.e. Sampata did not deny the title of Ram Raji, but denied that Sampata was the daughter.

33. Learned counsel for the petitioner has read out the plaint of the Suit filed as Annexure to the writ petition along with its relief clause and has argued that the plaintiffs were claiming Bhumidhari rights

over a certain plot of land and Sirdari rights on the other plots of land. The ground for such claims was that Ram Raji, the erstwhile recorded tenure holder, had made out a Will in their favour and also that Sampata was not the daughter of Ram Raji and Sheetla Prasad, and on the death of the couple, plaintiffs being the nephews of Sheetla Prasad, were entitled to succession. In such a suit, if the parties agreed to a compromise and the defendant abandoned his claim, then it would only mean that the plaintiffs became Bhumidhar/Sirdar. It would result in a fresh declaration of a right of Bhumidhar or Sirdar, not only against the defending private persons, but also against the world at large, including the State and the Gaon Sabha. Sampata was already a recorded tenure holder in PA-11 and had also won the mutation proceedings upto the stage of Revision. If the suit failed, then Sampata would have remained the Bhumidhar and if the suit was allowed, then Ram Sumran and others would have become Bhumidhar.

34. It has also been argued that fraud and justice cannot go hand-in-hand. Once Kallu Ram had sold off the property in question, he had no right to enter into a compromise with the plaintiffs, as he had no interest left in the property. Moreover, if the property was being conveyed through a compromise, then it was compulsorily to be registered under Section 17 of the Registration Act.

35. It has also been argued by the petitioner's counsel that the Suit was transferred from the Court of Sub Divisional Officer, Sadar to the Court of Sub Divisional Officer, Tarabganj and a date of 7.8.2014 was fixed, which was preponed for extraneous consideration and a compromise was filed on 23.7.2014 and the Suit itself was decreed in terms of the compromise on 30.7.2014. In such a short period of time, neither the Gaon Sabha nor the State could file any objections thereto.

36. Learned counsel for the petitioner has pointed out the part of the order passed by the first Appellate Court, on Page 64 and 65 of the paper book and has argued that no finding has been returned by the Board of Revenue with regard to the specific statements made in the order of First Appeal against the conduct of the respondents.

37. It has also been submitted that Ayodhya Prasad, the subsequent Power of Attorney, bought the land in question from the private respondents in favour of his own father on 7.8.2014 soon after the Suit was decreed in favour of the respondents. A copy of the Sale Deed has been produced, which shows that Lalta Prasad, father of Ayodhya Prasad had bought two plots of land in dispute.

38. It has been submitted that since the Suit had been filed by the plaintiffs, the burden of proof was also on them. It has again been reiterated that under Section 341 of the Act, an order of remand is an order under Rule 23A of Order XLI of CPC and no Second Appeal would lie against such an order, but only an FAFO could have been entertained by the Board of Revenue.

39. It has further been submitted that under Order XXIII Rule 3 of the CPC, "parties to the compromise decree" cannot file an appeal against the same. However, the petitioner was not a party to the compromise and it was entered behind her back and to the prejudice of her interest. The vendor had deprived the Vendee of the

right to property bought in exchange of valuable consideration. It has also been submitted that the doctrine of *lis pendens* does not mean that a Sale Deed executed during the pendency of litigation would automatically become void. It only means that the transferee shall step into the shoes of the transferer and his rights shall be subservient to the rights of the parties as determined in the suit.

40. Having heard the parties at length, this Court has also perused the pleadings on record. It appears that Bhikhu, Ram Sumran and Ram Kumar, sons of Ram Prasad had filed a Suit for Declaration under Section 229-B of the Act and for ejectment under Section 209 of the Act against Sampata, wife of Shiv Prasad, who was substituted by her son Kallu Ram. During the pendency of the said Suit, the Gaon Sabha, Laxmanpur through its Pradhan was the defendant no.2, and the State of U.P. through the Deputy Commissioner, Gonda was the defendant no.3. In the said Suit, it was alleged that one Dhondey was the original tenure holder, who had two sons; Sheetla Prasad and Ram Prasad. Sheetla Prasad was married to Smt. Ram Raji and they were issue-less. Ram Prasad had three sons, i.e. the plaintiffs. On certain plot of land in village Laxmanpur, the mother of defendant no.1 Ram Raji was recorded as Bhumidhar and on other plots of land, she was recorded as Sirdar and on still other plots of land, she was recorded as co-Sirdar along with the plaintiffs. On the death of Smt. Ram Raji, the plaintiffs claimed that being the nephews, they succeeded on one plot in question as Bhumidhar, and on all the remaining land as Sirdar. Also, that Ram Raji had made out a Will dated 5.9.1972 in favour of the plaintiffs also. It was also alleged that the defendant no.1 Sampata was not the daughter/legal heir of Ram Raji and Sheetla Prasad, but without any basis, she claimed to be their legal heir and successor. The plaintiffs had filed an application for mutation and correction of papers in the Court of Tehsildar, which application was rejected on 10.9.1972 against which, the plaintiffs had filed a Revision, which was also rejected on 23.3.1974. Hence, the need arose to file a Suit for Declaration and the same was actually filed on 6.7.1974. In Paragraph 8 of the Suit, it had been mentioned that defendant nos.2 and 3, as per statutory provisions, were necessary parties and had been given notice under Section 106 of the U.P. Panchayat Raj Act read with Section 80 of CPC and despite service of notice on 26.4.1974, the defendant nos.2 and 3 had neither replied to the notice nor had recognized the rights of the plaintiffs as Bhumidhar/Sirdar of the property in question. In the prayer clause, a decree/declaration of Bhumidhari/Sirdari rights over the property in question was sought against all the defendants. Also, a decree of ejectment of the defendant no.1 was sought under Section 209 of the U.P.Z.A. and L.R. Act.

41. Initially the said Suit was decreed in favour of the plaintiffs against which, Sampata filed a First Appeal before the Court of Commissioner of Faizabad Division, Faizabad. The First Appeal was allowed on 6.12.1979. Aggrieved by the order passed in First Appeal, dismissing the Suit of the plaintiffs, the plaintiffs had filed a Second Appeal, which was allowed by the Board of Revenue on 18.10.1995, remanding the matter back to the Court of the Sub Divisional Officer, Sadar, Gonda with the direction that issues be framed and evidence be taken afresh of all parties concerned. After remand of the Suit, the

plaintiffs died and were substituted by their legal heirs. The defendant no.1 also died and was substituted by her son Kallu Ram. Kallu Ram after selling off the property in dispute initially made out a Power of Attorney in favour of the husband of the petitioner so that he may pursue the pending litigation on 31.7.2010. Later on, a fresh Power of Attorney was executed by him in favour of one Ayodhya Prasad, who moved an application on 23.7.2014 before the trial court that the parties had willingly entered into a compromise to settle the Suit out of court.

42. In the compromise, mention was made of a fresh Power of Attorney executed in favour of Ayodhya Prasad in 2014, but neither the petitioner nor the respondents herein have filed a copy of the Power of Attorney so executed in favour of Ayodhya Prasad in this Court.

43. The Sub Divisional Officer by his order dated 30.7.2014, first mentioned the brief facts relating to the litigation and thereafter referred to the compromise filed before him on 23.7.2014 and thereafter, decreed the Suit in terms of the compromise, which was directed to become part of the order.

44. Learned counsel for the private respondents has pointed out from the contents of the compromise dated 23.7.2014 that Kallu Ram not only gave up his right to the property in question, but also admitted that his mother Sampata was not the daughter of Ram Raji and Sheetla Prasad. In the said compromise, mention has also been made of the fact that on the property in dispute, the plaintiffs alone had possession and that Kallu Ram was in no way interested in the property in question nor had possession over it.

45. The contents of the compromise filed in the Court of Sub Divisional Officer show that Kallu Ram gave up the claim of Sampata to be the daughter of Ram Raji and Sheetla Prasad. He also gave up all of his claim therefore, to the property in question. He undermined the very basis of his ownership of the property in dispute, which he had already sold off by two Sale deeds in the year 2010 and 2012. He in effect rendered himself open to be prosecuted for knowingly committing fraud with the transferee *pendente lite* and apparently for no good reason, as in the compromise, he gave up all his rights without getting anything in return. Such a compromise was highly unlikely to have been entered into with the knowledge of Kallu Ram. The application for taking the compromise on record was signed by Ayodhya Prasad, the new Power of Attorney holder and for disposing of the case also. The order sheet was signed only by Ayodhya Prasad, alleging that Kallu Ram was not available at the time.

46. It has come to the notice of the Court that Kallu Ram also sold off the very same property, which he had already disposed off in 2010 and 2012 through registered Sale Deeds, in favour of the father of Ayodhya Prasad, one Lalta Prasad on 7.8.2014 soon after the Declaratory Suit was disposed of on the basis of the compromise Decree.

47. The basic question that arises for decision of this dispute is whether such a compromise, which was not signed either by the Gaon Sabha or the Collector on behalf of State Government, could have been relied upon by the trial court to decide the matter.

48. Apparently, the date fixed by the trial court for hearing of the case in the presence of the parties was 7.8.2014. Later on, on an application moved by Ayodhya Prasad behind the back of the petitioner, it was preponed to 23.7.2014. On 23.7.2014, the compromise was filed in Court and on 30.7.2014, the Suit was decreed in favour

of the plaintiffs on the basis of the compromise. The State Government impleaded through the Deputy Collector and the Gaon Sabha impleaded through the Gram Pradhan, were contesting defendants, as the relief claimed in the Prayer clause of the Suit was also for a declaration of Bhumidhari rights and Sirdari rights against all the defendants. This Court has noticed Para-8 of the plaint, where a specific averment in this regard was made.

49. This Court has already held in ***Jag Ram and another vs. Deputy Director of Consolidation, Gonda and others: Writ Petition No.459 (Consolidation) of 2002,*** decided today i.e. 28.05.2020, that no such compromise could have been made the basis of decreeing the suit by the trial court.

50. In the case of ***Parsottam vs. Narottam; 1970 ALJ 505,*** it was held by the Division Bench that a suit for declaration of Bhumidhari or Sirdari rights is to be filed against the State Government and the Gaon Sabha and any other person who claims Bhumidhari or Sirdari rights, in such land has to be impleaded as a party. It was held that the State Government and the Gaon Sabha are necessary parties to such a suit and, therefore, any Decree on the basis of compromise without their consent could be validly ignored by the Consolidation Authorities. The appellants therein claimed themselves to be Bhumidhars. The dispute whether the defendant-respondents were still Sirdars had to be adjudicated only in a suit under Section 229-B where the State Government and the Gaon Sabha were also necessary parties. The Revenue Court was not competent to look into the agreement between the parties and to give effect to it in view of the clear provisions of sub-section (3) of Section 229-B. It is well settled that there is no estoppel against the statute. If the statute requires that declaration of rights of a Sirdar can take place only in the presence of the State Government and the Gaon Sabha, then an agreement in the absence of these parties would be violative of such a statutory provision.

51. In ***Saral Tiwari alias Jagdish Tiwari*** (supra), a co-ordinate Bench of this Court was considering whether a compromise between the parties in a Suit for Declaration of Bhumidhari rights under Section 229-B of the U.P.Z.A. and L.R. Act, which was not signed by the Gaon Sabha or the State, could result in a valid Decree. The Court considered this fact that the plaintiff was seeking tenancy right in the land in dispute on the basis of possession. It was not a case where declaration of already existing tenancy right was being claimed by the plaintiff whose name even though he was in possession, was not recorded in the Khatauni for some reason. This Court held that tenancy rights being regulated by the provisions of U.P.Z.A. and L.R. Act, a fresh tenancy right could not be created in favour of a person on the basis of a compromise without Gaon Sabha and the State either conceding or being signatories to the said compromise.

52. The Explanation under Order XXIII Rule 3 of C.P.C. provides that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of this Rule. This Explanation gives a requirement that a compromise should be lawful to become binding. In a Suit under Section 229-B of the U.P.Z.A. and L.R. Act, the State Government and the Gaon Sabha are necessary parties. If they do not join in the compromise, then it is not a lawful compromise.

53. This Court is not convinced with the argument made by the learned counsel for the petitioner that only an FAFO was maintainable before the Board of Revenue

and not a second appeal under Order XLI, Rule 23A of CPC.

54. This Court has perused Section 341 and the Schedule attached to the Act and finds that there is a specific provision of Second Appeal given in Column-6 against an order passed by the Divisional Commissioner in First Appeal. Because of the specific provision given in the Schedule to the Act and also for the reason that under Section 341(3), both substantive and procedural provisions have been given in the Act itself, which is a special Act, the provisions of the CPC, a general Act would not apply.

55. Now coming to the argument raised by the learned counsel for the respondents that the First Appeal itself was not maintainable before the Divisional Commissioner against the compromise Decree by a person, who was not a party to the Suit proceedings. This Court has carefully perused the judgment relied upon by the learned counsel for the respondents, namely, ***Y. Sleebachen*** (supra). A perusal of the same would show that the Supreme Court was considering a matter arising out of Arbitration and Conciliation Act, 1996. Three awards were passed in favour of the contractor against which, the State-respondents filed appeals, which were pending. During the pendency of the Appeals, a proposal to negotiate an out of Court settlement was mooted. During the negotiations, no definite amicable solution could be reached between the parties. As a result, the Appellate Court proceeded to hear the arguments. When the matter was being argued before the District Judge, the contractor came out with a proposal where he agreed to give certain concessions, which had earlier been asked for by the State, but had been refused by him. The District Government Pleader found that the action of the contractor was fair and just and, therefore, accepted the proposal of the contractor and the District Judge passed three consent Decrees. Before the High Court, it was pleaded that the District Government Pleader was not authorized to enter into any such settlement. The High Court set aside the consent Decree passed by the District Judge. The Supreme Court in Appeal filed by the contractor against the order of the High Court made certain observations that if the consent Decree contained certain concessions, which had not actually been agreed upon by the State Government and that the Government Pleader was not actually authorized to record the compromise on its behalf, then the State Government should have approached the District Judge concerned who had passed the consent Decree. The Supreme Court observed that it is not even remotely suggested in any of the grounds taken before the High Court that the Government Pleader had acted improperly. On the contrary, it was suggested that there was a failure of the compromise or that no compromise was recorded or agreed upon before the Court. The contents of the compromise itself being doubted, the Supreme Court observed that it is contrary to the record of the Appellate Court, and the statements recorded in the judgment of the District Judge, which was an impermissible ground of challenge raised for the first time in Appeal. The Supreme Court relied upon the observations made by the Court in ***State of Maharashtra versus Ramdas Shrinivas Nayak, (1982) 2 SCC 463,*** to observe that matters of judicial record are unquestionable. They are not open to doubt, and that they were bound to accept the statement of the Judge recorded in the judgment as to what transpired in Court. If a party thinks that the happenings

in Court have been wrongly recorded in the judgment, it is incumbent upon such a party, while the matter is still fresh in the mind of the Judge, to call the attention of the very Judge, who had made the record, to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter necessarily ends there. It observed that since no application was filed by the respondents before the District Judge immediately after the passing of the Decrees in terms of the compromise, or even thereafter, for recall of the compromise Decree with a plea that such a compromise was unacceptable to the Government and the Government Pleader was not authorized to enter into such settlement, the High Court could not have looked into such a ground raised for the first time in Appeal. This judgment of the Supreme Court is distinguishable and not applicable to the facts of the instant case.

56. The judgments cited by the learned counsel for the petitioner with regard to the permissibility of a person, not being a party to the proceedings to file an Appeal, if his rights are affected, are more in line with the general principles of law that any aggrieved person, may file an appeal, if his rights are being prejudiced or affected.

57. In the case of ***Hardevinder Singh*** (supra), the Supreme Court observed in Paragraphs 13, 14, 15 and 19 of the judgment thus:-

"13. Presently, it is apt to note that Sections 96 and 100 of the Code make provisions for preferring an appeal from any original decree or from a decree in an appeal respectively. The aforesaid provisions do not enumerate the categories of persons who can file an appeal. If a judgment and decree prejudicially affects a person, needless to emphasise, he can prefer an appeal. In this context, a passage from Smt. Jatan Kanwar Golcha v. M/s. Golcha Properties Private Ltd. [(1970) 3 SCC 573 : AIR 1971 SC 374] is worth noting:

"It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate Court and such leave should be granted if he would be prejudicially affected by the judgment."

14. In State of Punjab v. Amar Singh and another [(1974) 2 SCC 70 : AIR 1974 SC 994], Sarkaria, J., while dealing with the maintainability of an appeal by a person who is not a party to a decree or order, has stated thus:

"84. Firstly, there is a catena of authorities which, following the doctrine of Lindley, L.J., in re Securities Insurance Co., (1894) 2 Ch 410 have laid down the rule that a person who is not a party to a decree or order may with the leave of the Court, prefer an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially affected by it. As a rule, leave to appeal will not be refused to a person who might have been made ex nominee a party- see Province of Bombay v. W.I. Automobile Association, AIR 1949 Bom 141; Heera Singh v. Veerka, AIR 1958 Raj 181 and Shivaraya v. Siddamma, AIR 1963 Mys 127; Executive Officer v. Raghvan Pillai, AIR 1961 Ker 114. In re B, an Infant (1958) QB 12; Govinda Menon v. Madhavan Nair, AIR 1964 Ker 235."

15. In Baldev Singh v. Surinder Mohan Sharma and others [(2003) 1 SCC 34], a three Judge- Bench opined that an appeal under Section 96 of the Code would

be maintainable only at the instance of a person aggrieved by and dissatisfied with the judgment and decree. In the said case, while dealing with the concept of "person aggrieved', the Bench observed thus:

"A person aggrieved to file an appeal must be one whose right is affected by reason or the judgment and decree sought to be impugned. It is not the contention of Respondent 1 that in the event the said judgment and decree is allowed to stand, the same will cause any personal injury to him or shall affect his interest otherwise."

19. At this juncture, we may usefully reproduce a passage from Banarsi and others (AIR 2009 SC 1989 : 2003 AIR SCW 1494) (supra) wherein it has been stated thus:-

"Sections 96 and 100 CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. See Phoolchand v. Gopal Lal [AIR 1967 SC 1470], Jatan Kumar Golcha v. Golcha Properties (P) Ltd. (AIR 1971 SC 374)(supra) and Ganga Bai v. Vijay Kumar (AIR 1974 SC 1126)(supra). No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 CPC provide for an appeal against decree and not against judgment."

(Emphasis supplied)

58. A coordinate Bench of this Court in ***Smt. Lal Dei*** (supra), observed in Paragraphs 14, 15 and 16 thus:

"14. Similarly, in another decision given in case of Bramadeo (supra), this Court was ceased with similar issue and in this decision also the matter was considered in detail which will also be useful to be quoted here. The analysis as made in paras 8 to 11 in this judgment is quoted here:- (All. CJ p.355)

"8. At this stage I consider it proper to have Dictionary meaning of word 'Party'. In view of dictum in P.B. Samant v. A.R. Antuley, dictionary meaning of a word can be ascertained to have correct interpretation. In Webster Third New International Dictionary word 'Party' denotes one directly disclosed by record to be so involved in the prosecution of defence of a proceeding as to be bound by the decision or judgment therein; one indirectly disclosed by the record as being directly interested in the subject-matter of a suit or as having power to make a defence or control the proceedings or appeal from the judgment meaning of 'Party' is.

9. According to 'Bourvier's Law Dictionary' 'Parties' in law may be said to be those united in interest in the performance of an act. That term includes every party to an act. In equity all persons materially interested, either legally or beneficially in the subject-matter of a suit, are to be made parties to it, either as plaintiff or defendant so that there may be a complete decree that may bind them all (see Christian v. R. Co.). It is not indispensable that all the parties should have an interest in all the mattes contained in the suit, but it is sufficient if each party has an interest in some material matter in suit, and it is connected with the orders (see Brown v. Safe Deposit Co). In the absence of parties and without their having an opportunity to be heard, a Court is without jurisdiction to make an adjudication affecting them. Active parties

are those who are so involved in the subject-matter in controversy that no decree can be made without their being in Court. Passive parties are those whose interests are involved in granting complete relief to those who ask it.

10. According to Words and Phrases (Permanent Edition) Volume 31 in its broadest meaning, the word party includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as formed party or not. A party to a judicial proceedings is one whose interest in subject matter, whether favourable or adverse is such that his presence on the record is either necessary or proper.

11. In view of the aforesaid meaning of the word 'party' it is evidence that if a person is concerned with conducting or taking part in any matter or proceeding he is a party even though he may not have been impleaded or made a party by the objector. Further the words under Section 11 of the Act are, 'any party' and not 'any person impleaded as party'. Legislature cannot make such provision that if an interested person is not made a party by the objector he cannot file an appeal; and he is helpless. Assuming he does not file an appeal he shall have to file an objection afresh which would be barred by Section 11-A in case he files a civil suit for cancellation of the order of the Consolidation Officer or Assistant Consolidation Officer that can abate under Section 5. In case he does not file an appeal or objection during consolidation operation, and if he prefers to file a suit after denotification under Section 52, his suit would be barred by Section 49 of the Act. By enacting Section 11 and using word 'any party' the intention of the Legislature cannot be to deprive a person from right of appeal. The interpretation of a particular statutory provision has to be effective and operative. I am accordingly, of the view that petitioners have a right of appeal even though they were not impleaded as a party in the objection filed by Smt. Rama Devi, respondent No. 4."

15. In these cases it was held that appeal filed by any aggrieved person is maintainable.

16. In another decision, in case of Sumer Chandra (supra) again the matter was considered and it was held that appeal by any aggrieved person is maintainable. In this decision reliance has been placed on the decision given by the Apex Court in case of Jatan Kunwar Golcha v. Golcha Properties Pvt. Limited., 1971 SC 374 and AIR 1979 Orissa, page 175. The extract of paras 18 and 19 will be useful to be noticed here-

"18. In Abdul Rasid Khan v. S.K. Rahimmullam, it has been held that a person who is not a party to the suit may prefer an appeal. Reliance was also placed in the judgment of the Apex Court which is quoted below-

"In Smt. Jatan Kunwar Golcha v. Golcha Properties Pvt. Ltd., AIR 1979 Orissa 175, it has been held that it is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the Appellate Court and such leave should be granted if he would be prejudicially affected by the judgment. This decision has also been followed by a Division Bench of this Court in Teja Singh v. A.D.M. (Executive) Suldargarh. It was open to the petitioner to ask for leave to appeal to the Appellate Court and if he is prejudicially affected, leave was to be granted, as has been held by the Supreme Court in the case referred to above. But the petitioner did not take recourse to his position."

19. In the aforesaid judgment reliance has been placed on the judgment of the Apex Court reported in Smt. Jatan

Kunwar Golcha v. M/s Golcha Properties Pvt. Ltd., AIR 1971 SC 374 (V 58 C 91) (in Liquidation). The relevant portion of the Apex Court is quoted below-

"In our opinion apart from Rule 139 to which reference has been made by the High Court, the Official Liquidator as well as the learned Company Judge were bound by the rules of natural justice to issue a notice to the appellant and hear her before making the order appealed against. If there was default on their part in not following the correct procedure it is wholly incomprehensible how the appellant could be deprived of her right to get her grievance redressed by filing an appeal against the order which had been made in her absence and without her knowledge. It would be a travesty of justice if a party is driven to file a suit which would involve long and cumbersome procedure when an order has been made directly affecting that party and redress can be had by filing an appeal which is permitted by law. It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the Appellate Court and such leave should be granted if he would be prejudicially affected by the judgment."

(Emphasis supplied)

59. Learned counsel for the respondents has placed reliance upon ***Guruswamy Nadar*** (supra) to argue that since the land in dispute had been bought by the petitioner during pendency of the Suit for Declaration and ejectment before the Sub Divisional Officer, Gonda, she did not have a right greater than that of the original defendant.

60. This Court has carefully perused the judgment rendered in ***Guruswamy Nadar*** (supra), where it was observed that normally as a public policy, once a suit has been filed pertaining to any subject matter of the property, in order to put an end to such kind of litigation, principals of *lis pendens* has been evolved so that litigation may finally terminate without the intervention of a third party. This is because of public policy, otherwise no litigation will come to an end. Therefore, in order to discourage that same subject matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked. Otherwise, litigation will never come to an end.

61. This Court has also perused the judgment in ***Smt. Ram Peary*** (supra), which has been affirmed in the judgment of the Supreme Court. However, several judgments of the Supreme Court have dealt with the doctrine of *lis pendens* in a more comprehensive manner.

62. In the case of ***Raj Kumar versus Sardari Lal and others, 2004 AIR SCW 470,*** the doctrine of *lis pendens* as expressed in Section 52 of the Transfer of Property Act was considered by the Supreme Court. The transfer took place during the pendency of the suit, but the Decree passed ex-parte in the suit was sought to be set aside, not by the defendant on record, but by a person, who did not come or was not brought on record promptly, and hence, apparently appeared to be a third party. The Supreme Court observed that such a person in accordance with the principles incorporated in Section 52 of the Transfer of Property Act would be a representative-in-interest of the defendant-judgement debtor. Under Section 52 of the Transfer of Property Act, a decree passed against the defendant transferor would also be executed against the *lis pendens* transferee of the defendant, even

though he was not a party to the suit. Such a person can prefer an appeal being a person aggrieved. The person who is liable to be proceeded against in execution of the decree can file an appeal against the decree. Such a person can also file an application for recall under Rule 13 of Order IX of the CPC, as such, a person stepped into the shoes of the defendant and the decree was sought to be executed against him. It was held by the Supreme Court that a *lis pendens* transferee, though not brought on record under Order XXII Rule 10 of CPC, is entitled to move an application under Order IX Rule 13 of CPC to set aside a decree passed against his transferor, the defendant in the suit.

63. In the case of ***A Nawab John and others versus V.N. Subramaniyam, 2012 AIR SCW 4248,*** the Supreme Court was considering a case where a specific performance of a registered agreement and delivery of possession was sought by the plaintiff in a suit before the trial court. During the pendency of the suit, the sole respondent V.N. Subramaniam filed an application, praying that he may be impleaded as a party-defendant to the said suit on the ground that he had purchased the suit property. His application for impleadment was allowed and the plaint came to be amended mentioning the details of subsequent events. The Supreme Court examined the background of insertion of the doctrine of *lis pendens* in Section 52 of the Transfer of Property Act. It referred to a judgement rendered by it earlier, reported in ***(1972) 2 SCC 200,*** which in turn relied upon "Commentaries on the Laws of Scotland", by Bell, where it was observed that *"during pendence of an action of which the object is to vest the property or obtain the possession of the real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and to be bound by the claims which shall ultimately be pronounced".*

64. The Supreme Court referred to the language of Section 52 of the Transfer of Property Act and observed in Paragraph-17 that it is settled legal position that the effect of Section 52 is not to render transfers effected during pendency of a suit by a party to the suit void, but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The *pendente lite* purchaser would be entitled to, or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court. The mere pendency of the suit does not prevent one of the parties to the suit from dealing with the subject matter of the suit. The Section only postulates a condition that the *lis pendens* alienation will in no manner affect the rights of the other party under any decree, which may be passed in the suit unless the property alienated with the permission of the Court. In Paras 18 and 19 of the said judgment, the Supreme Court observed thus:-

"18. Such being the scope of Section 52, two questions arise: whether a pendente lite purchaser: (1) is entitled to be impleaded as a party to the suit?; (2) once impleaded what are the grounds on which he is entitled to contest the suit.

19. This Court on more than one occasion held that when a pendente lite purchaser seeks to implead himself as a party-defendant to the suit, such application should be liberally considered. This Court also held in Saila Bala Dassi v. Nirmala Sundari Dassi [AIR 1958 SC 394]

that, "justice requires", a pendente lite purchaser "should be given an opportunity to protect his rights". It was a case, where the property in dispute had been mortgaged by one of the respondents to another respondent. The mortgagee filed a suit, obtained a decree and "commenced proceedings for sale of the mortgaged property". The appellant Saila Bala, who purchased the property from the judgment-debtor subsequent to the decree sought to implead herself in the execution proceedings and resist the execution. That application was opposed on various counts. This Court opined that Saila Bala was entitled (under Section 146 CPC) to be brought on record to defend her interest because, as a purchaser pendente lite, she would be bound by the decree against her vendor. There is some divergence of opinion regarding the question, whether a pendente lite purchaser is entitled, as a matter of right, to get impleaded in the suit, this Court in Amit Kumar Shaw v. Farida Khatoon [(2005) 11 SCC 403]: (AIR 2005 SC 2209: 2005 AIR SCW 2078), held that:

"Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alienee pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case."

The preponderance of opinion of this Court is that a pendente lite purchaser's application for impleadment should normally be allowed or "considered liberally."

(emphasis supplied)

65. In the case of ***Thomson Press (India) Limited versus Nanak Builders and Investors Private Limited and others 2013 (5) SCC 397,*** the Supreme Court was considering an appeal arising out of a suit for specific performance of prior agreement to sell filed by the buyer against the original owner/transferor/seller *pendente lite*. In Paragraph 26 to 29 of the said judgment, the Supreme Court after referring to Section 52 of the Transfer of Property Act, observed that transfer during pendency of suit does not automatically render such transfer void. The provisions of the Section only render such transfers subservient to the rights of the parties to a litigation. The transferees acquiring any immovable property during litigation over it, are held to be bound, by application of the doctrine of *lis pendens* and by the decree passed in the suit even though they may not have been impleaded in it. "The whole object of the doctrine of *lis pendens* is to subject parties to the litigation, as well

as others who seek to acquire rights in immovable property, which are the subject matter of litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated." The Supreme Court further observed in Paragraphs 55 and 56 that a transferee *pendente lite* can be added as a party to the suit lest the transferee suffered prejudice on account of the transferor losing interest in the litigation post such transfer. Sometimes a transferor *pendente lite* may not even defend the title properly as he has no interest in the same or may collude with the plaintiff in which case the interest of the purchaser *pendente lite* will be ignored. To avoid such situations, transferee *pendente lite* can be added as a party defendant to the suit provided his interest is substantial and not just peripheral. This is particularly so where the transferee *pendente lite* acquires the interest in the entire estate that forms the subject matter of the dispute.

66. It is evident from a careful consideration of latest judgments of the Supreme Court dealing with Section 52 of Transfer of Property Act that the Supreme Court has emphasized that a transferee *pendente lite* is not void ab initio. It only makes such transfer subject to the rights of the parties finally determined. Also, if the transferee *pendente lite* can prove that the Decree had been obtained on collusion by the plaintiffs and the original defendant, the transferor *pendente lite*, such transferee is entitled to file Recall application or an Appeal against such a Decree on showing the Court that its interest had been prejudicially affected by failure of the transferor *pendente lite* to properly defend the action. Hence, this Court holds that Smt. Manju Devi was entitled to file the First Appeal before the Court of the Additional Commissioner against the compromise Decree dated 30.7.2014. The private respondents have been unable to produce any interim order of the trial court prohibiting alienation without permission of the Court.

67. Also, when the First Appeal was being heard by the Additional Commissioner, the Gaon Sabha and the State had filed objections to the compromise Decree that it could not have been passed without their participation in terms of Section 229-B(3) of the Act. If the Gaon Sabha and the State Government were not parties to the compromise, the trial court could not have decreed the Suit in their absence. The compromise Decree dated 30.7.2014 was rightly set aside by the First Appellate Court. The Second Appeal though maintainable before the Board of Revenue was improperly allowed by it only on the ground that transferee *lis pendens* is void.

68. The judgment and order passed by respondent no.1 dated 11.1.2018 is hence, liable to be set aside and is ***set aside.***

69. The order of the Additional Commissioner in First Appeal dated 14.10.2015 being affirmed by this Court, the matter is remanded to the Court of the Sub Divisional Officer, Tarabganj, Gonda, who shall, after framing issues, give a reasonable opportunity of hearing to all concerned, including the subsequent purchasers, and pass appropriate orders in accordance with law within a period of six months from the date, a certified copy of this order is produced before him, as the Suit for Declaration was initially filed in his Court on 6.7.1974.

70. The writ petition stands ***allowed.***

(2020)03-05ILR A1121
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.02.2020

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE MANISH KUMAR, J.

Misc. Bench No. 4345 of 2020

Punjab Homeopathic Pharmacy & Ors. ...Petitioners

Versus

Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Shankar Dayal Jaiswal, Rohit Jaiswal

Counsel for the Respondents:
C.S.C., A.S.G.I., Savitra Vardhan Singh, Shobhit Mohan Shukla

Civil Law-Tender for procurement of medicines under Ayush Mission-eligibility criteria-average turnover of Rs. 5 Crore in last three years with total turnover of Rs, 15 Crore—condition of minimum turnover existed prior- and depend on volume of procurement and other requirements-no malafide proved- W.P. dismissed.

Held, It is not a case where there is overnight change in the condition of the Tender rather in the last year also, the condition of minimum turnover was existing though the prior turnover required was of Rs. 9 crore. The minimum turnover criteria depend on the volume of procurement and other requirements. Interference therein be made if mala fide exists to favour someone. We have already expressed our opinion on the aforesaid. A case of mala fide or favour is not made out. (para 38) (E-9)

Cases Cited:

1. Maa Binda Express Carrier & anr. vs. North-East Frontier Railway & ors. (2014) 3 SCC 760.

2.Michigan Rubber (India) Ltd. vs. St. of Karnataka & ors. (2012) 8 SCC 216

3. Tata Cellular vs. U.O.i. 1994 (6) SCC 651

4.U.O.I. (Uoi) & anr. vs International Trading Co.: 2003 5 SCC 437

(Delivered by Hon'ble Munishwar Nath Bhandari, J, Hon'ble Manish Kumar, J.)

1. Heard Sri Prashant Chandra, Senior Advocate appearing on behalf of the petitioner, Sri Savitra Vardhan Singh, learned counsel for opposite party nos. 1 & 2, Sri Shobhit Mohan Shukla, learned counsel for the opposite party no. 4 and learned standing counsel for the State.

2. By this writ petition, a challenge is made to Clause 46(4) of the Tender Specification dated 16.01.2020.

3. It is a case where side opposite floated tender to procure the medicines under Ayush Mission. The tender was floated on 16.01.2020 containing certain terms and conditions. A challenge to Clause 46 (4) of the Tender has been made, as it requires average turnover of 5 crore in last three years with total turnover of Rs. 15 crore in the year 2016-17, 2017-18 & 2018-19.

4. Challenge to the eligibility condition is on requirement of the prior turnover. It is mainly in reference to the Government order dated 10.03.2016 under para 16 of the Public Procurement Policy for Micro and Small Enterprises order of 2012 (in short 'the order of 2012'). It was to relax the condition of prior experience and prior turnover criteria. A reference of Para 4 of the said order has been given to show a direction to the Central Ministries/Departments/Public Sector

Undertakings to relax the requirement of prior turnover and prior experience subject to procurement of quality material with technical specifications.

5. It is submitted that the conditions of prior turnover is in ignorance of the Government Order dated 10.03.2016 under para 16 of the order of 2012. Para 16 permits Government to remove the difficulties for procurement of goods and services from Micro and Small Enterprises. The respondents should not have kept the requirement of prior turnover, as it otherwise reduces competitions.

6. Coming to the facts of this case, it is submitted that by virtue of Clause 46(4) of the Tender, there would be no competition as only one enterprise would be eligible to get contract. It is for the reason that after the tender notice, only three enterprises participated therein out of which one is petitioner not confirming to the requirement of minimum turnover criteria. Out of two others, one Kerala State Homoeopathic Co-operative Pharmacy would also be eliminated having been blacklisted. It would leave only one Company namely M/s. Goa Antibiotics and Pharmaceuticals Limited. The aforesaid is not only contrary to the Government Order dated 10.03.2016 but to eliminate competition at the cost of public exchequer.

7. In view of above, a challenge to tender condition has been made. No purpose is sought to be achieved by putting condition of prior turnover in procurement of drugs under the Ayush Mission. A reference of Ayush Mission has also been given. It has been introduced by the Government of India to purchase Drugs. The Scheme introduced by the Government of India does not provide a condition of prior turnover for procurement of the drugs. Accordingly, the procurement agency could not have put a condition de hors the Scheme of the Government of India. The entire funding is by the Central Government thus the State Ayush Society Mission had no authority to act contrary to the Scheme.

8. The complete framework for the implementation of Ayush Mission has been given. The procurement of drugs has to be made from M/s. IMPC or a Public Sector Undertaking or pharmacies under the State or the co-operative Societies manufacturing quality drugs. Emphasis of the procurement agency should have been on the purchase of quality drugs than prior turnover eliminating competition.

9. Reference of the Government Procurement Policy has also been given. Therein also, no direction exist for a condition of prior minimum turnover. The condition laid down by the opposite party no. 4 is thus arbitrary and otherwise suffers from mala fide, as it intend to favour only one party leaving others. In the light of aforesaid, prayer is to set aside clause 46(4) of the Tender with a direction to the opposite parties to consider the bid given by the petitioner and if it is competitive, allow the supply of the drugs.

10. To substantiate the argument, learned counsel for the petitioner has made a reference of the judgment of the Apex Court in the case of ***Maa Binda Express Carrier and Another vs. North-East Frontier Railway and Others: (2014) 3 SCC 760.*** A specific reference of para 8 & 11 of the aforesaid judgment has been given. A further reference of the judgment of the Apex Court in the case of ***Michigan Rubber (India) Limited vs. State of***

Karnataka and Others: (2012) 8 SCC 216 has been given. Para 11, 12, 13 & 24 has been referred.

11. Learned counsel appearing for side opposite has contested the writ petition. It is submitted that the condition of prior turnover under Clause 46(4) has not been introduced for the first time but it was existing in the previous Tender also. The condition aforesaid was challenged earlier also. The writ petition was dismissed as rendered infructuous. The issue has no merit as condition of minimum turnover is to ensure supply of Drugs worth Rs. 15 crore (approx.) in this year.

12. To clarify the aforesaid, learned counsel has given an illustration. It is submitted that if the minimum turnover criteria is eliminated, the bids would be given without showing the capacity to supply the drugs. An establishment having a turnover of Rs. 50 lakh in a year may remain successful in the bid and if the purchase order is issued thereupon, the supply of Drugs worth Rs. 15 crore in a year would not be possible. The criteria of minimum turnover is to ensure supply of the volume of drugs for which the Tender is floated. It is not to eliminate the petitioner or to favour someone.

13. The bidders in this case are non else but the Public Sector Undertakings only and not a Private Enterprise. The opposite parties cannot have a reason to eliminate any of the Public Sector Undertaking because supply under the Ayush Mission has been emphasized through IMPC, Public Sector Undertaking or Pharmacies under the State Government and the Co-operative Societies manufacturing drugs in their own Unit having Good Manufacturing Practices (GMP) compliances. The participation pursuant to Tender is of non else but of Public Sector Undertakings which include even the petitioner. Thus the allegation of elimination with a view to favour someone is for sake of it.

14. It is further stated that jurisdiction of this Court to review conditions of the Tender is limited in view of the judgment of the Apex Court in the case of ***Tata Cellular vs. Union of India: 1994 (6) SCC 651.*** The court cannot sit as court of appeal on the terms and conditions of the Tender. It cannot even review terms and conditions of Tender. The interference is limited to the cases of mala fide or arbitrariness. Aforesaid grounds are not attracted in this case. The prayer is accordingly to dismiss the writ petition.

15. We have considered the rival submission of the parties and perused the record.

16. By this writ petition, a challenge is made to clause 46(4) of the Tender. For ready reference, the aforesaid clause is quoted hereunder:-

"विगत तीन वर्षों (2016-17, 2017-18, 2018-19) में होम्योपैथिक औषधियों निर्माता फर्मों का औसतन टर्न ओवर रू० 5 करोड़ न्यूनतम हो, अथार्त गत तीन वर्षों का सफल टर्न ओवर रू० 1 5 करोड़ होI"

17. The clause quoted above requires minimum average turnover of Rs. 5 crore in three years with gross turnover of Rs. 15 crore in the year i.e. 2016-17, 2017-18, 2018-19. The condition aforesaid has been kept for procurement of drugs worth Rs. 15 crore in this year. The challenge to Clause 46(4) of the Tender has been made firstly

in reference to the Government order dated 10.03.2016, which has been issued under para 16 of the order of 2012. Para 4 of the order is quoted below for ready reference:-

"(4) In exercise of Para 16 of Public Procurement Policy for Micro and Small Enterprises Order 2012, it is clarified that all Central Ministries/Departments/Central Public Sector Undertakings may relax condition of prior turnover and prior experience with respect to Micro and Small Enterprises in all public procurements subject to meeting of quality and technical specifications."

18. The para quoted above gives discretion to the Central Ministries/Departments/Central Public Sector Undertakings to relax the condition of prior turnover and prior experience. It is for the Micro and Small Enterprises in all the public procurements. It is not in dispute that the procurement of drugs in this case is under a Scheme floated by the Government of India namely National Ayush Mission. It is even funded by the Central Government, thus it is for public procurement.

19. In the light of the aforesaid, the order of 2012 and the Government order dated 10.03.2016 would apply. The question would however be as to whether the order dated 10.03.2016 gives a mandate to relax the condition of prior turnover and prior experience in all the public procurement. We find use of the word 'may' in para 4 and thereby a discretion has been given in public procurement to relax the condition of prior turnover.

20. It is urged by the learned counsel for the petitioner to read the word 'may' as 'shall' in the facts and circumstances of this case.

21. We have considered the aforesaid submission but unable to accept it. The word 'may' cannot be read as 'shall' as the order dated 10.03.2016 was not issued to restrain condition of minimum turnover criteria in all circumstances. The order dated 10.03.2016 was issued in pursuance to Para 16 of the order of 2012 which is quoted hereinbelow for ready reference:-

"16. Removal of difficulty. % Any difficulties experienced during the course of implementation of the above policy shall be clarified by Ministry of Micro, Small and Medium Enterprises through suitable Press releases which would be kept on the public domain."

22. Para 16 of the order of 2012 is to take care of the difficulties. The procurement from Micro and Small Enterprises with condition of prior experience or prior turnover criteria has not been taken away in all the cases but a liberty is given to eliminate the condition which can be in an appropriate case. It can be where procurement may not have nexus with the turnover.

23. In the light of aforesaid, challenge to clause 46(4) of the Tender cannot be accepted in reference to the order dated 10.03.2016.

24. The other issue raised by learned counsel for the petitioner is in reference to the procurement under the Ayush Mission. A reference of the Scheme introduced by the Government of India has been given. It is to emphasize that a condition does not exist for prior turnover criteria in procurement of drugs under the said Mission.

25. The contest to the argument has been made by learned standing counsel appearing for opposite party no. 4. He submits that the Scheme does not lay down terms and conditions of the Tender. It only

gives guidelines as to how the Scheme is to be implemented. In the light of the aforesaid, procurement under the Ayush Mission is made after formulating terms and conditions of the agreement. It is not only to ensure procurement of drugs but the quality to benefit the public.

26. We find that the Manual for Procurement of Drugs under Ayush Mission does not provide terms and conditions of the Tender. It has given general guidelines of the Scheme. The terms and conditions of Tender is to be formulated by the procurement agency. Accordingly, challenge to clause 46 (4) of the Tender cannot be accepted in reference to the Manual for Procurement of Drugs under Ayush Mission.

27. It cannot be accepted even in the light of the Manual for Procurement of Goods 2017. The Government of India, Ministry of Finance, Department of Expenditure has issued the Manual for Procurement of Goods. It has a reference for procurement of the goods from micro and small enterprises. The clause in regard to procurement of material for small and micro enterprises is similar to what exists in the order dated 10.03.2016. The word 'may' has been used therein also. Condition of prior turnover and prior experience has been left at the discretion of the Procurement Agency. Clause 1.10.4 (ix) is quoted hereunder for ready reference:-

"(ix) Ministry of MSME have clarified that alll Central Ministries/Departments/Central Public Sector Undertakings may relax condition of prior turnover and prior experience with respect to Micro and Small Enterprises in all public procurements subject to meeting of quality and technical specifications."

28. If the comparison of the language of Clause quoted above is made with the order dated 10.03.2016, it would show use of same language, as exist in the order dated 10.03.2016 thus, the policy of 2017 does not incorporate a different condition than what exist under the Government order dated 10.03.2016. The word 'may' has been used even in the policy of 2017.

29. Now we may refer to the factual aspect raised by learned counsel for the petitioner. An allegation to eliminate competition has been made because pursuant to the tender, only three bids have been received. It is stated that the petitioner may be ousted on account of condition of prior turnover and another Public Sector Undertaking i.e. Kerala State Homoeopathic Co-operative Pharmacy having been blacklisted would also be ousted leaving only one Public Sector Undertaking. The condition is otherwise said to be tailor made.

30. We find that the condition of minimum turnover was incorporated in the Tender without knowing turnover of different Public Sector Undertakings and Co-operative societies so as to eliminate one or other undertaking. It is not a case where a favour is extended with pre-conceived notion to benefit any Private Enterprise. The bid pursuant to the Tender has been given only by Public Sector Enterprises of different States.

31. It is otherwise a fact that the clause 46(4) of the Tender cannot be said to be tailor made. It is looking to the volume of the drugs to be procured in a year. It is of Rs. 15 crore (approx) and for that if the side opposite has insisted for prior turnover of minimum 5 crore in average with 15 crore in last three years, it cannot be said to

be a tailor made condition. The capacity of the bidder is required to be taken into consideration to ensure supply, thereby we cannot accept the submission of learned counsel for the petitioner for challenge to the Clause 46(4) on the aforesaid ground. If a bidder is having turnover of Rs. 50 lakh or even one crore in a year, whether he would be in a capacity to supply drugs worth Rs. 15 crore on remaining successful in the Tender. All these issues remain in the realm of the procurement agencies and not open for review by the Court exercising jurisdiction under Article 226 of the Constitution of India.

32. The allegation of mala fide is also looked into. It is always easy to make allegation of mala fide then to prove it. The condition of prior turnover was inserted without having knowledge of the bidders thus question of mala fide does not arise. It may be unfortunate that out of many eligible Public Sector Enterprises, only three have participated in the Tender but merely for that reason, it cannot be said that conditions of Tender suffers from mala fide rather we find the condition to be reasonable. It is to ensure supply of drugs worth Rs. 15 crore. No reason of mala fide has been given by the petitioner other than eliminating the competitors. No bias against the petitioner has been shown.

33. In the light of the facts given above, we are unable to accept the allegation of mala fide so as to cause interference in Clause 16(4) of the Tender.

34. We may now refer to the judgment cited by learned counsel for the petitioner. It is in the case of ***Maa Binda Express Carrier (supra).*** The Apex Court has taken note of the limited jurisdiction of the Court in the contractual matters and even in the condition of Tender. Para 8 & 11 of the said judgment have been referred by learned counsel for the petitioner and are quoted hereunder for ready reference:-

"8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided

such relaxation is permissible under the terms governing the tender process.

11. In Michigan Rubber (India) Ltd. v. State of Karnataka and Ors. (2012) 8 SCC 216 the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words:

"19. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and

(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226." (emphasis supplied)

35. Para 8 makes it clear that condition of Tender is not open to judicial scrutiny unless it is found to be tailor made. At the end of para 11, a reference of the earlier judgment has been given to show as to when interference in the Tender condition can be made. It is when it suffers from mala fide or intend to favour someone. The case in hand is not covered by the aforesaid judgment. The condition under challenge is neither suffering from mala fide nor it is tailor made to favour someone.

36. Another judgment cited by learned counsel for the petitioner is in the

case of ***Michigan Rubber (India) Ltd. (supra).*** Para 11, 12, 13 & 24 have been referred and are quoted hereunder for ready reference:-

"11. In Tata Cellular vs. Union of India, (1994) 6 SCC 651, this Court emphasised the need to find a right balance between administrative discretion to decide the matters on the one hand, and the need to remedy any unfairness on the other, and observed:

"94. (1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. ... (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

12) In Raunaq International Ltd. vs. I.V.R. Construction Ltd. & Ors. (1999) 1 SCC 492, this Court reiterated the principle governing the process of judicial review and held that the writ court would not be justified in interfering with commercial transactions in which the State is one of the parties except where there is substantial public interest involved and in cases where the transaction is mala fide.

13) In Union of India & Anr. vs. International Trading Co. & Anr., (2003) 5 SCC 437, this Court, in similar circumstances, held as under:

"15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if

so, does it really satisfy the test of reasonableness.

16. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in a different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary.

22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.

23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country.

24. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected."

37. In para 11 of the judgment quoted above, the Apex Court has made a reference in the case of ***Tata Cellular vs. Union of India, (1994) 6 SCC 651.*** In the said case, certain restrictions have been imposed on the Courts to cause interference in the conditions of Tender.

38. A reference of the judgment in the case of ***Union Of India (Uoi) And Anr. vs International Trading Co.: 2003 5 SCC 437*** would also be relevant on the facts of this case. It is not a case where there is overnight change in the condition of the Tender rather in the last year also, the condition of minimum turnover was existing though the prior turnover required was of Rs. 9 crore. The minimum turnover criteria depend on the volume of procurement and other requirements. Interference therein be made if mala fide exists to favour someone. We have already expressed our opinion on the aforesaid. A case of mala fide or favour is not made out.

39. In view of above, writ petition fails and is dismissed.

(2020)03-05ILR A1130
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.03.2020

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 6548 of 2010
&
Misc. Single No. 4074 of 2010

Superintending Engineer, Faizabad Circle & Ors. ...Petitioners
Versus
Presiding Officer, Labour Court, U.P., Faizabad & Ors. ...Respondents

Counsel for the Petitioners:
Standing Counsel

Counsel for the Respondents:
C.S.C., Kailash Nath Tewari, Y.S. Lohit

Civil Law-Industrial Dispute-Government Departments -Public Work Department-excluded from definition of industry-impugned award did not considered preliminary objection of maintainability-quashed-W.P. allowed.

Held, Since in the judgment rendered in Bangalore Water Supply case (supra), the majority opinion excluded Government departments which may otherwise be covered by the expansive definition of 'industry' given in Paragraph 140 to 143, if there are constitutionally and competently enacted legislative provisions, governing such activities as undertaken by such Departments; the Public Works 16 Department stands excluded from the expansive definition of 'industry' as given by the Bangalore Water Supply and Sewerage Board case (supra). (para 22) (E-9)

Cases cited:

1. Writ Petition No.4382 (SS) of 2001: St. of U.P. & ors. Vs. Harish Chandra, decided on 31.7.2015

2. St. of Mah. & anr Vs. Sarva Shramik Sangh, Sangli & ors., 2013 (16) SSC 16

3. Bangalore Water Supply and Sewerage Board Vs. A. Rajappa (1978) 2 SCC 213 **(Relied upon)**

4. State of U.P. Vs Jai Bir Singh, (2005) 5 SCC 1

5. Writ Petition No.6910 (MS) of 2002: Superintending Engineer Provincial Division P.W.D. Barabanki Vs Presiding Officer, Labour Court, Lucknow decided on 20.3.2017

6. Sant Kumar Dubey Vs. Presiding Officer, Industrial Tribunal (IV), Uttar Pradesh, Agra & ors., 1997 Labour and Industrial Cases 777

7.St. of U.P. & ors., Vs. Deep Chandra and others (2004) 1 UPLBEC 816

8. U.O.I. & ors. Vs. Ranbir Singh Rathore & ors., (2006) 11 SCC 696

9.N.H.A.I. Vs. Ganga Enterprises & anr., (2003) 7 SCC 410

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

1. Heard learned counsel for the petitioners and learned counsel for the respondents.

2. These writ petitions have been taken up together by this Court as they relate to the question whether an Industrial Adjudication case could have been entertained by the Labour Court on reference being made to it regarding daily wage workmen engaged by the Public Works Department on muster roll and whether the Public Works Department of the State of U.P. can be considered to be an industry under the Industrial Disputes Act.

3. The facts, in brief, of each of these writ petitions are being stated here in below.

4. Writ Petition No.6548 (MS) of 2010 challenges an order passed by the respondent no.1 dated 29.1.2009 in Adjudication Case No.16 of 1998 (Krishna Prasad versus Superintending Engineer, Faizabad Circle, Faizabad and others) whereby the respondent no.1 has issued directions that respondent no.3 shall be entitled to reinstatement and all service benefits. In this petition, Krishna Prasad was initially engaged as a Beldar on daily wage basis in 1981 and disengaged after November, 1989. After seven years of such disengagement, he approached the Deputy Labour Commissioner, Faizabad Region, Faizabad under Section 2(A) of the Industrial Disputes Act (for short "the Act') on 15.6.1996. The conciliation attempt having failed, the Deputy Labour Commissioner referred the matter to the respondent no.1, which was registered as Adjudication Case No.16 of 1998. After the written statement was filed by Krishna Prasad, the petitioners also filed a written statement, in which, they specifically disputed the applicability of the Industrial Disputes Act to Public Works Department of the State of U.P.. It was submitted that the engagement of daily wage workers takes place for carrying out work assigned by the Government of U.P. under the provisions of Paragraph 429 and 430 of Part-I, Volume-VI of the Financial Handbook and Muster Roll is maintained and wages are paid at the prescribed rates under the Minimum Wages Act. The daily wage workers are engaged to meet the exigencies of work and as per availability of budget and since there was no work available, the respondent no.3 was disengaged in 1989.

5. This Court has perused the written statement filed by the employers in which, in paragraph 1 and 2, it was clearly stated that the Industrial Disputes Act, 1947 does not apply to the Public Works Department of State of U.P. The workers are engaged on the basis of Paragraphs 429 and 430 of the Financial Handbook, Volume-VI and payment is charged to the works under paragraph 667 of the Financial Handbook.

6. The respondent No.1 did not consider the preliminary objection raised regarding maintainability of the adjudication case first, but went on with the adjudication of the case on the basis of written statement and oral evidence of the respondent no.3 that he had worked w.e.f. 15.12.1981 upto 15.7.1989 continuously and that his name appeared at Serial No.182 in the seniority list of 270 workmen maintained by the establishment. No notice was given to him nor any retrenchment compensation was given before his disengagement on 15.7.1989. Since after the filing of the written statement by the employer, no attempt was made to appear before the respondent no.1 for cross examination of the workman despite several opportunities being given to them, the respondent no.1 relied upon evidence produced by the workmen to come to a conclusion that the respondent no.3 had been disengaged on 15.7.1989 in violation of section 6N of the Act. A direction was issued for his reinstatement and consequential benefits to be given to him in the Award dated 29.1.2009.

7. It appears that no interim order was granted by this Court in this writ petition and the workman was reinstated by the petitioners subject to final orders being passed by this Court. The Office Memorandum dated 7.5.2012 putting back

the respondent no.3 into service on daily wage basis at the rate of Rs.100/- per day has been brought on record by the respondent no.3 by filing an application on 4.9.2017.

8. In Writ Petition No.4074 (MS) of 2010, the petitioners have challenged the award dated 10.11.2009 passed in Adjudication Case No.12 of 2002.

9. In the said writ petition, the case of the petitioners is that the respondent no.1 was engaged as daily wage labourer on 1.12.1984 and was disengaged in November, 1986. The respondent no.1 raised an industrial dispute before the Assistant Labour Commissioner, Faizabad in 2001 and after failure of conciliation proceedings, the matter was referred to the Labour Court for adjudication on 25.12.2002. The written statement was filed by the petitioners wherein, they stated clearly in Paragraph 1 and 6 that the Industrial Disputes Act does not apply to the Public Works Department of the State of U.P. which is a Government department where engagement of labourers is done as per Paragraph 429 and 430 of the Financial Handbook Volume-VI and that the Public Works Department being a Department of the Government of U.P. carries out work assigned to it on a cost to cost basis without any profit or loss.

The Labour Court however did not think it appropriate to decide the preliminary objection raised by the employer as to the maintainability of the adjudication case, but went on to decide the matter on the basis of evidence led both oral and documentary by the respondent no.1 and came to the conclusion that the respondent no.1 had been retrenched without following the procedure prescribed under Section 6N of the Act and was entitled for reinstatement. However, because of passage of time, full back wages were not given by the Labour Court, Faizabad, but a direction was issued for payment of 20% of the back-wages only.

10. This Court at the time of hearing the writ petition as fresh, did not pass any interim order. Several applications for grant of interim relief were filed as execution case had been initiated by the respondent no.1. When these applications were not taken up, the petitioners reinstated the respondent no.1 on 15.4.2015 as daily wage Beldar. The respondent no.1 moved an application for modification of the award by this Court and dismissal of the writ petition with the direction that the respondent no.1 be engaged as chowkidar as in the oral evidence filed by the employer's witness before the Labour Court, it had come out that the respondent no.1 was lastly engaged as chowkidar. In the absence of any interim order, the Deputy Labour Commissioner continued with the execution proceedings with regard to the back wages as granted by the Labour Court in the Award and attachment of the properties in the office of the Executive Engineer took place, as a result whereof, more than one lakh rupees was deposited before the Labour Court and an application bearing C.M. Application No.71364 of 2010 was moved before this Court. This Court by an order dated 8.9.2015 directed the Deputy Labour Commissioner to release the property, which had been attached, if the due amount had been deposited by the petitioners, but the amount so deposited by the petitioners would not be released in favour of the respondent no.1, although he may be allowed to continue in service in terms of the Award.

11. From the order sheet, it is evident that respondent no.1 died on 19.3.2017 and a substitution application was moved by his widow Mrs. Durgawati along with his son and daughter, who are both minors. This

Court allowed the substitution application by its order dated 6.9.2017.

12. During the course of argument in these two writ petitions, learned counsel for the respondents Mr. Y.S. Lohit has relied upon several judgments of this Court and of the Supreme Court to submit that these writ petitions be dismissed.

13. This Court has perused the judgments cited by both learned counsel for the petitioners and the learned counsel for the respondents. No doubt, in Writ Petition No.4382 (SS) of 2001: *State of U.P. and others vs. Harish Chandra,* decided on 31.7.2015, this Court had dismissed a similar petition filed by the Irrigation Department, placing reliance upon the observations made by the Supreme Court in *State of Maharashtra and another versus Sarva Shramik Sangh, Sangli and others, 2013 (16) SSC 16*, wherein it was observed that the mere fact that correctness of the decision in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa (1978) 2 SCC 213* had been referred to a larger bench in *State of U.P. versus Jai Bir Singh, (2005) 5 SCC 1,* will not come in the way of the Court in following the existing law now covered by the seven Judges Constitution Bench judgment in *Bangalore water supply case (supra),* which is presently holding the field. Similarly, a coordinate Bench of this Court in Writ Petition No.6910 (MS) of 2002: Superintending Engineer Provincial Division P.W.D. Barabanki versus Presiding Officer, Labour Court, Lucknow has dismissed the writ petition on 20.3.2017 by observing that the judgment rendered by the Supreme Court in *Bangalore water supply case (supra)* has been followed in two coordinate Bench decisions in *Sant Kumar Dubey versus Presiding Officer, Industrial Tribunal (IV), Uttar Pradesh, Agra and others: 1997 Labour and Industrial Cases 777* and in *State of U.P. and others vs. Deep Chandra and others (2004) 1 UPLBEC 816,* wherein it has been held that the Public Works Department of the Government of U.P. is an industry and covered by the U.P. Industrial Disputes Act as the petitioners therein had not taken the trouble to file any written statement before the Presiding Officer, Labour Court and there was no question of showing any interference in the Award.

14. This Court, however, having gone through the written statement filed by the writ petitioners herein in both the adjudication cases before the Labour Court, finds that a preliminary objection was raised regarding maintainability of the adjudication case before the Labour Court under the Industrial Disputes Act, 1947, yet the preliminary objection was ignored and orders were passed in favour of the private respondents only on the basis of oral and documentary evidence led by the workmen.

15. In ***Union of India and others versus Ranbir Singh Rathore and others (2006) 11 SCC 696,*** the Supreme Court had observed thus:-

"42. .....In any event we feel that the High Court's approach is clearly erroneous. The present appellants in the counter-affidavit filed had raised a preliminary objection as regards the maintainability of the writ petitions and had requested the High Court to grant further opportunity if the necessity so arises to file a detailed counter-affidavit after the preliminary objections were decided. The High Court in fact in one of the orders clearly indicated that the

preliminary objections were to be decided first. But strangely it did not do so."

16. In ***National Highways Authority of India versus Ganga Enterprises and another, (2003) 7 SCC 410,*** the Supreme Court in Paragraph-6 observed thus:-

"6. The respondent then filed a writ petition in the High Court for refund of the amount. On the pleadings before it, the High Court raised two questions viz.: (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered Question (a) and then chose not to answer Question (b). In our view, the answer to Question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293] , State of U.P. v. Bridge & Roof Co. (India) Ltd. [(1996) 6 SCC 22] and Bareilly Development Authority v. Ajai Pal Singh [(1989) 2 SCC 116] . This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of Verigamto Naveen v. Govt. of A.P. [(2001) 8 SCC 344] and Harminder Singh Arora v. Union of India [(1986) 3 SCC 247]. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed."

17. Regarding the validity or otherwise of the preliminary objection raised by the petitioners, this Court has gone through the judgment in Bangalore Water Supply case (supra) carefully. While considering what constitutes the expression "industry' after critically examining the previous decisions, Justice Krishna Iyer, who delivered the main judgment i.e. opinion on his behalf and on behalf of two other Judges, has observed in Para-139 to 143 as follows:

""139. ... So we proceed to formulate the principles, deducible from our discussion, which are decisive, positively and negatively, of the identity of "industry' under the Act. We speak, not exhaustively, but to the extent covered by the debate at the Bar and, to that extent, authoritatively, until overruled by a larger Bench or superseded by the legislative branch.

I

140. "Industry', as defined in Section 2(j) and explained in Banerji [D.N. Banerji v. P.R. Mukherjee, 1953 SCR 302 : AIR 1953 SC 58] has a wide import.

(a) Where (i) systematic activity, (ii) organised by cooperation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services

geared to celestial bliss i.e. making, on a large scale prasad or food), prima facie, there is an "industry' in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on employer-employee relations.

(d) If the organisation is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

II

141. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.

(a) "Undertaking' must suffer a contextual and associational shrinkage as explained in Banerji [D.N. Banerji v. P.R. Mukherjee, 1953 SCR 302 : AIR 1953 SC 58] and in this judgment; so also, service, calling and the like. This yields the inference that all organised activity possessing the triple elements in I (supra), although not trade or business, may still be "industry' provided the nature of the activity (emphasis in original) viz. the employer-employee basis, bears resemblance to what we find in trade or business. This takes into the fold of "industry' undertakings, callings and services, adventures "analogous to the carrying (emphasis in original) on the trade or business'. All features, other than the methodology of carrying on the activity viz. in organising the cooperation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy.

III

142. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

(a) The consequences are (i) professions, (ii) clubs, (iii) educational institutions, (iv) cooperatives, (v) research institutes, (vi) charitable projects, and (vii) other kindred adventures, if they fulfil the triple tests listed in I (supra), cannot be exempted from the scope of Section 2(j).

(b) A restricted category of professions, clubs, cooperatives and even gurukulas and little research labs, may qualify for exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

(c) If, in a pious or altruistic mission many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then, the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertakings alone are exempt -- not other generosity, compassion, developmental passion or project.

IV

143. The dominant nature test:

(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not ''workmen' as in University of Delhi case [University of Delhi v. Ram Nath, (1964) 2 SCR 703 : AIR 1963 SC 1873] or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in Corpn. of Nagpur [Corpn. of the City of Nagpur v. Employees, (1960) 2 SCR 942 : AIR 1960 SC 675] will be the true test. The whole undertaking will be ''industry' although those who are not ''workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by Government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby." (Emphasis supplied)

18. It is undisputed that muster roll employees are engaged by the Department of Irrigation and Public Works and other such Departments which carry out welfare activities relating to infrastructure etc. on behalf of the State Government in terms of Paragraph 429 and 430 of Volume-VI Part-I of Financial Handbook.

19. The Financial Handbook is a set of fundamental rules which govern the administration of not only Central Government but also the State Government. Volume-VI of the Financial Handbook deals with several matters including the matters relating to how contracts are to be signed with regard to construction work and how construction work itself is to be carried out by such Departments as the Department of Irrigation and Public Works.

20. The muster roll employees having been engaged under Paragraph 429 and 430, and work charge employees being engaged under Paragraph 630 of the Financial Handbook, are governed by the statutory provisions as given in the Financial Handbook with regard to their engagement and monitory benefits admissible to them on such engagement.

21. The Financial Handbook containing Fundamental Rules are in the nature of "law' as defined in Article 13 of the Constitution of India and they carry statutory force.

22. Since in the judgment rendered in *Bangalore Water Supply case* (supra), the majority opinion excluded Government departments which may otherwise be covered by the expansive definition of "industry' given in Paragraph 140 to 143, if there are constitutionally and competently enacted legislative provisions, governing such activities as undertaken by such Departments; the Public Works Department stands excluded from the expansive definition of "industry' as given by the *Bangalore Water Supply and Sewerage Board case* (supra).

23. Having perused the Awards impugned passed by the Labour Courts in these two writ petitions, the Court finds no mention at all or consideration of the preliminary objection raised with regard to the maintainability of the Adjudication case under the U.P. Industrial Disputes Act by the Labour Court concerned.

24. The Awards dated 29.1.2009 and 10.11.2009 are set aside. However, since the respondents have been engaged in the absence of any interim order as daily wage Beldars, the benefit granted to them by the authorities during the pendency of these writ petitions shall not be taken away from them. The amount of back wages deposited by the petitioners in Writ Petition No.4074 (MS) of 2010 before the Labour Court, shall be refunded to them on an appropriate application being moved by them.

25. The writ petitions stand ***allowed*** to this extent.

(2020)03-05ILR A1137
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2020

BEFORE

THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE KARUNESH SINGH PAWAR, J.

Misc. Bench No. 6950 of 2020

M/s Rathi Steel & Power Ltd. (Furnace Division) ...Petitioner
Versus
U.P. Electricity Regulatory Commission & Ors. ...Respondents

Counsel for the Petitioner:
Vishal Dixit, Ankit Tripathi, Ashok Tripathi, Ashok Kumar Prajapati, Devendra Kumar, Kamlesh Kumar

Counsel for the Respondents:
Sanjay Singh, Shree Prakash Singh

Civil law-U.P.Electricity Supply Code,2005- Cl.4.49Petitioner prayed for enhancement of load-bank guarantee was demanded by Respondent-payment of additional security is a condition for release of additional load-non payment-additional load not to be released-supply can be disconnected-event of deposit of additional security-cannot be said to be any dues recovered from Petitioner-demand of bank guarrantee or cash for grant of additional load is perfectly justified.W.P. dismissed.

Held, the scheme of the Act and the Code does not indicate that any process for recovery of additional security is contemplated or provided for because of the reason that the consequences for non deposit of additional security has been clearly provided in the Act itself. The payment of additional security being condition for release of additional load, in the event it is not paid the additional load is not to be released and further supply can be discontinued. No more is contemplated with regard to non payment of additional security. Thus, we are of the view that in the event of deposit of additional security by the petitioner for grant of additional load cannot be said to be any dues, which is to be recovered from the petitioner and therefore, the demand by the respondents of giving bank guarantee or cash for grant of additional load is perfectly justified. (para 22) (E-9)

Cases Cited:

1. Ferro Alloys Corporation Ltd. Vs. A.P. State Electricity Board and another reported in 1993 Supp (4) S.C.C. 136

2. Gainda Ram Vs.Vs. Municipal Corporation of Delhi Vs. [(2010) 10 SCC 715]

3. Krishnan Kakkanth Vs. Govt. of Kerala [(1997) 9 SCC 495]

4.Indian Drugs & Pharmaceuticals Ltd& ors. Vs. Punjab Drugs Manufacturers Association & ors. [(1999) 6 SCC 247],

5. Cooverjee B. Bharucha Vs. Excise Commissioner and the Chief Commissioner, Ajmer & ors. [AIR 1954 SC 220)

6.State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat & ors. [(2005) 8 SCC 534

7. PGF Limited & ors. Vs. U.O.I. & anr. : 2015 (13) SCC 50.

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

(1) Heard Sri Vishal Dixit, learned counsel for the petitioner, Sri Sanjay Singh, learned counsel for the respondent no.1 and Sri Shree Prakash Singh, learned counsel for the respondents nos. 2 to 4.

(2) By this writ petition under Article 226 of the Constitution of India, the petitioner is praying for following reliefs :

(i) issue writ order or direction in the nature of certiorari quashing the provision of clause 4.49 of U.P. Electricity Supply Code 2005 by declaring it unconstitutional or ultra vires.

(ii) issue writ order or direction in the nature of mandamus commanding the opp. party No.1 for modifying clause 4.49 of U.P. Electricity Supply Code 2005 upto the extent of placing the clause of accepting simple security undertaking from the petitioner instead of bank guarantee or cash.

(iii) issue writ order or direction in the nature of mandamus commanding the opp. party licensee to sanction/release the additional load of 3100 KVA after accepting simple security undertaking for the court stayed amount from the petitioner.

(iv) Issue any other order or direction which this Hon'ble court may deem fit and proper.

(v) Allow the petition with cost."

(3) According to the petitioner, a dispute arose between the petitioner and the licensee for application of tariff order in respect of allowing the TOD (time of day) rebate which has not been allowed to the petitioner properly by the licensee. Therefore, the petitioner approached the Electricity Ombudsman by filing Reference No. 111 of 2019 : *Rathi Steel & Power Ltd. (Furnance Division)* and Reference No. 112 of 2019 : *Rathi Steel & Power Ltd. (Rolling Mill Division).* In the aforesaid reference, earlier the Electricity Ombudsman stayed the entire money, due to which, there was loss to the petitioner, therefore, the petitioner had approached this Court by filing writ petition Misc. Single No. 11068 of 2019 : *M/s Rathi Steel & Power Ltd. (Furnace Division) Vs. Electricity Ombudsman, U.P., Lucknow*, which was disposed of vide judgment and order dated 18.04.2019 with the directions that if the petitioner tenders an amount of Rupees Seventy Lakhs to respondent no.3, then, respondent no.3 shall accept the same and give a receipt of the same to the petitioner.

(4) Order dated 18.04.2019 reads as under :

"Heard learned counsel for the petitioner and learned counsel for the respondents.

The grievance of the petitioner is that the opposite parties is not allowing TOD (time of day) rebate to the petitioner, which is permissible to him as per order dated 09.12.2017, and the petitioner is being a HV-2 category industry, was

entitled to the said rebate. The petitioner in this regard has made several representations to the respondents, but on receiving no response, had approached the Electricity Ombudsman U.P. under Section 43 (6) of the Electricity Act, 2003 read with Provisions of Regulations, 2007. Along with the said reference, the petitioner has preferred the application for interim relief, which is quoted below:-

"Hence for the facts & circumstances stated in the memo of statutory reference duly supported by an affidavit, it is most respectfully prayed that this Hon'ble Authority may kindly be pleased to direct the opp. party, UPPCL that after reduction of claimed amount of Rs.59,52,721/- against the TOD limit, rebate of 20% remaining money be accepted from the petitioner and his electricity connection should not be disconnected during the pendency of the matter."

After due consideration, the Electricity Ombudsman passed an order, directing the Executive Engineer, not to take any coercive steps against the petitioner. The petitioner is interpreting the said order as, if the entire recovery proceedings to the tune of Rs.1,11,97,943/- have been stayed and subsequent to the said interim order, the respondents are not even accepting the admitted liability while the petitioner is ready and willing to deposit Rs.70 lakhs, which is the undisputed amount, which the petitioner is ready and willing to deposit with the respondent no.3.

Sri S.P. Singh, learned counsel for the respondents disputes the interpretation as given by the petitioner in the writ petition and submits that at no stage, have the respondents refused to accept the admitted amount, which the petitioner is at liberty to deposit with them. He further submits that the assessment of electricity has been correctly made and the matter is under consideration before the Ombudsman and it is only the interim order, against which the petitioner has approached this Court.

After hearing counsel for the parties and perusing the record.

The innocuous prayer made by learned counsel for the petitioner is that he is ready and willing to deposit the undisputed amount of Rs.70 lakhs, which the respondents should be directed to accept.

Sri S.P. Singh, learned counsel for the respondents submits that they have no objection, if a direction is passed that the petitioner may deposit Rs.70 lakhs to respondent no.3, before the scheduled period i.e. 23.04.2019.

It is therefore provided that, if the petitioner tenders an amount of Rs.70 lakhs to respondent no.3, then respondent no.3 shall accept the same and give a receipt of the same to the petitioner.

With the above observations, writ petition stands disposed of."

(5) It has been stated by the petitioner that the petitioner has applied for additional load of 3100 KVA but the licensee has informed the petitioner vide letter dated 17.1.2020 that until and unless the cash or bank guarantee would not be furnished upto the extent of Court stayed amount as per the provisions of Clause 4.49 of the U.P. Electricity Supply Code, 2005, the additional load of 3100 KVA would not be released to him. Thereafter, the petitioner approached the Electricity Ombudsman by filing application in pending Reference No. 111 of 2019, wherein during the course of hearing, Electricity Ombudsman has discussed that we are bound with the provision of Clause 4.49 of the U.P.

Electricity Supply Code, 2005. Thereafter, the petitioner has filed the present writ petition for declaring the provision of Clause 4.49 of the U.P. Electricity Supply Code, 2005 as ultra vires.

(6) Learned counsel for the petitioner has submitted that Clause 4.49 of U.P. Electricity Supply Code 2005 (hereinafter referred to as ***"Code 2005"***) is unconstitutional and *ultra vires.* The assessment amount having been stayed, which is still continuing, therefore, asking for submission of bank guarantee to recover the said amount is interference with the order of stay. He submits that provisions of Clause 4.49 of the Code 2005 is against Article 19 (1) (g) and Article 14 of the Constitution of India as by asking bank guarantee, the licensee is trying to snatch the petitioner's right for enhancement of plant capacity for surviving in the market. Therefore, Clause 4.49 of the Code, 2005 is unfair, unreasonable and arbitrary.

(7) The main thrust of submission of learned Counsel for the petitioner is that Clause 4.49 of 2005 Code to the extent of furnishing bank guarantee or cash for the purpose of release of additional load or reduction of load for the court stayed amount is ultra vires to Article 19 (1) (g) and Article 14 of the Constitution of India, hence no bank guarantee can be demanded from the petitioner.

(8) Before we proceed to consider the respective submission, it is necessary to look into the relevant provisions of the Electricity Act, 2003 and U.P. Electricity Supply Code 2005.

(9) Part-VI of the Electricity Act, 2003 deals with distribution of electricity. Section 45 provides for power to recover charges, Section 46 relates to power to recover expenditure and Section 47 deals with power to require security. Sections 45, 46 and 47 of the Electricity Act, 2003 are quoted below:-

45. Power to recover charges.- (1) Subject to the provisions of this section, the prices to be charged by a distribution licensee for the supply of electricity by him in pursuance of section 43 shall be in accordance with such tariffs fixed from time to time and conditions of his licence.

(2) The charges for electricity supplied by a distribution licensee shall be -

(a) fixed in accordance with the methods and the principles as may be specified by the concerned State Commission ;

(b) published in such manner so as to give adequate publicity for such charges and prices.

(3) The charges for electricity supplied by a distribution licensee may include -

(a) a fixed charge in addition to the charge for the actual electricity supplied;

(b) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee.

(4) Subject to the provisions of section 62, in fixing charges under this section a distribution licensee shall not show undue preference to any person or class of persons or discrimination against any person or class of persons.

(5) The charges fixed by the distribution licensee shall be in accordance with the provisions of this Act and the regulations made in this behalf by the concerned State Commission.

46. Power to recover expenditure.- The State Commission may,

by regulations, authorise a distribution licensee to charge from a person requiring a supply of electricity in pursuance of section 43 any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of giving that supply.

47. Power to require security.- (1) Subject to the provisions of this section, a distribution licensee may require any person, who requires a supply of electricity in pursuance of section 43, to give him reasonable security, as determined by regulations, for the payment to him of all monies which may become due to him -

(a) in respect of the electricity supplied to such persons; or

(b) where any electric line or electrical plant or electric meter is to be provided for supplying electricity to person, in respect of the provision of such line or plant or meter, and if that person fails to give such security, the distribution licensee may, if he thinks fit, refuse to give the supply or to provide the line or plant or meter for the period during which the failure continues.

(2) Where any person has not given such security as is mentioned in subsection (1) or the security given by any person has become invalid or insufficient, the distribution licensee may, by notice, require that person, within thirty days after the service of the notice, to give him reasonable security for the payment of all monies which may become due to him in respect of the supply of electricity or provision of such line or plant or meter.

(3) If the person referred to in sub-section(2) fails to give such security, the distribution licensee may, if he thinks fit, discontinue the supply of electricity for the period during which the failure continues.

(4) The distribution licensee shall pay interest equivalent to the bank rate or more, as may be specified by the concerned State Commission, on the security referred to in sub-section (1) and refund such security on the request of the person who gave such security.

(5) A distribution licensee shall not be entitled to require security in pursuance of clause (a) of sub-section (1) if the person requiring the supply is prepared to take the supply through a pre-payment meter."

(10) The U.P. Electricity Supply Code 2005 has been framed under Section 181 of the Electricity Act, 2003. Clause 4.20 of the U.P. Electricity Supply Code 2005 provides for security deposit. Clause 4.20 of the Supply Code is quoted below:-

" 4.20. Security Deposit

(a) [A security deposit to cover the estimated power consumption for two months shall be made by all consumer / applicant.

(b) The estimated consumption and security deposit amount for different categories of new consumers shall be determined by the Licensee with the approval of the Commission.

(c) In case of enhancement of load, only additional security to cover the additional load (Load after enhancement minus existing load) shall need to be deposited.

(d) Deleted

(e) The Licensee may give notice to any consumer for deposit of additional security deposit if:

(i) The security deposit falls short of covering the estimated power consumption bill for 2 months based on his average monthly consumption for the preceding financial year.

(ii) In case of a new connection, additional security shall be demanded only after completion of one full financial year.

(iii) Only when the required additional security deposit payable by the consumer exceeds 10% of the existing security deposit, a demand for additional security deposit, shall be made.

(iv) The security deposit is reduced due to adjustment of outstanding dues.

(v) Security deposit has become invalid or insufficient due to any other reason.

(f) [The consumer shall deposit the additional security within 30 days after the service of the notice. If a person fails to give such security, the Licensee may discontinue supply of electricity for period during which failure continues. However, a maximum of three instalments, if considered prudent by the licensee, may be permitted.]

(g) If the existing security deposit is found to be in excess of more than 20% of the required security deposit, refund of the excess amount shall be made by adjustment in the ensuing bills within three billing cycles to the consumer.

(h) The security deposit shall be returned to consumer, upon termination of the agreement & finalization of permanent disconnection, and after adjustment of all dues, within 30 days. However, if the delay in payment exceeds 90 days, interest at bank rates of Reserve Bank of India, shall be payable to the consumer. In this regard it shall be the responsibility of the licensee to keep a watch on the bank rate from time to time.

(i) The Licensee shall pay interest on security deposit to the consumers at bank rate as on 1st April of applicable financial year by way of credit in the bill of the consumer in the months of April, or May or June as per the applicable billing cycle. However, no interest shall be payable if the deposit is not made by way of cash, cheque or bank draft. The interest rates are subject to change as per the tariff orders of Commission from time to time.]

(j) The amount of security deposit shall be accepted in parts according to the phasing agreed for release of load in case of "Phased Contract Demand". The subsequent additional security amount shall be deposited 30 days prior to the release of additional load.

The Licensee shall energise no connection until the requisite security amount has been deposited by the applicant / consumer.

A distribution licensee shall not be entitled to require security in pursuance of this section, if the person requiring the supply is prepared to take the supply through a prepayment meter, as and when distribution licensee provides a choice to consumer to opt for supply through pre-payment meter."

(11) Paragraph 4.43 of U.P. Electricity Supply Code 2005 deals with enhancement of load. In the present case, petitioner has made application for enhancement of the load. Paragraph 4.43 (a), which is relevant for the purpose, is quoted below:-

"4.43 Enhancement of Load for cases other than Public Lighting:

(a) Applications for enhancement of load shall be filed in duplicate to the concerned sub divisional officer of the Licensee in the prescribed form (Annexure 4.10) along with the following:

(i) Prescribed Registration-cum-processing fee as approved by the Commission from time to time.

(ii) Work completion certificate and Test report from a LEC (Licensed Electrical Contractor).

(iii) Letter of approval from the Electrical inspector, if required.

(iv) Copy of the paid, latest electricity bills/ arrears due.

(v) If matter related to dues is stayed by court, the procedure as per clause 4.49 may be followed.

(vi) [Addendum to the Agreement to act as supplementary to the main agreement duly filled and signed by the consumer."

(12) Clause 4.43 (v) of the Constitution states that if matter related to dues is stayed by the court, the procedure as per clause 4.49 may be followed. Paragraph 4.43 sub-clause (e) provides as under:-

"(e) The application for enhancement of the sanctioned load will not be accepted if the consumer has any arrears of the licensee's dues."

(13) Clause 4.49, which is relevant, is as under:-

"4.49 Permanent disconnection/Release of Connection/ Enhancement and Reduction of Load where arrears disputed are stayed by Court/ other forums :

Where there is a stay order by any Court, Forum Tribunal, or by Commission, staying the recovery of any dues by licensee, and during the operating period of any such order-

(i) If a consumer sells a premises and an application for release of new connection is made by the purchaser; or

(ii) If any application for new connection, reconnection, enhancement or reduction of load is made by a consumer; or

(iii) If any application for permanent disconnection is made by a consumer the licensee shall release the new connection to such consumer and also permit reconnection, reduction or enhancement of Loads, as well as allow permanent disconnection, subject to:-

- submission of Bank Guarantee to the satisfaction of licensee, of equivalent amount of pending dues, by the applicant or owner, and,]

- agreement with licensee on terms of extension / invoking of guarantee, and \

- levy of surcharge amount on pending dues, and the application of such consumers shall not be kept pending by the licensee."

(14) Sub-clause (1) of Section 47 of the Electricity Act, 2003 provides that a licensee may require any person, who require supply of electricity in pursuance of Section 43, to give him reasonable security as may be determined by regulations, for the payment to him of all monies which may become due to him - (a) in respect of the electricity supplied to such person; or (b) where any electric line or electrical plant or electric meter is to be provided for supplying electricity to such person, in respect of the provision of such line or plant or meter.

(15) The U.P. Electricity Supply Code 2005 provides detail procedure for billing. Clause 6.1 (a), (g) and (h), which are relevant in the present case, are quoted below:-

"6.1 General Provisions :

(a) The billing cycle for different categories of consumers is specified at

Annexure 3.1. The Licensee shall notify the date by which each category of consumer shall receive the bill, as per the billing cycle specified in this Code. Such notification shall be made by the Licensee every year or one month before any change is made in the date.

(b) .....

(c) .....

(g) The Licensee shall dispatch the bills giving at least 15 days time to the consumer for making payments prior to the due date of payment. Where the bills are served to the consumer through hand held system, the consumer shall deposit the same within 7 days. The Bill shall contain details of the energy consumption, various charges, due date of 52 payment, disconnection date, arrears, Security deposit details, rebates, extracts pertaining to consumer rights, Mode of payment and collection facilities, Telephone Nos. and address of Customer service, and call centers, where consumers can make bill related complaints, Telephone Nos. and address of Consumer Grievance redressal forums etc. In case of cheques and bank drafts, the receiving authority in whose favour the amount should be drawn should be clearly mentioned.

(h) Bills of each consumer shall clearly reflect the arrears and amount of current billing separately. It shall be obligatory on the part of consumers to pay his electricity bills on or before due date of payment."

(16) The provisions of the Electricity Act, 2003 and U.P. Electricity Supply Code 2005, as noted above, clearly indicate that a consumer is liable to pay charges for consumption of electricity in accordance with the tariff as fixed from time to time and there is a procedure for preparation of bill, sending of bill to the consumer and time frame for payment of the bill. The security/additional security is taken to cover up the advance payment for electricity to be consumed by the consumer. The consequences for not deposit of security/additional security has been provided in Section 47 of the Electricity Act, 2003 itself. Sub-section (1) of Section 47 clearly provides that if a person fails to give such security, the distribution licensee may refuse to give the supply of electricity or to provide the line or plant or meter for the period during which the failure continues. The submission of security is thus condition precedent for supply of electricity. The licensee being entitled not to give supply on failure of consumer to submit additional security, the question of realisation of amount of additional security does not arise.

(17) Sub-section (3) of Section 47 further provides that in the event person referred to in sub-section (2) fails to give such security, the distribution licensee may discontinue the supply of electricity for the period during which the failure continues. Section 56 of the Electricity Act, 2003 also empowers the licensee to disconnect the supply in default of payment. The security deposit/additional security deposit cannot be thus treated to be an arrear, which can be recovered as arrears of land revenue. The consequences of failure of giving additional security/security are provided in the Act itself. The provisions of the Electricity Act, 2003 and U.P. Electricity Supply Code 2005 does not indicate that in the event additional security is not provided, the licensee shall initiate proceedings for recovery of the additional security. The initiation of proceeding for recovery of the amount of additional security is not contemplated because

licensee is empowered not to release the supply in the event of non deposit and further to disconnect in the event additional security is not given as contemplated under sub-section (2) of Section 47. The additional security/security is nothing but an advance payment and when advance payment is not made the consequence as contemplated under the Electricity Act, 2003 have to take effect which no where indicates recovery in any manner.

(18) In this context it is also relevant to refer Clause 6.1 (h) of U.P. Electricity Supply Code 2005, which provides that bills of each consumer shall clearly reflect- (i) the arrears and (ii) amount of current bill whereas Clause 6.1(g) provides that bills shall contain details of- (1) the energy consumption; (ii) various charges; (iii) due date of payment, disconnection date; (iv) arrears and (v) security deposit detail, rebates.

(19) A perusal of provisions of U.P. Electricity Supply Code 2005 regarding billing indicate that details of security deposit has been separately provided.

(20) What is the object and purpose of security deposit and what is its nature has been considered by the Apex Court in the case of ***Ferro Alloys Corporation Limited vs. A.P. State Electricity Board and another*** reported in 1993 Supp (4) S.C.C. 136. The Apex Court in the said case was considering the security deposit under the provisions of Electric Supply Act, 1948. The Apex Court laid down that very nature of the security deposit is one of the advance payment. Following was laid down in paragraph 106 of the said judgment:-

"106. Thus, it will be clear that the true nature of the transaction in these cases is one of advance payment of charges for consumption of electricity estimated for a period of approximately three months. Such an advance is liable to be made good and kept at the stipulated level from month to month. It is open to the consumer to permit adjustment of the advance in the first instance. Thereafter, he could make good the shortfall in consumption charges and the security deposit before actual disconnection. Actually speaking, it is only after three months the disconnection takes place. Hence, it is like a running current account."

(21) The Apex Court in the said judgment has also laid down that there is no relationship of debtor and creditor with regard to security deposit and the relationship between consumer and the licensee is that of depositor and depositee.

(22) As noticed above, the scheme of the Act and the Code does not indicate that any process for recovery of additional security is contemplated or provided for because of the reason that the consequences for non deposit of additional security has been clearly provided in the Act itself. The payment of additional security being condition for release of additional load, in the event it is not paid the additional load is not to be released and further supply can be discontinued. No more is contemplated with regard to non payment of additional security. Thus, we are of the view that in the event of deposit of additional security by the petitioner for grant of additional load cannot be said to be any dues, which is to be recovered from the petitioner and therefore, the demand by the respondents of giving bank guarantee or cash for grant of additional load is perfectly justified.

(23) Now, we deal with the plea of the petitioner that restrictions imposed for granting additional load i.e. payment of bank guarantee or cash, in Clause 4.46 of

the 2005 Code is unconstitutional, unreasonable and ultra vires to Article 19 (1) (g) and Article 14 of the Constitution of India.

(24) While considering whether a restriction is a reasonable restriction, one has to test the reasonableness of the restriction imposed upon the right guaranteed by Article 19 (1) (g) of the Constitution in an objective manner and from the stand point of interests of the general public and not from the stand point of interests of persons upon whom the restrictions have been imposed or upon abstract considerations. A restriction cannot be said to be unreasonable merely because in a given case it operates harshly.

(25) Under Article 13 (3) of the Constitution of India, for the purpose of Part-III of the Constitution, law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. It would thus be clear that apart from the primary legislation, it also includes various forms of subordinate legislation. It is in that context that we can examine the contentions as raised on behalf of the petitioner.

(26) At this juncture, we may refer to the judgment in ***Gainda Ram and others Vs. Municipal Corporation of Delhi and others*** [(2010) 10 SCC 715]. The Supreme Court held that the reasonable restrictions on the fundamental right under Article 19 (1) (g) can be imposed either by existing law or by a law made by a State in the interest of general public. Therefore, nothing short of law can impose reasonable restrictions. We may thereafter reproduce para 49 of the said judgment, which reads as under:-

"49. In Bijoe Emmanuel v. State of Kerala [(1986) 3 SCC 615] this Court held: (SCC pp. 624-25, para 16)

"16. ...The law is now well settled that any law which may be made under clauses (2) to (6) of Article 19 to regulate the exercise of the right to the freedoms guaranteed by Articles 19 (1) (a) to (e) and (g) must be 'a law' having statutory force and not a mere executive or departmental instruction."

In coming to the aforesaid formulation in Bijoe Emmanuel this Court relied on two Constitution Bench decisions of this Court in Kameshwar Prasad Vs. State of Bihar and another Constitution Bench decision of this Court in Kharak Singh Vs. State of U.P."

(27) Restrictions to prevent a person from carrying on his trade or business, can be imposed only by law as set out in Article 13 (2) of Part-III of the Constitution of India. We may also gainfully refer to the judgment of the Supreme Court in ***Krishnan Kakkanth Vs. Government of Kerala and others*** [(1997) 9 SCC 495], where the Court observed that infringement of fundamental right under Article 19 (1) (g) must have a direct impact on the restriction on the freedom to carry on trade and not ancillary or incidental effects on such freedom to trade arising out of any governmental action. In that case, the purchases could be made from the approved dealers and that was a subject matter of challenge. Considering that, the Apex Court observed that the obligation to purchase from approved dealer has been fastened only to such farmer or agriculturist who has volunteered to accept financial assistance under the scheme on various terms and conditions.

(28) When a challenge is made that the impugned clause is violative of Article 19 (1) (g) of the Constitution, it is for the petitioner to demonstrate based on the material, impact of the restrictions on their business and in the absence of any material, it is difficult for the Court to countenance the said argument.

(29) In the case of ***Indian Drugs & Pharmaceuticals Ltd. and Others Vs. Punjab Drugs Manufacturers Association and Others.*** [(1999) 6 SCC 247], the Apex Court has held as under:-

"16. It is clear from the various judgments referred to above that a decision which would partially affect the sale prospects of a company, cannot be equated with creation of monopoly. In Ram Jawaya Kapur and Naraindas cases the Constitution Bench also held that the policy restrictions, as discussed above, can be imposed by exercise of executive power of the State under Article 162 of the Constitution. Therefore, the contention of the appellants in regard to creation of monopoly and violation of the fundamental right under Articles 19 (1) (g) and 19 (6) should fail. The judgments cited above also show that preference shown to cooperative institutions or public sector undertakings being in public interest, will not be construed as arbitrary so as to give rise to a contention of violation of Articles 14 of the Constitution. We have noted above that this Court in the cases of Oil & Natural Gas Commission v. Assn. of Natural Gas Consuming Industries of Gujarat, Krishnan Kakkanth and Hindustan Paper Corpn. Ltd. Vs. Govt. of Kerala has held that the preference shown to cooperative institutions or public sector undertakings being in public interest, will not be construed as arbitrary so as to give rise to a contention of violation of Article 14 of the Constitution."

(30) It would thus be clear that a decision, which partially affects the sale prospects of a company, cannot be equated with creation of monopoly. We may also refer to the observations in paragraph 8 of the judgment in ***Cooverjee B. Bharucha Vs. Excise Commissioner and the Chief Commissioner, Ajmer and others*** [AIR 1954 SC 220). Para 8 of the said judgment reads as under:-

"8. The contention that the effect of some of these provisions is to enable Government to confer monopoly rights on one or more persons to the exclusion of others and that creation of such monopoly rights could not be sustained under Art. 19 (6) is again without force. Reliance was placed on the decision in - 'Rashid Ahmad v. Municipal Board of Kairana', AIR 1950 SC 163 (B). That decision is no authority for the proposition contended for. Elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trades which all could carry. The provisions of the regulation cannot be attacked merely on the ground that they create a monopoly. Properly speaking, there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of liquor."

(31) In the instant case, the occasion for demanding bank guarantee arose only due to the reason that petitioner has prayed for enhancement of the load to 3100 KVA. The requirement of asking bank guarantee

is for insulating the Corporation against apprehended or future losses. Clause 4.49 of U.P. Electricity Supply Code 2005 is merely a protective provision rather than a provision for enforcing recovery. Clause 4.43 of U.P. Electricity Supply Code 2005, which relates to enhancement of load for cases other than public lighting provides that if the matter relates to dues is stayed by court, the procedure as per Clause 4.49 may be followed. Clause 4.49 comes into play in the present case since the amount of assessment under Section 126 of the Electricity Act, 2003 has been stayed by the Court, which, according to the petitioner, is pending consideration.

(32) It is not the case of the petitioner that by any order or the impugned clause has the effect of totally prohibiting him from carrying on any business but in the instant case, in pursuance of Clause 4.49 of the 2005 Code, the petitioner was asked to furnish bank guarantee or cash for the purpose of release of additional load. This will not amount to full prohibition. (See *State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat and others* [(2005) 8 SCC 534].

(33) The another ground to challenge Clause 4.49 of U.P. Electricity Supply Code 2005 is that Clause 4.49 overreach the order of the Court. It is submitted that there being stay by the Court against the assessment, the respondents cannot ask for submission of bank guarantee for an amount, which has already been stayed by the Court. It is contended that asking bank guarantee is a device to abridge the Court's order and power of judicial review. Reliance has been placed by counsel for the petitioner on *PGF Limited and others Vs. Union of India and another* : 2015 (13) SCC 50.

(34) The judgment relied by the learned counsel for the petitioner i.e. PGF Ltd. vs Union of India and another (supra) is not applicable in the facts and circumstances of the case because in the present case, Clause 4.49 of U.P. Electricity Supply Code 2005 in no manner affects the consequence of the interim order of the Court. The Bank guarantee has been asked on the premise that petitioner has applied for enhancement of load. Had the petitioner not applied for enhancement of the load, there was no question for asking any bank guarantee.

(35) The next question for our consideration is whether by the impugned clause has the petitioner's right to life and liberty been affected? For this Court to intervene, it must be shown that the impugned clause is demonstrably arbitrary, capricious, irrational, discriminatory or violative of constitutional or statutory provisions. Otherwise, it cannot be struck down by a court, nor can the Court go into the wisdom of the State policy. Here, the petitioner has failed to demonstrate any of the aforesaid.

(36) In view of the foregoing discussions, we are satisfied that no grounds have been made out to declare Clause 4.49 of U.P. Electricity Supply Code 2005 as ultra vires. Thus the prayer of the petitioner to declare Clause 4.49 of U.P. Electricity Supply Code 2005 as ultra vires is refused.

(37) With the aforesaid, the writ petition has no merit and is, accordingly, **dismissed**.

(2020)03-05ILR A1149
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Special Appeal No. 219 of 2015
With
Special Appeal Defective No. 31 of 2003

Town Area Committee, Jhunsi, Allahabad & Anr. ...Appellants
Versus
Rajendra Bind & Ors. ...Respondents

Counsel for the Appellants:
Sri A.K. Tiwari

Counsel for the Respondents:
C.S.C., Sri Durga Singh, Sri J.K. Tiwari

A. Service – Termination - Contempt – Jurisdiction – The question referred to the Court was whether the judgment passed in *Rajendra Prasad Singh's case*, which has been affirmed by the Division Bench in Special Appeal No. 1211 of 2009, is correct or not?

The Court observed that termination orders passed in the year 1992 were set aside by learned Single Judge in three different writ petitions. One of them being the *Rajendra Prasad Singh's case,* against which special appeal filed by the State was also dismissed, as such, order of setting aside the termination order attained finality. Subsequently, appellants had passed termination order while considering the representation filed by respondent on the direction of Contempt Court. These orders were passed without even taking note that earlier termination orders were set aside and the issue brought before the authority was confined to payment of salary. There was no issue of termination of service before the authority, therefore, there was no justification in passing the termination order on the representation filed by the respondents. (Para 22)

The Court held that the common termination order passed in 1992 (on 21.03.1992) was bad in law and was rightly set aside on the ground that the GO dated 06.12.1991 was not related to writ petitioners as they were neither daily wagers nor working on work charge basis. It was related to future employments and services of the writ petitioners could not be terminated in view of the said GO. (Para 28)

In the light of the above observations, the view taken by the learned Single Judge in *Rajendra Prasad Singh's case*, which has been affirmed by the Division Bench, was held to be a correct view.

Appeal dismissed. Reference answered. (E-4)

Appeal against judgment and orders dated 19.02.2019 and 01.04.2015, passed in Civil Misc. Writ Petition No. 23102 of 2009.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
Hon'ble Suneet Kumar, J.
Hon'ble Saurabh Shyam Shamsheri, J.)

1. Supplementary affidavit filed today on behalf of respondent, is taken on record.

2. Heard Shri H.N. Singh, learned Senior Counsel assisted by Shri A.K. Trivedi on behalf of the appellants, Shri J.K. Tiwari on behalf of respondent nos.1 to 6 and Ms. Subhash Rathi, learned Additional Chief Standing Counsel for respondent no.7.

3. The present Larger Bench is constituted under the order of Hon'ble the Chief Justice in pursuance of the following questions referred by a Division Bench of this Court, vide order dated 28.9.2017, passed in Special Appeal No.219 of 2015 and Special Appeal (Defective) No.31 of 2003 :-

1. "Whether the judgment of learned Single Judge passed in Rajendra Prasad Singh's case, which has been affirmed by the Division Bench in Special Appeal No.1211 of 2009, is correct or not.

2. Whether in absence of any post in the establishment/department in question, the appointment can be sustained or not.

3. Whether in the absence of post directives can be issued for ensuring payment of salary."

4. These cases have chequered history and before going into the questions referred above, it is necessary to consider the facts of the present case. From the record available, facts of the case are as follows :-

5. The respondents/writ petitioners were appointed on temporary basis by individual appointment letters dated 1.4.1990 by the Town Area Committee, Allahabad under the order issued by the then Chairman, Town Area Committe, Jhunsi, Allahabad, on the post of Helper for the purpose of maintenance of tube wells, which were transferred from the department of Jal Nigam. It was specifically mentioned in their appointment letters that it would be subject to the approval of the Committee.

6. The said appointments were duly approved in the meeting dated 25.4.1990, conducted under the chairmanship of the then Chairman, Town Area Committe, Jhunsi, Allahabad.

7. The State Government issued Government Order dated 6.12.1991/24.12.1991 whereby ban was imposed on appointment of any person as daily wager or on work charge basis by the Nagar Palika Nagar Nigam Department. On the basis of said ban, the services of the respondents/writ petitioners were terminated by the Town Area Committee, Jhunsi, Allahabad, under a common order dated 21.3.1992.

8. The respondents/writ petitioners namely Babu Lal, Anis Ahmad and Ram Lal approached this Court by way of filing Civil Misc. Writ Petition No.1093 of 1992 which was allowed by an order dated 8.12.1995 whereby their termination orders were set aside. For reference, the said order is reproduced hereinafter :-

"The petitioners have challenged the order dated 21.3.1992 annexure No.8 to the writ petition whereby petitioner's employments were terminated. The petitioners contend in the writ petition that they were appointed in various posts by order dated 1.4.1990 on temporary basis and started discharging their duties. Such appointment was duly approved by the Town Area Committee, Jhunsi in its meeting held on 25.4.1990. Thereafter, by order dated 21.3.1992 at Annexure No.8 to the writ petition the petitioners' services were terminated and hence the present writ petition.

Counter Affidavit was filed by the respondent no.1 and 2, but no counter affidavit was filed on behalf of the respondent no.3.

After hearing the parties and considering the materials available on record I find that the impugned order of termination in respect of the petitioners' services was passed in view of the fact that no clarification was given by the respondent no.3 in spite of the fact that such clarification was sought for by the respondent Nos.1 and 2 as to whether the petitioners' employment are to continue in

spite of the Government Order dated 6.12.1991.

Upon considering the material I find that the Government Order dated 6.12.1991 does not relate to the petitioners as they are not daily wager or on work charge basis and further the said order relates to future appointment. In the circumstances, the petitioners' employment already made on temporary basis could not be terminated in view of the said Government Order.

In the aforesaid circumstances, there being justification in passing the impugned order of termination dated 21.3.1992 the said order is hereby quashed. Accordingly, the writ petition succeeds and is allowed. There will be no order as to costs."

(emphasis supplied)

9. As per the record available, no special appeal was filed against the order dated 8.12.1995, as such, the order passed by the learned Single Judge dated 8.12.1995, has attained its finality.

10. Ramesh Bind, Rajendra Bind, Bhanu Pratap Singh, Paras Nath, Kishore Kumar, Ram Nath & Raghvendra Singh (respondents/writ petitioners) also challenged their termination order by way of filing Writ Petition No.10902 of 1992, which was also allowed by an order dated 29.7.2002 in terms of the earlier judgment and order dated 8.12.1995. The said order is also reproduced hereinafter :-

"Shri V.K. Gupta appears on behalf of the petitioners. Shri S.P. Gaur has not appear on behalf of the respondent.

Shri V.K. Gupta contended that the controversy involved in this writ petition is exactly the same and is covered by the decision given in W.P. No.10903/1992, Babu Lal and others Vs. Town Area Committee, Jhunsi and others decided on 8.12.95 by this Court.

Heard and perused the records of the writ petition.

This writ petition is disposed of finally on the same terms and conditions given in judgment dated 8.12.95, Babu Lal and others Vs. Town Area Committee Jhunsi and others."

(emphasis supplied)

11. Belatedly, the special appeal was filed against the order dated 29.7.2002 which was once dismissed in default, however, restored and is also listed in the present bunch as Special Appeal (Defective) No.31 of 2003.

12. Rajendra Bind and 5 others (respondents/writ petitioners) approached this Court by way of filing a Civil Misc. Contempt Writ Petition No.2632 of 2005 for violation of order dated 29.7.2002, passed by the learned Single Judge in Writ Petition No.10902 of 1992. The said contempt petition was disposed of by order dated 21.8.2006, which is reproduced hereinafter :-

"The applicants contend that the order dated 29.7.2002 continues to be violated as they have not been paid their salary. The order which was issued in Writ Petition No.10903 of 1992 was for quashing of the order of termination whereby the services of the employees of the town area Jhunsi were terminated. The applicant's writ petition was also disposed of on the same terms and conditions. There is no specific direction for payment of any past salary or any such other payments and as such, it would be appropriate that the applicants, approach the Chairman, Nagar Panchayat Jhunsi, Allahabad with a fresh

application for clearance of their dues which shall be considered and disposed of preferably within 3 months of the date of production of the same alongwith a certified copy of this order.

The contempt petition is consigned to records with the aforesaid observations."

(emphasis supplied)

13. One of the employee namely Rajendra Pratap Singh, who was aggrieved by his termination order, filed another Writ Petition No.32445 of 1992, which was allowed, vide order dated 21.8.2009. For reference, the said order is reproduced hereinafter :-

"This case was on cause list on 19.8.2009 and on the request of the learned counsel for the petitioner was adjourned for 20.8.2009 and then for today, but today also none appeared for the petitioner. Learned standing counsel representing respondent no.3 is present. I have perused the record.

Aggrieved by the order dated 21.8.1992 (Annexure 8 to the writ petition) the under Article 226 of the Constitution seeking writ of certiorari quashing the said order whereby the Chairman, Nagar Kshetra Samiti Jhunsi, Allahabad has terminated his services from the post of Naib Moharrir. From the facts stated in the writ petition, it appears that on purely temporary basis on 1.4.1990 in the pay scale off Rs.305-330 subject to approval by body. The aforesaid appointment of the petitioner was later on approved by the Committee on 25.4.1990 (Annexure 2 to the writ petition). Thereafter, by order dated 1.9.1991, the petitioner was promoted with effect from 1.9.1991 in the pay scale of Rs.325-475 and the said promotion was also approved the Committee on 13.1.192. The district Magistrate, Allahabad vide letter dated 24.12.1991. However, informed all local bodies within Allahabad District that as per the Government Order dated 16.12.1991., no person should be employed on daily wage basis and pursuant thereto the impugned order has been passed.

Even the facts stated above, it is evident that the petitioner was not appointed on daily wage basis. It is also not the case of the respondent 1 and 2 that his appointment was illegal or contrary to the statute. In the circumstances, termination of the services of the petitioner pursuant of the Government Order dated 16.12.1991 cannot sustain.

The writ petition is, accordingly, allowed. The impugned order dated 21.08.1992 (Annexure 8 to the writ petition for all consequential benefits. No costs. "

(emphasis supplied)

14. The said order was challenged by the appellant - Town Area Committee, Jhunsi, Allahabad, by filing Special Appeal No.1211 of 2009, which was dismissed by this Court, vide order dated 18.11.2009 with the following observations :-

Heard Shri V.K. Dwivedi, learned counsel for appellant. Shri Pankaj Agarwal has entered appearance on behalf of petitioner-respondent.

By the judgment dated 21.8.2009 under challenge in this Special Appeal, learned Single Judge has found that the petitioner was initially appointed as Peon on temporary basis on 1.4.1990 in the pay scale of Rs.305-330 subject to approval of the Committee constituted by Local Body. The appointment was approved by the Committee on 25.4.1990 and thereafter by the order dated 1.9.1991, the petitioner was promoted w.e.f. 1.9.1991 in the pay scale of Rs. 325-475. This promotion was also

approved by the Committee on 13.1.1992. The Town Area Committee, by the order dated 21.8.1992, to give effect to the Government Order dated 16.12.1991, circulated to the local bodies by the District Magistrate on 24.12.1991 to dispense with the services of daily waged employees, terminated the services of the petitioner. The Court found that the petitioner's appointment was neither illegal nor contrary to the rules. He was not appointed on daily wages and was not covered by the Government Order dated 16.12.1991.

Shri V.K. Dwivedi, learned counsel for appellant states that the petitioner was earlier an employee of Jal Sansthan and that in the year 1991 there was only 14 sanctioned posts. The petitioner was appointed in addition to the sanctioned post.

The appointment order dated 1.4.1990 would show that the petitioner was appointed on the post of peon to maintain the tubewell on temporary basis, and his services were thereafter confirmed.

We do not find that learned Single Judge has committed any error of facts and law in dismissing the writ petition.

The Special Appeal is dismissed."

(emphasis supplied)

15. Though the learned Single Judge as well as Division Bench had not noticed the earlier judgment, however, reasoning given by the learned Single Judge which was upheld by Division Bench was same as given by earlier Single Bench.

16. In pursuance of the order dated 21.8.2006 passed in contempt petition, the respondents/ writ petitioners approached the District Panchayat, Jhunsi, Allahabad, for ventilating their grievances regarding the non-payment of their salary. The Chairman, Nagar Panchayat, Jhunsi, Allahabad, vide order dated 29.10.2008 while considering the representation, terminated the services of the respondents/writ petitioners on the ground that their initial appointments were based on forged documents vide individual orders.

17. Another contempt petition was filed in the year 2007 being Contempt Petition No.2284 of 2007 which was disposed of, vide order dated 5.1.2019 on the ground that decision was already taken.

18. Rajendra Bind & others (respondents/writ petitioners) approached this Court by way of filing Writ A No.23102 of 2009, challenging their termination order dated 29.10.2008. The said writ petition was allowed by the learned Single Judge, vide order dated 19.2.2015 and the impugned termination order dated 29.10.2008 was quashed. The relevant part of the order is reproduced hereinafter :-

"In the Counter Affidavit, it has been sought to be urged that the appointment of the petitioners was made without any sanction of the appropriate Government. It has further been contended that the petitioners had been engaged to perform functions only during the pendency of the 'Maha Kumbh Mela'. However, none of these contentions appear to be borne out from the orders of appointment and in any view of the matter do not appear to have been urged in defence in the earlier litigation taken before this Court.

This Court is constrained to record its conclusion that the petitioners were never confronted with the adverse material nor were they afforded any

opportunity of hearing prior to the making of the impugned order. Insofar as their appointments were concerned, no such plea was urged by the respondents in the earlier round of litigation. For all the aforesaid reasons, this Court finds that the impugned order dated 29th October, 2008 cannot be sustained.

Accordingly, this writ petition is allowed. The impugned order dated 29th October, 2008 is hereby quashed. The petitioners shall be entitled to resume work on their posts and be paid salary and other emoluments regularly in accordance with law."

(emphasis supplied)

19. The order dated 19.2.2015 (passed in Writ A No.23102 of 2009 - Rajendra Bind & ors. vs. Town Area Committee & others) was challenged before the Division Bench of this Court in Special Appeal No.219 of 2015. As earlier mentioned, the Special (Defective) No.31 of 2003 was also tagged. The learned Division Bench while considering the appeal made the abovementioned reference, which is under consideration before this Larger Bench.

20. From the facts as mentioned above, it is evident that :-

(i) The initial termination orders passed in the year 1992 were set aside by the learned Single Judge in three writ petitions bearing Writ Petition Nos.10902, 10903 of 1992 and 32445 of 1992 by orders dated 8.12.1995, 29.7.2002 and 21.8.2009 respectively. One of the special appeal filed against the said order was dismissed vide order dated 18.11.2009 and another special appeal was filed belatedly, it was initially dismissed in default. Later on the appeal was restored which is listed along with the present bunch. One of the order passed by learned Single Judge was not even challenged. The crux is that the initial termination orders were set aside on merit.

(ii) The second round of litigation was initiated when the respondents/writ petitioners approached the Contempt Court by way of filing a contempt petition demanding their salary which was not paid. The said contempt petition was disposed of with liberty to approach the appellants for their redressal of grievances.

(iii) When the representations were moved, the appellants without considering that the termination orders passed earlier were already set aside and special appeal was also dismissed, and as such, order of this Court had attained finality, acted beyond the directions passed by the Contempt Court and again terminated the respondents/writ petitioners on the ground that their initial appointments were based on forged document.

(iv) The said order ex-facie was beyond the powers of the appellants. There was no occasion for the appellants to pass such order on the representation moved by the respondents/writ petitioners in pursuance of the order passed by the learned Contempt Court.

(v) The allegation of forged document was neither placed before the Court earlier nor any documents were ever confronted with the writ petitioners in earlier round of litigation.

(vi) The issues, such as appointment beyond the sanctioned post and the initial appointment was illegal, has no relevance in the present facts and circumstances, as the order of initial appointment had already been confirmed way back in the year 1995.

(vii) The entire exercise of the appellants by terminating the

respondents/writ petitioners in the year 2008 was without jurisdiction, therefore,, it was an illegal order, which is unsustainable in the eyes of law also.

(viii) The appellants have acted arbitrarily by terminating the services of the respondents/writ petitioners when they approached for their demand of salary.

(ix) Appellants could not interfere with the order passed by the learned Single Judge, which was upheld by the Division Bench of this Court in the garb of contempt proceedings.

21. Shri H.N. Singh, learned Senior Counsel appearing on behalf of the appellants has tried to convince the Bench that the initial appointments of the respondents/writ petitioners was itself bad as the Chairman had no power to appoint the respondents/writ petitioners. In support of his submission, he relied upon the United Provinces Town Areas Act, 1914. However, on a pointed query, raised by the Bench, whether the appellants had power to pass termination orders while considering the representation pursuant to the order passed by the Contempt Court? Learned Senior Counsel was unable to justify the action taken by the appellants.

22. Termination orders passed in the year 1992 were set aside by learned Single Judge in three different writ petitions. One of the special appeal filed by the State was also dismissed, as such, order of setting aside the termination order attained finality. Subsequently, appellants had passed termination order while considering the representation filed by respondent on the direction of this Court (Contempt Court). These orders were passed without even taking note that earlier termination orders were set aside and the issue brought before the authority was confined to payment of salary. There was no issue of termination of service before the authority, therefore, there was no justification in passing the termination order on the representation filed by the respondents. We are of the definite view that the appellants have acted illegally and in arbitrary manner.

23. In view of the above discussion, we do not find any illegality and infirmity in the judgment and order passed by the learned Single Judge whereby the termination orders passed in the year 2008, were set aside. Accordingly, the Special Appeal No.219 of 2015 is **dismissed**.

24. ***In Re:- Special Appeal Defective No.31 of 2003*** - In this special appeal, appellants have questioned judgment and order dated 29.7.2002 passed by learned Single Judge in Writ Petition No.10902 of 1992 whereby common termination order dated 21.3.1992 has been set aside qua the writ petitioners. The writ petition was allowed in same terms and conditions given in the judgment and order dated 8.12.1995 passed in Writ Petition No.1093 of 1992.

25. As already noted, the said common termination order was earlier challenged in the Writ Petition No.1093 of 1992 and the same was allowed and termination order dated 21.3.1992 was set aside, vide order dated 8.12.1995 qua the writ petitioners. Learned Single Judge held that :- *"Upon considering the material I find that the Government Order dated 6.12.1991 does not relate to the petitioners as they are not daily wager or on work charge basis and further the said order relates to future appointment. In the circumstances, the petitioners' employment already made on temporary basis could not be terminated in view of the said Government Order. In the aforesaid*

circumstances, there being justification in passing the impugned order of termination dated 21.3.1992 the said order is hereby quashed. Accordingly, the writ petition succeeds and is allowed. There will be no order as to costs." This order remain unchallenged.

26. Similarly, the common termination order dated 21.8.1992 was challenged in Writ Petition No.32445 of 1992 also. Learned Single Judge, vide judgment and order dated 21.8.2009 quashed the said termination order qua the writ petitioners. The learned Single Judge held that *"it is evident that the petitioner was not appointed on daily wage basis. It is also not the case of the respondent 1 and 2 that his appointment was illegal or contrary to the statute. In the circumstances, termination of the services of the petitioner pursuant of the Government Order dated 16.12.1991 cannot sustain". Against the order, a Special Appeal 1211 of 2009 was preferred, however, the same was dismissed on 18.11.2009. The Division Bench held that "The appointment order dated 1.4.1990 would show that the petitioner was appointed on the post of peon to maintain the tubewell on temporary basis, and his services were thereafter confirmed. We do not find that learned Single Judge has committed any error of facts and law in dismissing the writ petition. The Special Appeal is dismissed".* The said judgment and order was not challenged further.

27. Now the appellants are trying to reopen the case. The appellants have failed to point out any error in the impugned order as well as in the consistent view taken by Single Benches and Division Bench of this Court that common termination order dated 21.3.1992 was bad in law.

28. We are of the considered opinion that view taken by learned Single Bench and Division Bench of this Court is correct. The common termination order was bad in law and rightly set aside on the ground that the Government Order dated 6.12.1991 was not related to writ petitioners as they were neither daily wagers nor working on work charge basis. The Government Order dated 6.12.1991 was related to future employments and services of the writ petitioners could not be terminated in view of the said Government Order.

29. Accordingly, the Special Appeal Defective No.31 of 2003 is ***dismissed***.

30. While dismissing the appeal, we answer the reference as follows :-

(a) ***Referred question no.1*** - ***"Whether the judgment of learned Single Judge passed in Rajendra Prasad Singh's case, which has been affirmed by the Division Bench in Special Appeal No.1211 of 2009, is correct or not"*** -- We have dismissed Special Appeal Defective No.31 of 2003 by present judgment and affirmed the view taken by learned Single Judge in Writ Petition No.1093 of 1992, Writ Petition No.10902 of 1992, Writ Petition No.32445 of 1992 as well as view taken by Division Bench in Special Appeal No.1211 of 2009 that common termination order dated 21.8.1992 was bad in law, therefore, the view taken by the learned Single Judge in ***Rajendra Prasad Singh's case (Supra),*** which has been affirmed by the Division Bench in Special Appeal No.1211 of 2019 is a correct view.

(b) ***Referred question no.2*** - ***"Whether in absence of any post in the***

establishment/department in question, the appointment can be sustained or not"

&

Referred question no.3 *- "Whether in the absence of post directives can be issued for ensuring payment of salary."* - So far as the question nos.2 and 3 are concerned, there is no need to answer these questions as the issues do not arise in the facts and circumstances of the present case.

31. The reference is answered, accordingly.

(2020)03-05ILR A1157
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2019

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Special Appeal No. 982 of 2002

The General Manager (Personnel), Uco Bank, Kolkata & Ors. ...Appellants
Versus
Dheeraj Kumar Dixit ...Respondent

Counsel for the Appellants:
Sri Manoj Misra, Sri Ravi Prakash Pandey, Sri V.K. Srivastava, Sri Virendra Kumar Srivastava, Sri R.N. Singh

Counsel for the Respondent:
Sri D.S.P. Singh

A. Service – Compassionate appointment – The Court in the writ petition struck down Clauses 7 and 8 of the Scheme for Recruitment of Dependents of Deceased Employee on Compassionate Ground, providing guidelines for the recruitment, framed by the Bank, while considering the case of the petitioner-respondent for compassionate appointment. While allowing the present appeal the Court reversed the judgment and held as follows.

B. The ground which can justify compassionate appointment is the penury condition of the deceased. And while considering penury condition for compassionate appointment, the income of the bereaved family from various sources including the gratuity, pension etc. has to be taken into account – The total income of the family of the deceased was more than 60% of the last drawn gross salary of the deceased, therefore the petitioner-respondent was not eligible for appointment on compassionate ground in the bank, as per the scheme of the Bank. (Para 4, 6, 9, 10, 12)

Appeal allowed. (E-4)

Precedent followed:

1. Umesh Kumar Nagpal Vs. St. of Har. & ors., JT 1994 (3) SC 525 (Para 6)

2. L.I.C. Vs. Asha Ram Chandra Ambedkar & anr., JT 1994 (2) SC 183 (Para 6)

3. State of Himachal Pradesh & anr. Vs. Shashi Kumar, in Civil Suit No. 988 of 2019 dated 16.01.2019 (Para 9, 12)

Appeal against judgment and order dated 31.07.2002, passed in Writ Petition No. 23899 of 2000.

(Delivered by Hon'ble Bala Krishna Narayana, J.
&
Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Ravi Prakash Pandey, learned counsel for the appellant.

2. None appears on behalf of the respondent.

3. This special appeal has been preferred by the General Manager (Personnel) of UCO Bank, Kolkata, and the Regional Manager, UCO Bank, Bhelpura,

District Varanasi, against the judgement and order dated 31st July, 2002, passed by learned Single Judge of this Court in Civil Misc. Writ Petition No.23899 of 2000.

4. The facts of this case as emerging from the perusal of the pleadings filed before the Writ Court are that the father of the petitioner-respondent Dhiraj Kumar Dixit was working on the post of Assistant Cashier in the UCO Bank, Chowk, Varanasi. He died in harness on 6.2.1997. The petitioner-respondent on 20.5.1997 claimed appointment on compassionate ground. His application remained pending. He filed writ petition no.1765 of 2000, which was disposed of by this Court on 17.1.2000 directing the petitioner-respondent to make a fresh representation, which was to be decided by the General Manager (Personnel), UCO Bank, Calcutta. The petitioner-respondent prepared a fresh representation and sent it by registered post alongwith a copy of the order passed by this court on 29.1.2000 and 1.2.2000. But since the representation was not decided he sent reminders on 3.3.2000 and 7.3.2000. The General Manager by his order dated 19.4.2000 rejected the representation of the petitioner-respondent on the ground that total income of the family of the deceased was more than 60% of the last drawn gross salary of the deceased, therefore, the petitioner-respondent was not eligible for appointment on compassionate ground in the bank, as per the scheme of bank. The petitioner-respondent had challenged before the Writ Court the Scheme for Recruitment of Dependants of Deceased Employee on Compassionate Ground (in brief Scheme), annexure-1 to the petition and the order dated 19.4.2000 passed by respondent no.1, annexure-5 to the writ petition.

5. Before the Writ Court, the petitioner-respondent had urged that the provident fund, gratuity, family pension, group insurance or insurance policy cannot be considered for determining the financial status or family income of the deceased's family nor it can furnish a ground for rejecting the claim for appointment on compassionate ground. It was also urged that the scheme framed by the Bank was ultra vires and arbitrary.

6. The stand taken by the respondent-appellant Bank before the Writ Court was that the head office of the Bank had framed a scheme on 21.9.1999 for recruitment of dependents of the deceased employees on compassionate grounds and the norms for eligibility have been laid down in the scheme which provides that if the monthly income of the bereaved family was 60% or more of the gross salary, the deceased employee was drawing at the time of his death, then such cases would not be considered for compassionate appointment. The Bank took a further stand that monthly income of the family of the petitioner-respondent on being calculated in accordance with the formula provided in the scheme, was above 60% of the last drawn gross salary of the deceased employee. Hence, the petitioner-respondent was not entitled for compassionate appointment. It was also urged before the Writ Court that the Bank had framed a scheme in pursuance of the decision of the Apex Court In ***Umesh Kumar Nagpal v. State of Haryana and others JT 1994(3) SC 525*** in which the Apex Court in paragraph 7 has laid down that rules or executive instructions have to be framed by the public authority for providing employment on compassionate ground. Reliance was also placed by the respondent-appellant Bank on the decision of the Apex Court in ***Life Insurance Corporation of India Vs Mrs. Asha Ram Chandra Ambedkar and another JT 1994(2) SC 183.*** He further urged that the

High Court while considering the appointment on compassionate ground cannot go behind the scheme framed by the Bank for giving appointment on compassionate ground and no mandamus can be issued directing to make appointment forbidden under the scheme framed by the Bank. The scheme neither suffered from any illegality nor the petitioner-respondent was entitled for appointment on compassionate grounds.

7. The learned Single Judge after considering the submissions advanced before him by learned counsel for the parties, allowed the writ petition by the order impugned in this special appeal.

8. Following paragraphs of the impugned judgement which are relevant for the purpose of deciding this special appeal is quoted hereinbelow :-

"Today most of the service whether government or inpublic sector or even otherwise are pension-abe and there is a provision for family pension. Every employee from peon in class-IV to head of department in class-I contributes to Provident Fund, is entitled to gratuity and is compulsorily insured. If these amounts which are payable to the family on death of the employee are clubbed together and a notional 11% insterest is calculated on it to arrive at 60% of the gross salary drawn by the deceased then this would hardly be any dependant who could be entitled for compassionate appointment.

Family pension is paid to the widow of the deceased. This is also a social security for the employee's widow. The calculation of 11% interest on the amount received by the family of the deceased and the Family Pension is not only against the letter and spirit of the apex court judgement but is contrary to basic philosophy of socio-economic justice. Further 11% interest was not paid even on Fixed Deposit Receipts in 1999. Today it is much less. The provision for calculating 11% interest is, thus, arbitrary.

For these reasons this writ petition succeeds and is allowed. Clauses 7 and 8 of the Scheme for Recruitment of Dependents of Deceased Employee on Compassionate Ground annexure-1 to the writ petition are struck down as arbitrary and irrational. Consequently, the impugned order dated 19.4.2000 passed by respondent no.1 annexure-5 to the writ petition is quashed. The respondents are directed to consider the representation of the petitioner afresh within six weeks and grant compassionate appointment in Class-III or IV according to his eligibility."

9. It has been contended by learned counsel for the respondent-appellant that it has been the consistent view of the Apex Court that while considering a claim for compassionate appointment, the income of the bereaved family from various sources including the gratuity, pension etc. has to be taken into account and an appointment on compassionate ground can only be provided on the ground which can justify compassionate appointment is the penury condition of the deceased family and the learned Single Judge was not at all justified in striking down clauses 7 and 8 of the scheme providing guidelines for the recruitment of the dependant of the deceased family on compassionate ground framed by the Bank. In support of his aforesaid contentions, learned counsel for the respondent-appellant has placed reliance upon by judgement of the Apex Court rendered in the case of ***State of Himachal Pradesh and another v. Shashi Kumar,*** in Civil Suit No.988 of 2019 dated 16th January, 2019.

10. Having considered the submissions made by learned counsel for the respondent-appellant and very carefully perused the law reports cited by him, we find that there is force in the submissions made by him. The Apex Court in the case of ***State of Himachal Pradesh and another (supra)*** after considering the entire law on the subject of compassionate appointment, came to the conclusion that while considering the penury condition of the bereaved family, the income of the bereaved family from different sources including the family pension has to be taken into consideration.

11. The paragraphs of the aforesaid judgement which are relevant for our purpose are being reproduced hereinbelow :-

"In view of the clear terms of the Policy, we are of the view that the High Court was in error in issuing a mandamus to the Government to disregard its Policy. Such direction could not have been issued by the High Court. The High Court has drawn sustenance in issuing mandamus in the above terms on a decision of this Court in Govind Prakash Verma (supra). That was a case of compassionate appointment where in the course of the proceedings before the High Court, a learned Single Judge had directed the Life Insurance Corporation, which was the employer of the deceased employee, to make an enquiry and submit a report on whether the members of the family engaged in gainful employment were also supporting the family of the deceased employee. This Court, in an appeal against the judgment of the High Court rejecting the petition for compassionate appointment, observed that the officer who had enquired into the matter in pursuance of the order of the learned Single Judge completely omitted to furnish any report on the points which were required by the High Court to be investigated. The High Court rejected the petition on the ground that the family was in receipt of family pension and other amounts towards terminal benefits. Reversing the view of the High Court, a two- Judge Bench of this Court held thus:

"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules..." The decision in Govind Prakash Verma (supra) has been considered subsequently in several decisions. But, before we advert to those decisions, it is necessary to note that the nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal Vs. State of Haryana4. The principles which have been laid down in Umesh Kumar Nagpal (supra) have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract:

"2. ...As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies.

One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual 4 (1994) 4 SCC 138 categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned." Specifically in the context of considering the financial circumstances of the family of the deceased employee, several judgments of this Court have elaborated on the principles to be followed.

The decision in General Manager (D&PB) Vs. Kunti Tiwary5 involved an interpretation of an office memorandum dated 7 August 1996 circulated to all banks in the light of the decision in Umesh Kumar Nagpal (supra). The Indian Banks Association adopted the directions of this Court in the Scheme which was proposed for the appointment of heirs of deceased employees. The Scheme contemplated that in order to determine the financial condition of the family, the following amounts would have 5 (2004) 7 SCC 271 to be taken into account:

"7...(a) Family pension.

(b) Gratuity amount received.

(c) Employee's/employer's contribution to provident fund.

(d) Any compensation paid by the Bank or its Welfare Fund.

(e) Proceeds of LIC policy and other investments of the deceased employee.

(f) Income of family from other sources.

(g) Employment of other family members.

(h) Size of the family and liabilities, if any, etc." Eventually, this

recommendation was accepted in the Scheme. In the light of these recommendations and the Scheme, this Court observed that where the family of a deceased employee was not left without means of livelihood, the claim for compassionate appointment could not be sustained. It may be noted that in that case it was on a review of the overall financial position of the family, including amounts received towards terminal benefits that the decision was taken.

The decision of this Court in Punjab National Bank Vs. Ashwani Kumar Taneja6 followed the same principle. While reiterating the view which was taken in Kunti Tiwary (supra), this Court held that the Scheme specified the amounts which were required to be taken into consideration.

The decision in State Bank of India Vs. Somvir Singh7 has noticed the scheme for appointment of dependants of 6 (2004) 7 SCC 265 7 (2007) 4 SCC 778 deceased employees on compassionate grounds framed by the State Bank of India. The Court expressly held that the authorities were not in error in taking account of the terminal benefits, investments and the monthly family income including the family pension paid by the Bank. The view of this Court finds expression in the following extract:

"12. The competent authority while considering the application had taken into consideration each one of those factors and accordingly found that the dependants of the employee who died in harness are not in penury and without any means of livelihood. The authority did not commit any error in taking the terminal benefits and the investments and the monthly family income including the family pension paid by the Bank into consideration for the purposes of deciding as to whether the family of late Zile Singh had been left in penury or without any means of livelihood. The scheme framed by the appellant Bank in fact mandates the authority to take those factors into consideration. The authority also did not commit any error in taking into consideration the income of the family from other sources viz. the agricultural land." (emphasis supplied) In the view of this Court, the only issue to be considered was whether the claim for compassionate appointment had been considered in accordance with the Scheme. The income of the family from all sources was required to be taken into consideration according to the Scheme. This having been ignored by the High Court, the appeal filed by the Bank was allowed.

The judgment of a Bench of two-Judges in Mumtaz Yunus Mulani Vs. State of Maharashtra8 has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the Scheme. The decision in Govind Prakash Verma (supra) has been duly considered, but the Court observed that it did not appear that the earlier binding precedents of this Court have been taken note of in that case.

In Union of India Vs. Shashank Goswami, this Court considered a circular issued by the Office of the Comptroller and Auditor General of India in terms of which the total income of the family from all sources, including terminal benefits received, was required to be taken into account. Income limits were specified in the circular for Group "B', Group "C' and Group "D' posts. Taking note of the fact that a family pension has been authorized to the widow of the deceased employee, this

Court held that the case of the dependant did not fall within the income limits meant for Group "C' posts.

The same principle has been reiterated in another decision of a Bench of two-Judges of this Court in State Bank of India Vs. Surya Narain Tripathi10. 8 (2008) 11 SCC 384 9 (2012) 11 SCC 307 10 (2014) 15 SCC 739 While adverting to a submission of learned counsel based on the decision in Govind Prakash Verma (supra), this Court noted thus:

"8. He relied upon the judgment of this Court in Govind Prakash Verma v. LIC[Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] where a view has been taken that the compassionate appointment cannot be refused on the ground that another member of the family had received appropriate employment and the service benefits were adequate. We may humbly state that this view runs counter to the view which was taken earlier in Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] which was not cited before the Court in Govind Prakash [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] . The subsequent two judgments which were referred above also take the same view as in Umesh Kumar Nagpal[Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] . Mr Vikas Singh has drawn our attention to the judgment in SBIv. Somvir Singh [SBI v. Somvir Singh, (2007) 4 SCC 778 : (2007) 2 SCC (L&S) 92] where the 1998 Scheme has been considered.

9. In all the matters of compassionate appointment it must be noticed that it is basically a way out for the family which is financially in difficulties on account of the death of the breadearner. It is not an avenue for a regular employment as such. This is in fact an exception to the provisions under Article 16 of the Constitution. That being so, if an employer points out that the financial arrangement made for the family subsequent to the death of the employee is adequate, the members of the family cannot insist that one of them ought to be provided a comparable appointment. This being the principle which has been adopted all throughout, it is difficult for us to accept the submission made on behalf of the respondent." Now, it is in this background that it would be necessary to advert to the decision in Canara Bank (supra). A Scheme for compassionate appointment of 8 May 1993 was prevalent in Canara Bank when the employee died on duty in October 1998. Faced with the rejection of an application for compassionate appointment, the High Court was moved in a Writ Petition in which a learned Single Judge issued a direction for reconsideration of the claim for appointment. During the pendency of the appeal before the Division Bench, the Scheme for compassionate appointment was replaced by a new Scheme providing for ex gratia in lieu of appointment. The main issue which fell for consideration before this Court was whether the subsequent Scheme which was formulated in 2005 providing for ex gratia payment would govern or whether the application would have to be disposed of on the basis of the earlier Scheme of 1993. It may be noted that the application for compassionate appointment in that case had been rejected on the ground that the family of the respondent was not in indigent circumstances, as required by the Scheme for compassionate appointment of 1993.

Dealing with the applicability of the subsequent Scheme, a Bench of two-Judges of this Court held, following the

earlier decision in State Bank of India Vs. Jaspal Kaur11, that the cause of action to be considered for compassionate appointment arose when the earlier Scheme was in force. Hence, the claim could not be decided on the basis of the subsequent Scheme which 11 (2007) 9 SCC 571 provided only for the payment of ex gratia. Moreover, as a matter of fact, the subsequent scheme was superseded in 2014 by reviving the Scheme for the provision of compassionate appointment.

Hence, the issue which has been dealt with in Canara Bank (supra) is whether the application for grant of compassionate appointment could have been rejected on the basis of a scheme which had come into force after the date of submission of the application. That, as this Court observed, was the main question which fell for consideration. The Bench of two-Judges, however, also noted that it was urged on behalf of the appellant - Bank that the family of the respondent was in receipt of family pension. This, the Court held, was of no consequence in considering the application for compassionate appointment.

Learned senior counsel appearing on behalf of the appellants has sought to distinguish the above observations, in the judgment in Canara Bank (supra), by submitting that it is not the case of the State of Himachal Pradesh that mere receipt of family pension would disable an applicant from submitting an application for compassionate appointment or preclude consideration of the claim. On the contrary, the submission which is urged is that the Scheme requires consideration of all relevant sources of income and hence, receipt of family pension would be one of the criteria which would be taken into consideration in determining as to whether the family of the deceased employee is in indigent circumstances.

We find merit in this submission, for the simple reason, that it is in accord with the express terms of the Scheme of 18 January 1990, as modified by the State. The Scheme contemplates that payments which have been received on account of welfare measures provided by the State including family pension are to be taken into account. Plainly, the terms of the Scheme must be implemented.

For these reasons, we have come to the conclusion that the High Court was not justified, based on the decision in Govind Prakash Verma (supra) in issuing a direction to the State to act in a manner contrary to the express terms of the Scheme which require that the family pension received by the dependants of the deceased employee be taken into account.

That leads the Court to the next aspect of the matter relating to the fixation of an income slab. In our view, the fixation of an income slab is, in fact, a measure which dilutes the element of arbitrariness. While, undoubtedly, the facts of each individual case have to be borne in mind in taking a decision, the fixation of an income slab subserves the purpose of bringing objectivity and uniformity in the process of decision making. The High Court was of the view that it was not open to the Finance Department to amend the Scheme. The circulars which are issued by the Finance Department cannot be construed to be an amendment of the policy. They are really clarificatory of the intent and purpose of the Scheme. The circulars are explanatory, since they are intended to guide the decision maker on the concept of indigency which is incorporated in the Scheme. In fact, as we have noted earlier, in the decision of this court in Shashank Goswami(supra), the Court was

specifically dealing with a circular of the Comptroller and Auditor General of India which had imposed income limits respectively for Group "B', "C' and "D' posts for the purpose of guiding the decision in the case of compassionate appointment. The fixation of income limits was not construed to be and is not an arbitrary exercise of power. However, what we find from the record of this case is that the income limit was fixed (as the High Court observed) on 29 September 2008 by the letter of the Finance Department. The income limit of Rs.1,00,000/- for a family of four persons has since been revised to Rs.1,50,000/- on 20 April 2011. Mr. P.S. Patwalia has, on instructions, stated before this Court that this ceiling has been reiterated on 27 July 2017. What should be the appropriate income criterion is undoubtedly a matter of policy for the State Government to determine. However, we would impress upon the State Government the need to periodically revise the income limits preferably at intervals of three years. Inflation and the increase in the cost of living have an important bearing on financial exigencies faced by families of serving as well as deceased employees. In fixing the income criteria for considering cases of compassionate appointment, it would be appropriate if the State revisits the income limit at periodic intervals, as we have indicated above. We clarify that it would be open to the State to revise the income limits at a frequency of less than three years, if the State is so advised."

12. Thus, in view of the guidelines laid down by the Apex Court in the case of ***State of Himachal Pradesh and another v. Shashi Kumar (supra)*** and the pronouncement made in Clauses 7 and 8 of the scheme of recruitment of dependants of deceased employees on compassionate ground which provide that while considering the claim for compassionate appointment under the scheme, the income of the bereaved family from sources specified in the scheme is required to be taken into consideration, are neither unreasonable nor suffer from the vice of arbitrariness. Thus, we find that the view taken by learned Single Judge is wholly untenable and cannot be sustained. In our opinion, the learned Single Judge was not at all justified in striking down Clauses 7 and 8 of the scheme.

13. We accordingly allow the appeal and set aside the impugned order passed by learned Single Judge to the extent it seeks to strike down Clauses 7 and 8 of the scheme.

14. However, we leave it open to appellant to consider and examine the claim of the petitioner-respondent on compassionate ground strictly in accordance with the provisions of the scheme.

(2020)03-05ILR A1165
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2020

BEFORE

THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 1225 of 2019

Vinod Kumar Sharma, Distt. Inspector of Schools, Azamgarh & Anr. ...Appellants
Versus
Shiv Mohan Dwivedi, Assistant Teacher, Inter College, Sarai Brindaban, Azamgarh ...Respondent

Counsel for the Appellants:
Sri Kushmondeya Shahi

Counsel for the Respondent:
Sri Daya Shankar Prasad Singh, Sri Anjani Kumar Mishra, Sushma Devi

A. - Contempt Courts Act, 1971- Section 12, 19 – Contempt – Jurisdiction – Service/Payment of arrears of salary- Scope of contempt jurisdiction is to see whether the order of the Court has been complied with – in substance – or deliberately flouted leading to an inference of a "wilful, deliberate and contumacious" violation of the order of which non-compliance is alleged.

In the present case, where there is no direction to dispose of the applications/representation of the petitioner in a particular manner, the correctness, legality or propriety of the order passed by the respondent authority, in compliance of the directions under the order of the writ Court, cannot be gone into in contempt proceedings, since its scope, even otherwise is extremely limited and narrow. The correctness or otherwise of the orders which have been passed by the respondent, if required, may be tested in appropriate proceedings but not in contempt jurisdiction. (Para 24)

Appeal allowed. (E-4)

Precedent followed:

1. Midnapore Peoples Coop. Bank Ltd. & ors. Vs. Chunilal Nanda & ors., (2006) 5 SCC 399 (Para 11)

2. Shah Babulal Khimji Vs. Jayaben D. Kania & anr., (1981) 4 SCC 8 (Para 12)

3. A.P. Verma & ors. Vs. U.P. Laboratory Technicians Association & ors., 1998 (3) AWC 2264 (Para 13)

4. J. Parihar Vs. Ganpat Duggar & ors., (1996) 6 SCC 291 (Para 19)

5. Lalith Mathur Vs. Maheswara Rao, (2000) 10 SCC 285 (Para 20)

6. Jhareswar Prasad Paul & anr. Vs. Tarak Nath Ganguly & ors., (2002) 5 SCC 352 (Para 21)

7.D.E., Uttaranchal and ors. Vs. Ved Prakash Joshi and ors., (2005) 6 SCC 98 (Para 22)

8. Sudhir Vasudeva, Chairman and Managing DirectorO.N.G.C. & ors. Vs. M. George Ravishekaran & ors.,, (2014) 3 SCC 373 (Para 23)

Appeal against judgment and order dated 31.07.2019 and 21.08.2019, passed in Contempt Petition No. 4283 of 2018.

(Delivered by Hon'ble Biswanath Somadder, J.
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Let the rejoinder affidavit filed in Court today be taken on record.

2. This Special Appeal arises in respect of two orders dated 31st July, 2019 and 21st August, 2019, passed by a learned Single Judge in *Contempt Application (Civil) No.4283 of 2018 (Shiv Mohan Dwivedi Vs. Vinod Kumar Sharma).*

3. The appellants before us are the incumbents holding the office of District Inspector of Schools, Azamgarh and the Director of Education, Secondary, U.P., Lucknow, respectively.

4. For convenience, both the impugned orders are set-out hereinbelow in their entirety:-

Order dated 31st July, 2019

".....learned Additional Chief Standing Counsel has apprised the Court of the fact that the District Inspector of Schools vide order dated 20.11.2018 requested the Director of Education, Madhyamik for making available necessary budget to facilitate payment of arrears of salary of the applicant. The Director has forwarded the entire matter to the Secretary, Secondary Education, Lucknow

being the competent authority for sanctioning the budget.

Learned Additional Chief Standing Counsel seeks time so that in the meantime, the budget is sanctioned by the State Government.

Accordingly, the matter is adjourned for three weeks.

List on 21.8.2019, by which date, in case, the necessary budget is not sanctioned and payment is not made, the opposite party shall remain personally present before this Court to justify the delay in compliance of the order of this Court."

Order dated 21st August, 2019

"In the affidavit filed by the opposite party today before this Court, the stand taken is that despite specific request having been made by him to the Director of Education (Madhyamik) and the State Government to make available the required budget so as to ensure payment of arrears of salary to the applicant in terms of the order of the Writ Court, the amount has not been sanctioned so far.

Alongwith the affidavit, a letter written by the State Government to Director of Education dated 8.7.2019 has been filed, whereunder the State Government has directed the Director of Education to submit his clear report and also identify the officers who were guilty of the delay in making payment.

It is always open to the State Government to identify officers who are responsible for the delay in making payment to the applicant but that itself could not be an excuse for sitting tight over the matter and not sanctioning the required amount.

Leave is granted to learned counsel for the applicant to implead Principal Secretary, Secondary Education, U.P. Lucknow and Director of Secondary Education, U.P. Lucknow as respondents to the instant contempt petition by name.

Learned standing counsel shall communicate this order to the newly impleaded respondents within three days. They shall file their affidavits showing cause as to why the necessary budget has not been sanctioned so far. This is without prejudice to their right to proceed against the officers guilty for delay in making payment of the arrears to the applicant.

List on 23.9.2019."

5. The genesis of the contempt application is a judgment and order dated 8th December, 2016, passed by a learned Single Judge in Writ-A No.23338 of 2013 *(Shiv Mohan Dwivedi Vs. State of U.P. and four others).* The operative portion of the said judgment and order dated 8th December, 2016 is required to be noticed and is set-out hereinbelow:-

"The petitioner shall, within a period of two weeks from today, submit a detailed representation before the second respondent in regard to his claim for the release of salary which had been stopped in 2013. He shall alongwith his reply also furnish for the consideration of the second respondent a copy of the supplementary short counter affidavit filed in these proceedings on behalf of the Sampurnanand Sanskrit Vishwa Vidyalaya, Varanasi. In case a representation is so made by the petitioner within the time aforementioned, the respondent No.2 shall pass appropriate orders in accordance with law with due expedition and preferably within a period of one month from the date of production of a certified copy of this order."

6. A bare perusal of the operative portion of the said judgment and order

dated 8th December, 2016, clearly reveals that there was a mandatory direction upon the respondent no.2 (being the appellant no.1 before us) to pass appropriate orders in accordance with law in respect of a representation to be made by the respondent-writ petitioners within a certain time frame.

7. It is admitted position that pursuant to the directions as contained in the judgment and order dated 8th December, 2016, two orders have been passed by the respondent no.2 (being the appellant no.1 before us) being orders dated 11th January, 2017 and 27th August, 2018. Both the aforesaid orders had been placed on record along with the complaince affidavit of the opposite party no. 1 (District Inspector of Schools, Azamgarh) filed in the contempt case.

8. The principal contention of the learned counsel for the appellant is that the direction of the writ court was for consideration of the representation of the writ petitioner, and the said direction having been complied with in terms of the orders passed by the concerned respondent (appellant no. 1 herein), the contempt court could not have gone beyond the directions of the writ court and proceeded with the matter.

9. Learned counsel appearing for the respondent has tried to support the orders impugned by seeking to contend that the orders passed by the concerned authority stated to be in compliance of the directions of the writ court, have not been correctly passed.

10. Before proceeding to advert to the rival contentions of the parties, it may be necessary to take up the question with regard to maintainability of the present intra court special appeal, filed under Chapter VIII Rule 5 of the Allahabad High Court Rules (Rules of the Court, 1952)1, against orders passed in contempt proceedings initiated by filing an application under Section 12 of the Contempt of Courts Act, 1971.

11. In a case where the High Court, in a contempt proceeding, renders a decision on the merits of a dispute between the parties, either by an interlocutory order or final judgment, the question whether the same would be appealable under Section 19 of the Contempt of Courts Act, 1971, and if not, what would be the remedy of the person aggrieved, was considered in the case of **Midnapore Peoples' Coop. Bank Ltd. and others Vs. Chunilal Nanda and others**, and it was held that any direction issued or decision made by the High Court, in contempt proceedings, on the merits of a dispute between the parties, unless the same is incidental to or inextricably connected with the order punishing for contempt, would not be in the exercise of "jurisdiction to punish for contempt" and, therefore, would not be appealable under Section 19 of the Act, 1971. Such an order, passed by the Contempt Court, was held, amenable to a challenge in an intra court appeal under the relevant rules of the High Court. The position with regard to filing of appeals against orders in contempt proceedings were summarized thus :-

"11. The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarised thus:

I. An appeal under Section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for

contempt, that is, an order imposing punishment for contempt.

II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the Contempt of Courts Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt" and, therefore, not appealable under Section 19 of the Contempt of Courts Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases)."

12. The question as to whether an intra court appeal would be available against an interlocutory order containing directions on merits of the dispute was answered by referring to the decision in **Shah Babulal Khimji Vs. Jayaben D.Kania and another**, and it was held that interlocutory orders which finally decide a question or issue in controversy in the main case or which finally decide a collateral issue or a question which is not the subject matter of the main case, are "judgments" for the purpose of filing appeals under the relevant rules of the High Court.

13. Taking note of the position that in a proceeding initiated under the Contempt of Courts Act, the High Court could either punish or discharge the alleged contemnor and in doing so, it could pass all such ancillary orders which are necessary for exercise of such powers but it could not issue any directions or orders regarding the main dispute or controversy between the parties which had led to the filing of writ petition, this Court, in **A.P. Verma and Ors. Vs. U.P. Laboratory Technicians Association and Ors.**, held that if any order or direction is made by the Court concerning the merit of the controversy or dispute between the parties, or for implementation of any judgment or order, the same would be de hors the provision of the Contempt of Courts Act, and would be deemed to have been issued in exercise of powers conferred under Article 226 of the Constitution, and such direction would, therefore, be amenable to an appeal under Chapter VIII, Rule 5 of the Rules of the

Court . The observations made in the judgment are as follows :-

"7....Thus there can be no doubt that in any proceeding initiated under the Contempt of Courts Act, the High Court can either punish or discharge the alleged contemner and in doing so it can pass all such ancillary orders which are necessary for exercise of such power but it cannot issue any directions or orders regarding the main dispute or controversy between the parties which has led to the filing of writ petition by either of the parties. However, if any order or direction is made by the Court concerning the merit of the controversy or dispute between the parties, or for implementation of any judgment or order, it will be de hors the provision of Contempt of Courts Act and they can only be deemed to have been issued in exercise of power conferred by Article 226 of the Constitution. Such direction would, therefore, be amenable to an appeal under Chapter VIII, Rule 5 of the Rules of the Court as they are not issued in exercise of any power conferred by the Act..."

14. In the instant case, a bare reading of the two orders dated 31st July, 2019 and 21st August, 2019 passed in the contempt proceedings clearly show that orders touch the merits of the dispute between the parties and relate to the manner of implementation of the judgment passed by the writ court, as such, the said directions would be referable to the powers conferred under Article 226 of the Constitution of India, and accordingly, the same would be amenable to an intra court appeal under Chapter VIII Rule 5 of the Rules of the Court.

15. Coming to the merits of the present appeal, as we have already taken note of, the writ petition, being Writ A No. 23338 of 2013, had been disposed of in terms of judgment dated 8th December, 2016 whereunder the writ petitioner was required to submit a detailed representation before the respondent no.2 with regard to his claim for release of salary, and upon the representation being filed, the said respondent was to pass appropriate orders in accordance with law.

16. It is not in dispute that the aforementioned directions issued by the writ court in its judgment dated 8th December, 2016 had been complied with by the concerned respondent by passing orders dated 11th January 2017 and 27th August, 2018.

17. The question which thus arises is as to whether necessary orders having been passed by the authority concerned, stated to be in compliance of the directions issued by the writ court, was it open for the court exercising contempt jurisdiction to go beyond the directions contained in the judgment of the writ court and enter into the question of correctness, or otherwise, of the orders passed.

18. The broad contours governing the exercise of contempt jurisdiction are fairly laid out. The High Court, while exercising jurisdiction to punish for a breach or disobedience of its order, has to have due regard to the directions which had been issued and of which a breach is alleged. It has been consistently held that in dealing with a contempt petition, the High Court cannot go behind the order of which a breach is complained or, to take upon itself to decide issues which were not touched in the original order. The orders which seek to supplement the directions issued in terms of the original order, of which a breach is

complained, cannot be passed in the exercise of contempt jurisdiction. In doing so, the Court would be expanding the scope of contempt jurisdiction, which would not be permissible.

19. The scope of contempt jurisdiction, in a case where an order had already been passed on the basis of the directions issued by the court, came up for consideration in **J. Parihar Vs. Ganpat Duggar and Ors.**, and it was held that the authority concerned having passed an order, may be right or may be wrong, the contempt court could not proceed to consider the matter on merits. A fresh cause of action having arisen, it would be open to the party concerned to seek redressal before an appropriate forum. The observations made in the judgment are as follows :-

"6...The question is whether seniority list is open to review in the contempt proceedings to find out, whether it is in conformity with the directions issued by the earlier Benches. It is seen that once there is an order passed by the Government on the basis of the directions issued by the court, there arises a fresh cause of action to seek redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review. But that cannot be considered to be the willful violation of the order. After re-exercising the judicial review in contempt proceedings, a fresh direction by the learned Single Judge cannot be given to redraw the seniority list. In other words, the learned Judge was exercising the jurisdiction to consider the matter on merits in the contempt proceedings..."

20. In a somewhat similar set of facts, as in the present case, in **Lalith Mathur Vs. Maheswara Rao**, the question of maintainability of a contempt petition came up for consideration in a case when the court's direction was to consider the employees' representation, which was duly complied with, though the representation was rejected on merits. It was held that the direction issued by the contempt court, that the employee be absorbed on a suitable post, was without jurisdiction and should not have been passed. The relevant extract of the judgment is as follows:-

"4. The High Court in the writ petition had issued a direction for the consideration of the respondent's representation by the State Government. This direction was carried out by the State Government which had considered and thereafter rejected the representation on merits. Instead of challenging that order in a fresh writ petition under Article 226, the respondent took recourse to contempt proceedings which did not lie as the order had already been complied with by the State Government which had considered the representation and rejected it on merits."

21. The basic parameters governing the exercise of contempt jurisdiction were examined in **Jhareswar Prasad Paul and another vs. Tarak Nath Ganguly and others**, and it was held that the court cannot, in the guise of exercising contempt jurisdiction, grant substantive relief not covered by the order which is subject

matter of the proceedings and that a substantive relief not covered by the initial order could not be considered in contempt proceedings. In this case also, the contempt court had proceeded on the basis of the allegation that the respondent authorities had not complied with the initial order, "effectively" and "in appropriate manner". In the aforesaid background, the observations made in the judgment are as follows :-

"11. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law, since the respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizen and the democratic fabric of society will suffer if respect for the judiciary is undermined. The Contempt of Courts Act, 1971 has been introduced under the statute for the purpose of securing the feeling of confidence of the people in general for true and proper administration of justice in the country. The power to punish for contempt of court is a special power vested under the Constitution in the courts of record and also under the statute. The power is special and needs to be exercised with care and caution. It should be used sparingly by the courts on being satisfied regarding the true effect of contemptuous conduct. It is to be kept in mind that the court exercising the jurisdiction to punish for contempt does not function as an original or appellate court for determination of the disputes between the parties. The contempt jurisdiction should be confined to the question whether there has been any deliberate disobedience of the order of the court and if the conduct of the party who is alleged to have committed such disobedience is contumacious. The court exercising contempt jurisdiction is not entitled to enter into questions which have not been dealt with and decided in the judgment or order, violation of which is alleged by the applicant. The court has to consider the direction issued in the judgment or order and not to consider the question as to what the judgment or order should have contained. At the cost of repetition, be it stated here that the court exercising contempt jurisdiction is primarily concerned with the question of contumacious conduct of the party, which is alleged to have committed deliberate default in complying with the directions in the judgment or order. If the judgment or order does not contain any specific direction regarding a matter or if there is any ambiguity in the directions issued therein then it will be better to direct the parties to approach the court which disposed of the matter for clarification of the order instead of the court exercising contempt jurisdiction taking upon itself the power to decide the original proceeding in a manner not dealt with by the court passing the judgment or order. If this limitation is borne in mind then criticisms which are sometimes levelled against the courts exercising contempt of court jurisdiction "that it has exceeded its powers in granting substantive relief and issuing a direction regarding the same without proper adjudication of the dispute" in its entirety can be avoided. This will also avoid multiplicity of proceedings because the party which is prejudicially affected by the judgment or order passed in the contempt proceeding and granting relief and issuing fresh directions is likely to challenge that order and that may give rise to another round of litigation arising from a proceeding which is intended to maintain the majesty and image of courts.

12. Judging the case in hand on the touchstone of the principles noted

above, we find that the directions issued by the Division Bench in the impugned judgment in effect granted substantive reliefs not covered by the judgment/order passed in the original proceeding. In the judgment, no direction was issued by the High Court that the writ petitioners will be admitted to the cadre of Upper Division Clerks/Assistants in the Directorate. As noted earlier, they have all along been holding the posts of Clerk-cum-Cash Collector which are ex cadre posts. Entry of such persons into the cadre of Upper Division Clerks/Assistants has to be considered taking into account various aspects of the matter. It is one thing to say that the benefits under the government order may be extended to the writ petitioners also and extending benefits of the government order to the writ petitioners is one thing and directing their entry into the existing cadre of Office Assistants is a different thing. Such a dispute can only be determined on consideration of all relevant aspects of the matter and cannot be and should not be ordered in the summary proceeding for taking action for contempt of court. If the High Court felt that the grievance of the writ petitioners relating to the question of their entry into the cadre of Upper Division Clerks/Assistants has not been dealt with by the Court and specific direction has not been issued while disposing of the writ petitions/appeals then the appropriate course was to leave it to the parties (writ petitioners) to agitate the matter before the competent forum. Further the question of entry of holders of ex cadre posts, like the writ petitioners, into an existing cadre is a matter of policy which the Government has to decide. Be it noted here that on consideration of the matter the High Court held that no action for contempt of court need be taken against the respondents in the writ petition for deliberate disobedience of the judgment or order passed by the High Court. Thereafter it was not open to the court to pass any order granting substantive relief to the applicants (writ petitioners) on the plea that the question raised was also a part of their grievance in the writ petition.

13. In the facts and circumstances of the case, we are constrained to hold that the judgment/order passed by the High Court was without jurisdiction. In the result, the appeals are allowed. The judgment/order under challenge is set aside. The petition filed by the writ petitioners for taking action for contempt of court against the respondents is dismissed."

22. Taking a similar view in **Director of Education, Uttaranchal and Ors. Vs. Ved Prakash Joshi and Ors.**, it was held that review of decision, contempt in respect of which is in question, in contempt proceedings was not permissible. It was reiterated that all that the contempt court is concerned with is whether the decision in question has been complied with or not, and it cannot test the correctness or otherwise of the order, traverse beyond it or give additional directions. The observations made in the judgment are being extracted below :-

"7. While dealing with an application for contempt, the Court is really concerned with the question whether the earlier decision which has received its finality had been complied with or not. It would not be permissible for a court to examine the correctness of the earlier decision which had not been assailed and to take a view different than what was taken in the earlier decision. A similar view was taken in K.G. Derasari v. Union of India [(2001)10 SCC 496]. The court exercising contempt jurisdiction is primarily

concerned with the question of contumacious conduct of the party who is alleged to have committed default in complying with the directions in the judgment or order. If there was no ambiguity or indefiniteness in the order, it is for the party concerned to approach the higher court if according to him the same is not legally tenable. Such a question has necessarily to be agitated before the higher court. The court exercising contempt jurisdiction cannot take upon itself power to decide the original proceedings in a manner not dealt with by the court passing the judgment or order. Right or wrong the order has to be obeyed. Flouting an order of the court would render the party liable for contempt. While dealing with an application for contempt, the court cannot traverse beyond the order, non-compliance of which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional directions or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible. In that view of the matter, the order of the High Court is set aside."

23. The question as to whether a Court exercising contempt jurisdiction could pass supplemental order to the main order passed in the writ petition was taken up in the case of **Sudhir Vasudeva, Chairman and Managing Director, Oil and Natural Gas Corporation and others Vs. M.George Ravishekaran and others**, and it was held that the directions issued by the contempt judge which virtually amounted to supplementing the directions contained in the original order was beyond jurisdiction and could not be countenanced. The observations made in the judgment are as follows :-

"19. The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act, 1971. It is a drastic power which, if misdirected, could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution. This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self-determination of the sweep, meaning and effect of the order in respect of which disobedience is alleged. The Courts must not, therefore, travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self-evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or wilful violation of the same. Decided issues cannot be reopened; nor can the plea of equities be considered. The Courts must also ensure that while considering a contempt plea the power available to the Court in other corrective jurisdictions like review or appeal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate in other jurisdictions vested in the Court, as noticed above. The

above principles would appear to be the cumulative outcome of the precedents cited at the Bar, namely, Jhareswar Prasad Paul v. Tarak Nath Ganguly [(2002) 5 SCC 352, V.M. Manohar Prasad v. N.Ratnam Raju [(2004) 13 SCC 610], Bihar Finance Service House Construction Coop. Society Ltd. v. Gautam Goswami [(2008) 5 SCC 339] and Union of India v. Subedar Devassy PV[(2006) 1 SCC 613].

20. Applying the above settled principles to the case before us, it is clear that the direction of the High Court for creation of supernumerary posts of Marine Assistant Radio Operator cannot be countenanced. Not only the courts must act with utmost restraint before compelling the executive to create additional posts, the impugned direction virtually amounts to supplementing the directions contained in the order of the High Court dated 2-8-2006...the direction to create supernumerary posts at the stage of exercise of the contempt jurisdiction has to be understood to be an addition to the initial order passed in the writ petition. The argument that such a direction is implicit in the order dated 2-8-2006 [M. George Ravishekeran v.ONGC Ltd., WP No. 21518 of 2000, order dated 2-8-2006 (Mad)] is self-defeating. Neither is such a course of action open to balance the equities i.e. not to foreclose the promotional avenues of the petitioners, as vehemently urged by Shri Rao. The issue is one of jurisdiction and not of justification. Whether the direction issued would be justified by way of review or in exercise of any other jurisdiction is an aspect that does not concern us in the present case. Of relevance is the fact that an alternative direction had been issued by the High Court by its order dated 2-8-2006 [M. George Ravishekeran v. ONGC Ltd., WP No. 21518 of 2000, order dated 2-8-2006 (Mad)] and the appellants, as officers of the Corporation, have complied with the same. They cannot be, therefore, understood to have acted in wilful disobedience of the said order of the Court. All that was required in terms of the second direction having been complied with by the appellants, we are of the view that the order dated 2-8-2006 passed in M. George Ravishekeran v. ONGC Ltd. [M. George Ravishekeran v. ONGC Ltd., WP No. 21518 of 2000, order dated 2-8-2006 (Mad)] stands duly implemented. Consequently, we set aside the order dated 19-1-2012 passed in Contempt Petition No. 161 of 2010, as well as the impugned order dated 11-7-2012 passed in Sudhir Vasudeva v. M. George Ravi Shekeran [Contempt Appeal No. 2 of 2012, decided on 11-7-2012 (Mad)] and allow the present appeal."

24. The scope of contempt jurisdiction is to see whether the order of the Court has been complied with - in substance - or deliberately flouted leading to an inference of a "wilful, deliberate and contumacious" violation of the order of which non-compliance is alleged. In a case, such as the present one, where there is no direction to dispose of the applications/representation of the petitioner in a particular manner, the correctness, legality or propriety of the order passed by the respondent authority, in compliance of the directions under the order of the writ Court, in our opinion, cannot be gone into in contempt proceedings, since its scope, even otherwise is extremely limited and narrow. The correctness or otherwise of the orders which have been passed by the respondent, if required, may be tested in appropriate

proceedings but not in contempt jurisdiction.

25. Once the directions as contained in the judgment and order dated 8th December, 2016 had been complied with, the necessity of passing of the two orders could possibly not have arisen in contempt jurisdiction. The reason is that the two orders expand the scope of contempt jurisdiction and go behind the directions as contained in the judgment and order dated 8th December, 2016, passed by the writ Court. In the event, the writ petitioners were not satisfied, their remedies would lie elsewhere but certainly not by invoking the contempt jurisdiction of this Court under section 12 of the Contempt of Courts Act, 1971.

26. We, therefore, have no hesitation to set aside the two orders dated 31st July, 2019 and 21st August, 2019, passed by the learned Single Judge in Contempt Application (Civil) No.4283 of 2018 (Shiv Mohan Dwivedi Vs. Vinod Kumar Sharma) and the same are accordingly set aside.

27. The Special Appeal is, thus, allowed.

(2020)03-05ILR A1176
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

WRIT A No. 1915 of 2019

C/M, Shyamlal Khandelwal Inter College, Vishnuganj, Kannauj ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Yogesh Kumar Saxena

Counsel for the Respondents:
C.S.C.

A. Constitution of India-Articles 14, 16(1); U.P. Intermediate Education Act, 1921-Chapter III, Regulation 2(2) – Service – Interpretation of statute - Quota/Promotion -The question before the Court in the present petition is that whether the post of the Clerk(s) and class IV employee(s) in an educational institution recognized under U.P. Intermediate Education Act, 1921, would have to be necessarily clubbed together for determining the 50% promotion quota, for recruitment to the post of Head Clerk and Clerk. (Para 1)

The Court found different and contrary interpretations/observations available of the abovementioned Regulation:

1. Once a Clerk is promoted as Head Clerk, his appointment to the post of Head Clerk is to be counted as a post held by way of promotion even if the initial appointment to the post of Clerk was by way of direct recruitment. The posts of Head Clerk and Clerk are to be considered as a single cadre for the purpose of applying the quota of promotion and direct recruitment. (Para 7 to 9)

This implies, where there are two posts i.e. of Head Clerk and of Clerk, one being the promotional post, the other will always have to be filled by way of direct recruitment, which hampers the chances of Class IV employee to be promoted as Clerk, for all times to come. (Para 10, 14, 18)

2. Even though a Clerk would be promoted as Head Clerk, he would always retain the colour of the source of his recruitment. (Para 11, 12) Such observation is contrary to the previous observation. (Para 13)

B. Fundamental Rule 9(4) defines the word 'cadre' to mean the strength of a service or part of a service sanctioned as a separate unit. In the legal sense, the word 'cadre' is not synonymous with 'service'. (Para 17)

Where promotion is to be made from two distinct feeding cadres to one post then respective quota of promotion viz-a-viz each

distinct feeding cadre is separately assigned. Regulation 2(2) deals with avenues of promotion for two distinct posts from two distinct feeding cadres. (Para 16)

C. Questions referred: (1) Whether the language employed in Regulation 2(2) requires that the post of Clerk(s) and Class IV employee(s), carrying different pay scale and requiring distinct eligibility would have to be necessarily clubbed together and treated as one unit, for working out 50% reservation for promotion to the post(s) of Head Clerk and Clerk?
(2) Whether the language employed in the Regulation 2(2), has to be literally construed, even if it curtails the right of a class IV employee to be considered for promotion, on account of clubbing of post(s) so as to determine the 50% promotional quota?
(3) Whether the view that the colour of initial appointment would be retained by an employee, even after he gets promoted, lays down the correct law? (Para 19) (E-4)
Referred to larger bench.

Precedent referred:

1. Malkhan Singh Vs. St. of U.P. & ors., 2011 (1) ADJ 638 (Para 3, 6, 15)

2. Dina Nath Vs. St. of U.P. & ors., 2009 (10) ADJ 671 (Para 4, 6, 15)

3. C/M Adarsh Inter College, Achchalda & anr. Vs. St. of U.P. & ors., 2004 (4) ESC (Alld.) 2056 (Para 5)

4. Ramji Singh Vs. District Inspector of Schools, Ballia & ors., 2006 (2) ESC 1015 (Para 5)

5. Jagvir Singh Vs. State of U.P. & ors., Special Appeal No. 1535 of 2009 (Allahabad) (Para 7, 13, 14)

6. Hira Man Vs. St. of U.P. & ors., (1997) 11 SCC 630 (Para 10)

7. Gyan Singh Vs. St. of U.P. & ors., Writ-A No. 31988 of 2014 (Allahabad) (Para 11, 14)

8. Dilip Rai Vs. St. of U.P. & ors., Writ-A No. 16965 of 2017 (Allahabad) (Para 12)

9. K.S. Srinivasan Vs. U.O.I., AIR 1958 SC 419 (Para 17)

10. Chakradhar Paswan Vs. St. of Bihar, (1988) 2 SCC 214 (Para 17)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.

1. Whether the post of Clerk(s) and class IV employee(s) in an educational institution recognized under the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'Act of 1921') would have to be necessarily clubbed together for determining the fifty percent promotion quota, for recruitment to the post of Head Clerk and Clerk, on account of the language employed in regulation 2(2) of the Regulations framed under Chapter III of the Act of 1921, is the question arising for consideration in this matter.

2. Regulation 2(2) of the Regulations framed under Chapter - III of the Act of 1921 contains relevant provision for promotion and is extracted hereinunder:-

"2(2) Fifty per cent of the total number of sanctioned posts of head clerk and clerks shall be filled among the serving clerks and employees through promotion. If employees possesses prescribed eligibility and he has served continuously for 5 years on his substantive post and his service record is good, then promotion shall be made on the basis of seniority, subject to reject of the unfit.

If any employee is aggrieved by any decision or order of the management committee in this respect then he can made representation against it to the Inspector within two weeks from the date of such decision or order. Inspector on such representation can make such orders as he thinks fit. Decision of the Inspector would

be final and promptly executed by the management.

Note--In calculating fifty per cent of posts parts less than half would be left and half or more than half post would be deemed as one."

3. What would be the method applicable for effecting promotion as per the aforesaid provision, has been a subject matter of examination by this Court in various cases. Reference to some of such decisions would be apposite at this stage. In Malkhan Singh vs. State of U.P. and others, 2011 (1) ADJ 638, following observations have been made in para 10 & 11 of the judgment which are reproduced hereinafter:-

"10. The short controversy engaging attention in these writ petitions is, "whether one post of Assistant Clerk, with which we are concerned, can be filled in by promotion or by direct recruitment."

11. Regulation 2, Chapter III of the Regulations under the Intermediate Education Act, 1921 provides for filling of at least 50% of class III post by promotion. The cadre, in the case in hand, consist of one post of Head Clerk and three post of Assistant Clerk. *Though the post of Head Clerk in status and pay scale is higher to the post of Assistant Clerk but for the purpose of Regulation 2 Chapter III of the Regulations, irrespective of the pay scale and status, all 4 post are to be considered as a single cadre for the purpose of applying the quota of promotion and direct recruitment.* It is also not disputed by the parties that the post of Head Clerk can be filled in only by promotion. If the post of Head Clerk would have been occupied meaning thereby somebody is appointed, it would result in saying that one Class III post is already filled in by promotion, in rest of the post of Assistant Clerks, the quota of promotion and direct recruitment could have been calculated accordingly. It has been held that if there is only one post or three post, then the solitary post or two post out of three shall be filled in by promotion since promotion quota cannot be less than 50 per cent. In the present case since the post of Head Clerk is liable to be filled in by promotion and therefore, the DIOS has concluded that out of three posts of Assistant Clerk two have necessarily to be filled in by direct recruitment and only one by promotion and that too by applying reservation."

4. In Dina Nath vs. State of U.P. and others, 2009 (10) ADJ 671, following observations have been made in para 9 which are reproduced hereinafter:-

"9. The question up for consideration is slightly different. The submission of learned Counsel for petitioner is that the post of Head Clerk being 100% a promotion post under the Regulations has to be excluded for the purpose of determining respective quota of promotion on the post of Clerk and this question I have to consider in the light of the relevant Regulation 2 Chapter III. *It is clear from Regulation 2(2) that in order to determine 50% promotion quota, the posts of Clerk and Head Clerk both have to be considered as a single unit. Promotion of a Clerk to the post of Head Clerk is also to be treated in promotion quota like promotion from Class IV to Class III.* The submission of Sri Mukherji that the Head Clerk, being a different cadre, is available only for the persons working as Clerk and same cannot be treated at par with the post available for promotion to Class-IV to Class-III and, therefore, in order to form 50% quota for promotion, the post of Head

Clerk has to be excluded is thoroughly misconceived and in the teeth of clear language of Regulation 2(2) which provides that 50% promotion quota has to be filled in not only from Class-IV employees but also from Class-III employees and, therefore, if a Class III employees, i.e., a Clerk is promoted as Head Clerk, it is to be treated as a vacancy filled in by promotion and shall count while calculating 50% promotion quota in the entire cadre. *It is no doubt true that for the purpose of pay scale etc. Head Clerk constitute a different cadre than the post of Clerk but for the purpose of determining promotion quota, Regulation 2(2) clearly provides that it is the entire sanctioned strength of Head Clerk and Clerks which would be taken into account for the purpose of determining 50% promotion quota.* Accepting the submission of Sri Mukherji would mean that certain words in Regulation 2(2) have to be treated redundant, which is not permissible. It is well settled principle of interpretation that if the statute is unambiguous, clear and does not admit of any doubt, the Court should interpret the same in a manner so as to give effect to each and every word contained therein without either adding or omitting any word therefrom. It is a harmonious and plain reading of the statute particularly when the language does not admit of any doubt."

5. Reliance is also placed upon the observations contained in paragraph 4 of the judgment in C/M Adarsh Inter College, Achchalda and another vs. State of U.P. and others, 2004 (4) ESC (Alld.) 2056, which is also extracted hereinafter:-

"4. The argument is wholly misconceived. Regulation 2 of Chapter III of the Regulations made under the U.P. Intermediate Education Act, 1921 provide that for calculating the 50% quota, the post of Head Clerk is to be included with the post of clerks. There is only one post of Head Clerk, and two posts of clerks in the institution, out of which only one post has been filled up by direct recruitment and the other by promotion. The third post according to the Note appended to Regulation 2 has to be filled up by promotion of a class IV employee."

To similar effect are the observations of a Division Bench of this Court in Ramji Singh vs. District Inspector of Schools, Ballia and others, 2006 (2) ESC 1015.

6. This Court in Dina Nath (supra) and Malkhan Singh (supra) has taken the view that though the post of Head Clerk in status and pay scale is higher to the post of Clerk but for the purpose of regulation 2(2) of Chapter III of the Regulations, irrespective of the pay scale and status, the post(s) of Head Clerk and Clerk are to be considered as a single unit for the purpose of applying the quota for promotion and direct recruitment.

7. At this stage it would be appropriate to refer to a Division Bench judgment of this Court rendered in Special Appeal No.1535 of 2009 (Jagvir Singh vs. State of U.P. and others). In the aforesaid matter before the Division Bench, one Bhupendra Singh Chahar, was initially appointed as Clerk by way of direct recruitment. Thereafter he was promoted to the post of Head Clerk. The question that fell for consideration before the Division Bench was whether for the purpose of calculating the quota of promotion and direct recruitment, the appointment of Bhupendra Singh Chahar to the post of Head Clerk, should be counted as a post

held by a direct recruit or by a promote. The Division Bench held thus:-

"Mr. Ojha, alternatively submits that promotion of Chahar as a Head Clerk cannot be counted for the purpose of promotion. This submission is also misconceived. The next higher post of a Clerk is that of a Head Clerk and when Chahar has been promoted as a Head Clerk that has to be counted for calculating the percentage of promotion."

8. Two propositions, one explicit and another implicit, clearly emerge out of the observations of the Division Bench. The explicit observation is that once a Clerk is promoted as Head Clerk, his appointment to the post of Head Clerk is to be counted as a post held by way of promotion even if the initial appointment to the post of Clerk was by way of direct recruitment.

9. Moreover, as the Division Bench has been pleased to hold that at the time of making the calculations for determining the number of seats occupied by direct recruit and promotee, the appointment to the post of Head Clerk will be apportioned towards promotional quota and the remaining vacancies will have to be worked out accordingly, it becomes implicit that the Division Bench has applied the quota rule after considering the post of Head Clerk and Clerk to be forming a single cadre. Thus the Division Bench implicitly upholds the proposition that the posts of Head Clerk and Clerk are to be considered as a single cadre for the purpose of applying the quota of promotion and direct recruitment.

10. Once this Court applies the above enunciated principles to the facts of the instant matter, where there are two posts i.e. one being the post of Head Clerk and the other being the post of Clerk, it follows that one of the two posts will have to be filled by promotion and the other post will have to be filled by direct recruitment. As appointment to the post of Head Clerk, in light of the explicit observations of the Division Bench in Jagvir Singh's case (supra) will be seen as a promotion post, therefore the remaining one post of Clerk would always then have to be filled by way of direct recruitment. However, this leads to an anomalous situation. The chances of the class four employee to be promoted as Clerk gets scuttled in the process, for all times to come. The right of a class IV employee to be considered for promotion against a class III post is well recognized under the regulations. Fifty percent of the post(s) of Clerk are to be filled by promotion from class IV employees. While clubbing the post of Clerk and Head Clerk for determining fifty percent posts for promotion under regulation 2(2), an interpretation which takes away the right of a class IV employee to be considered for promotion would have to be avoided. It is by now well settled that the right to be considered for promotion in the relevant service rules is a fundamental right and it cannot be curtailed (see: *Hira Man vs. State of U.P. and others, (1997) 11 SCC 630).* A principle of interpretation which results in denying right of consideration for promotion to a class IV employee would have the effect of violating Article 14 and 16(1) of the Constitution of India.

11. A similar situation arose before this Court in Writ-A No.31988 of 2014 (Gyan Singh vs. State of U.P. and others). This Court in the aforesaid case, however, observed that no such anomalous situation would arise because even though a Clerk would be promoted as Head Clerk, he would always retain the colour of the

source of his recruitment. In other words if any person was initially appointed as clerk by way of direct recruitment and then internally he gets promoted as Head Clerk, he would in the eyes of law be holding the post as a direct recruit and the appointment now to be made to the post of Clerk will have to be done through promotion. Likewise, if any class IV employee is promoted as as Clerk and subsequently he gets promoted as Head Clerk, he would be said to be holding the post as a promotee as his initial source of recruitment was promotion. The relevant extract of the judgment of this Court in Gyan Singh (supra) expounding the above position is reproduced hereinafter:-

"One Chandra Kumar Pathak, who was a Class-IV employee in the institution was promoted on the post of Clerk on 8.7.2009. Subsequently, by virtue of putting in certain number of years of service, he was promoted within the cadre on the post of Head Clerk on 21.4.2014, which resulted in vancancy of one post in the cadre.

It is to be noted that at the relevant point of time there were only two Class-III posts in the institution. Sri Chandra Kumar Pathak was a promotee of Class-IV to Class III post. 50% quota reserved for promotion from Class-IV to Class-III post appears to have been filled up by his promotion and one remaining post is now to be filled up by direct recruitment.

The respondent no.5-Nirmal Kumar Pandey has been appointed on the said post on 15.5.2014 under Regulation 101 to 107 of Chapter III of the Regulation on account of death of his father, who was a Principal in another aided Intermediate College. The petitioner has challenged such an appointment of respondent no.5 on the ground that since one post is already filled up by promotion, which is the post of Head Clerk then the remaining post cannot be filled up by another promotion. As such, the claim of the petitioner for being appointed as a promottee will never occur since the post of Head Clerk is a promotion post, therefore the remaining one post will fall under direct recruitment quota and such an anomaly is not contemplated in the rules.

I have considered the submissions of the learned counsel for the petitioner.

On the first flush, the argument of Sri Siddharth Khare, learned counsel appearing for the petitioner appears to be logical but a close scrutiny of the provision indicates the fallacy in the same. The Head Clerk and the Clerk are from one cadre. It is the internal arrangement within the cadre to be given nomenclature of Head Clerk with certain pecuniary benefit for the Clerk to be promoted to that post after putting certain years of service. This would not mean that the Head Clerk and the Clerk in itself from a separate cadre. Class III cadre is inclusive of Head Clerk and the Clerk and forms one single cadre. If there are only two posts, one is to be filled up by promotion and another by direct recruitment.

The vacancy that occurred upon which the petitioner and respondent no.5 are vying, was the vacancy due to promotion of one Chandra Kumar Pathak to the post of Head Clerk, who himself was a promotee from Class-IV to Class-III post as Clerk. As such, one post is to be filled by promotion and the another remaining post is to be filled through direct recruitment. The respondent no.5 being a direct recruit is entitled for the said post, if he is otherwise eligible, since the 50% quota of promotee is already filled upon promotion of Chandra Kumar Pathak from class IV to Class III on 8.7.2009."

12. The aforesaid position has been elucidated succinctly by the same learned

judge in an interim order rendered in Writ-A No.16965 of 2017 (Dilip Rai vs. State of U.P. and others) which is being reproduced hereinunder:-

"Admittedly there are six posts of Class-III in the institution including that of the Head Clerk. The post of Head Clerk is to be filled from amongst senior most Clerks in the institution, but the post of Head Clerk is a part of the same cadre. Even if one is promoted to the post of Head Clerk, but at the time of consideration of posts as to how many posts shall be filled by promotion and how many posts shall be filled by direct recruitment it has to be seen whether the person who was promoted on the post of Head Clerk how did he join the cadre. If he was a direct recruitee then the post of Head Clerk will be treated as direct recruitment and if he was promoted on the post of Clerk and further promoted on the post of Head Clerk, then the post of Head Clerk will be treated to be a post through promotion amongst six posts including that of Head Clerk."

13. Though the above interpretation appears to be a very equitable solution to the problem at hand, but resort to such an interpretation would be in teeth of the observations made by the Division Bench in Jagvir Singh's case (supra) where the Division Bench has expressly observed that the next higher post of a clerk is that of a Head Clerk and when an Clerk is promoted as a Head Clerk, even though his initial source of appointment would have been direct recruitment, the same has to be counted for calculating the percentage of promotion.

14. Thus this Court is faced with a piquant situation as on one hand if the Court follows the dictum of the Division Bench in Jagvir Singh's case (supra) an anomalous situation, as elucidated above, surfaces inasmuch as the sole post of Clerk for all times to come would be filled by way of direct recruitment and the right of the class IV employee to be considered for promotion to the post of Clerk under Regulation 2(2) would be effaced forever. On the other hand if this Court goes by the interpretation accorded to regulation 2(2), contained in Chapter III of the Regulations framed under the Act of 1921 by this Court in Gyan Singh's case (supra) this Court would be ignoring the dictum of the Division Bench in Jagvir Singh's case (supra).

15. Judgments of this Court in Dina Nath (supra) and Malkhan Singh (supra) clearly acknowledge that post(s) of Clerk and Head Clerk carry different scale of pay and eligibility (Five years working on a substantive post of Clerk is essential for promotion to the post of Head Clerk whereas similar period of working on a class IV post is required for promotion to the post of Clerk). The only reason assigned for clubbing the two distinct posts of Clerk and Head Clerk for fifty percent promotion quota, by treating both the posts to be a single unit, is the use of expression *fifty percent of the total number of sanctioned posts of Head Clerk and Clerk* in Regulation 2(2).

16. Ordinarily, where promotion is to be made from two distinct feeding cadres to one post then the respective quota of promotion viz-a-viz each distinct feeding cadre is separately assigned. Regulation 2(2), however, deals with avenues of promotion for two distinct posts from two distinct feeding cadres. The promotion from Class IV post to the post of Clerk is one while the other promotion is from the

post of Clerk to Head Clerk. In case fifty percent promotion quota is reckoned for both the promotional posts, separately, from two distinct feeding cadres then there would be no difficulty. It is only when two distinct feeding cadres are clubbed together for promotion to two different posts that the difficulty arises, as is the case in hand. Right to be considered for promotion to the post of Clerk, from Class IV post, once is recognized under Regulation 2(2), then such a right cannot be taken away by applying a particular principle of construction.

17. Attributes of a cadre have otherwise been clearly outlined in service jurisprudence. It is primarily the strength of a service which is sanctioned as a separate unit (see: *K.S. Srinivasan Vs. Union of India, AIR 1958 SC 419; Chakradhar Paswan Vs. State of Bihar, (1988) 2 SCC 214).* In Chakradhar Paswan (supra), the Apex Court has observed as under in paragraph 8:-

"8.....In service jurisprudence, the term 'cadre' has a definite legal connotation. In the legal sense, the word 'cadre' is not synonymous with 'service'. Fundamental Rule 9(4) defines the word 'cadre' to mean the strength of a service or part of a service sanctioned as a separate unit. The post of the Director which is the highest post in the directorate, is carried on a higher grade or scale, while the posts of Deputy Directors are borne in a lower grade or scale and therefore constitute two distinct cadres or grades. It is open to the Government to constitute as many cadres in any particular service as it may choose according to the administrative convenience and expediency and it cannot be said that the establishment of the Directorate constituted the formation of a joint cadre of the Director and the Deputy Directors because the posts are not interchangeable and the incumbents do not perform the same duties, carry the same responsibilities or draw the same pay. The conclusion is irresistible that the posts of the Director and those of the Deputy Directors constitute different cadres of the Service."

18. While interpreting a statutory provision the Court would have to see as to whether the principle of construction applied for the purpose subserves the object for which it is introduced or it would violate the right of the person conferred by law. If it is found that the right of a person to be considered for promotion is being taken away only on account of the construction applied to the statute then a different interpretation may have to be resorted so that the right created by law is protected. Or else, the action itself would be rendered arbitrary and violative of Article 14 of the Constitution of India.

19. Since, interpretation of Regulation 2(2) in the manner done is likely to effect chances of promotion available to a Class IV employee in large number of institutions, I am of the considered opinion that the following issue requires consideration by a larger bench, to be constituted by Hon'ble the Chief Justice for answering following questions:-

(i) Whether, the language employed in Regulation 2(2) of the Regulations framed under Chapter III of the Act of 1921 requires that the post of Clerk(s) and Class IV employee(s) in an educational institution recognized under the Act of 1921, carrying different scale of pay and requiring distinct eligibility would have to be necessarily clubbed together and

treated as one unit, for working out fifty percent reservation for promotion to the post(s) of Head Clerk and Clerk, particularly when the promoted post(s) also carry distinct pay-scale and eligibility and do not form part of one cadre?

(ii) Whether, the language employed in Regulation 2(2) of the Regulations framed under Chapter III of the Act of 1921 has to be literally construed, even if it curtails the right of a class IV employee to be considered for promotion, on account of clubbing of post(s) so as to determine the fifty percent promotional quota as is laid down in the case of Dina Nath (supra) and in the case of Malkhan Singh (supra)?

(iii) Whether, the view taken by this Court in the case of Gyan Singh (supra) and in the case of Dilip Rai (supra) that colour of initial appointment would be retained by an employee, even after he gets promoted (be it direct recruitment or by promotion to obviate the difficulty caused due to clubbing of distinct posts in the feeding cadre), lays down the correct law?

(2020)03-05ILR A1184
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.02.2020

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE MANISH KUMAR, J.

Service Bench No. 2019 of 2000

Smt. Chandra Mukhi ...Petitioner
Versus
Union of India ...Respondent

Counsel for the Petitioner:
O.P. Srivastava, Manish Nigam, O.P. Srivastava, Sushil Kumar Singh

Counsel for the Respondent:
Manik Sinha, B.K. Shukla

A. Service – Pensionary benefits - The date of birth entered in the service book is taken as conclusive evidence for the purpose of retirement and it cannot be altered subsequently – Since there was no change or alteration in the date of birth in the service book by the Department and the entry was verified by the petitioner's husband himself, there was no occasion for providing any opportunity of hearing. (Para 7, 9, 12, 13, 15)

B. The stale claim and belated applications for alteration of the date of birth recorded in the service book after unexplained and inordinate delay, need to be scrutinized carefully and interference is made sparingly and without circumspection – In the present case, the dispute of date of birth was raised after attaining the age of superannuation. (Para 11, 17)

C. Pension is not a bounty but it is hard-earned benefit for long service which cannot be taken away – Withholding of retiral benefits is arbitrary and unfair on the part of the employer. The plea that the husband of the petitioner did not approach for payment of these benefits is legally not tenable. (Para 20 to 23)

Writ petition partly allowed. (E-4)

Precedent followed:

1. U.O.I. Vs. Harnam Singh, 1993 AIR 1367 (Para 16)

2. U.O.I. & ors. Vs. Kantilal Hematram Pandya, (1995) 3 SCC 17 (Para 17)

3. D.S. Nakara & ors. Vs. U.O.I., 1983 AIR 130; 1983 SCR (2) 165 (Para 22)

4. Grid Corporation of Orissa & ors. Vs. Rasanadas Das, (2003) 10 SCC 297 (Para 22)

5. U.P. Raghavendra Acharya & ors. Vs. St. of Kar. & ors., (2006) 9 SCC 630 (Para 22)

6. St. of Kerala & ors. Vs. M. Padmanabhan Nair, 1985 AIR 356; 1985 SCR (2) 476 (Para 23)

Petition challenges judgment dated 28.07.2000, passed in Review Petition No. 23 of 1997.
Judgment dated 07.07.1997, passed in Original Application No. 256 of 1994.
Judgment dated 12.02.1994, passed by Assistant Engineer (M.G.) North Eastern, Railways, Gonda.

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

1. The present writ petition has been preferred by the petitioner for following reliefs which are quoted hereunder:-

(i) For quashing of the judgment dated 28.07.2000 passed in Review Petition No. 23 of 1997 passed by opposite party No. 6

(ii) For quashing of the judgment dated 07.07.1997 passed in Original Application No. 256 of 1994 passed by opposite party No. 6

(iii) For quashing of the judgment dated 12.02.1994 passed by Assistant Engineer (M.G.) North-Eastern, Railways, Gonda, by which the husband of the petitioner was retired from service in illegal and arbitrarily manner

(iv) For directing the opposite parties to make full payment of salary to the petitioner from 14.02.1992 till 12.02.1994 treating husband of the petitioner as in continuous service with all consequential benefits.

(v) For directing the opposite parties for payment of entire pensionary benefits to the petitioner with interest at market rate and also direct the opposite parties for payment of family pension to the petitioner.

2. A dispute about date of birth of petitioner's husband exists. According to petitioner, the correct date of birth of her husband is 15.10.1942 but in Card "A" it was entered as 02.02.1935 due to which he was retired by order dated 12.02.1994 with effect from 14.02.1994. Felling aggrieved by the order dated 12.02.1994, the petitioner's husband preferred an Original Application No. 256 of 1994 before the Central Administrative Tribunal.

3. It was stated that applicant joined service in the Railways as "Gangman" on 19.04.1966 at the age of about 24 years. By the order dated 12.02.1994, he was made to retire with effect from 14.02.1994 at the age of 52 years by treating his date of birth to be 02.02.1935 whereas it was 15.10.1942.

4. In support of the contention raised above, the learned counsel for the petitioner has placed reliance on Card "B", seniority list and medical reports wherein the date of birth of her husband was entered as 15.10.1942.

5. The date of birth of the husband was changed by the authorities from 15.10.1942 to 02.02.1935 in Card "A". It has further been submitted that entry of date of birth in the service book is a conclusive proof and it cannot be altered subsequently without affording any opportunity of hearing.

6. The learned Tribunal has failed to consider that Card "A", wherein the date of birth was shown as 02.02.1935, is a subsequent document, hence the same was wholly irrelevant and could have taken as primary evidence for the purpose of ascertaining the date of birth.

7. The learned Tribunal has ignored the provisions of law under which the date

of birth entered in the service book is taken as conclusive evidence for the purpose of retirement and it cannot be altered subsequently. It has further been submitted if it is presumed that the date of birth of the husband was 02.02.1935, he would have been 31 years of age at the time of his initial appointment in the year 1966 whereas the maximum age for entering in the service was 25 years and if the date of birth of the husband is taken as 15.10.1942, he was about 24 years i.e. less than 25 years at the time of initial appointment.

8. Per contra, the learned counsel representing the Railways produced the service book in compliance of the earlier order of this Court. In the service book, date of birth of petitioner's husband was entered as 02.02.1935 and the same was verified by him by putting his signature and thumb impression.

9. Since the date of birth was verified by the petitioner's husband himself and if there was no alteration in the service book then there would arise no occasion for providing any opportunity of hearing.

10. It has further been contended that the husband of the petitioner was initially appointed as "Causal Labour" in the Department in the year 1956 and the services were regularized in the year 1996.

11. It has further been contended by the learned counsel for the Railways that after attaining the age of superannuation, an employee cannot dispute about his date of birth entered in the service record.

12. After hearing the learned counsel for the respective parties and examining the record which was produced before this Court, the date of birth of petitioner's husband entered in the service book as 02.02.1935 which was verified by the husband by putting his signature and thumb impression.

13. There is no alteration or cutting in the date of birth in the service book. Service book was also shown to the learned counsel for the petitioner and after the perusal of the same, he was unable to dispute the entry in the service book containing date of birth as 02.02.1935. There was no cutting or alternation in the entry in the service book.

14. If the contention of the petitioner is accepted that the date of birth of her husband is 15.10.1942 then at the time of initial appointment as "Causal Labour" in the year 1956, the age of the husband would have been about 14 years whereas the admissible age for entry in the service was between 18 to 25 at that time. So at any stretch of imagination the petitioner's husband would have not been given appointment and if it is calculated on the date of birth of 02.02.1935 the age would have been about 24 years which is within the maximum age limit of 25 years, thus the contention of the learned counsel for the petitioner cannot be accepted.

15. Since there is no change or alteration in the date of birth in the service book by the Department and the entry of date of birth is verified by the husband of the petitioner, there was no occasion for providing any opportunity of hearing. According to the petitioner admittedly entry in the service book is the conclusive proof of determination of date of birth than three documents i.e. Card "B", medical reports and seniority list would be irrelevant for the purposes of determination.

16. The Apex Court in the case of ***Union of India Vs. Harnam Singh, 1993 AIR 1367,*** has been held that the date of birth entered in the service book is relevant for the reason that right to continue in service stands decided by its entry in the service book. A government servant, who has declared his age at the initial stage of the employment is precluded from making a request for correction of his age. Only exception to claim correction in date of birth is if he is in possession of the irrefutable proof relating to his date of birth and must do so without unreasonable delay.

17. In the case of ***Union of India & Ors. Vs. Kantilal Hematram Pandya, 1995 SCC (3) 17,*** it has been held that the stale claim and belated applications for alter-ation of the date of birth recorded in the service book after unexplained and inordinate delay, that too on the eve of retirement need to be scrutinized carefully and interference is made sparingly and without circumspection. In the present case, the dispute of date of birth was raised after attaining the age of superannuation.

18. Petitioner's husband filed the Original Application before Central Administrative Tribunal, to question the date of birth when he himself had verified it in the service record by putting his signature and thumb impression.

19. Under these circumstances, this Court does not find any illegality in the judgment dated 28.07.2000 passed in Review Petition No. 23 of 1997 and the judgment dated 07.07.1997 passed in Original Application No. 256 of 1994, hence does not call for any interference by this Court.

20. As far as prayer for payment of pension with other post retiral benefits and family pension are concerned, petitioner's husband retired from service with effect from 14.02.1994 but till date no post retiral benefits have been extended. Withholding of retiral is arbitrary and unfair on the part of the employer. The plea that the husband of the petitioner did not approach for payment of these benefits is legally not tenable.

21. The learned counsel for the Railways failed to show anything on record that the Railways had made any effort or initiated the procedure for payment of pension prior or even thereafter on the retirement of petitioner's husband.

22. The Apex Court in the cases of ***D.S. Nakara & Others Vs. Union of India, 1983 AIR 130, 1983 SCR (2) 165, Grid Corporation of Orissa And Others Vs. Rasanadas Das, (2003) 10 SCC, 297 and U.P. Raghavendra Acharya And Others Vs. State of Karnataka And Others, (2006) 9 SCC 630,*** it has been been held that pension is not a bounty but it is hard-earned benefit for long service which cannot be taken away. It is treated to be deferred salary. It is akin to right of property. The payment of pension does not depend upon the discretion of the Government. It is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch.

23. The Apex Court in the case of ***State of Kerala And Ors. Vs. M. Padmanabhan Nair, 1985 AIR 356, 1985 SCR (2) 476*** has held that pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but a valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment.

24. For the reasons mentioned hereinabove, the petitioner shall approach the competent authority within a period of ten days alongwith the certified copy of the order of this Court for payment of retiral dues and family pension and the authorities are directed to complete the necessary formalities and make the payment of due amount to the petitioner within a period of two months with 6 percent simple interest. The writ petition to claim retiral benefit is allowed while dismissing on the claim of the petitioner for taking the date of birth of her husband as 15.10.1942.

(2020)03-05ILR A1188
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.02.2020

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Service Single No. 5748 of 1999

Satish Narain Treivedi ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Anil Kumar, Anurag Srivastava

Counsel for the Respondent:
C.S.C.

A. Service Law– Appointment/Payment of salary - U.P. Intermediate Education Act, 1921-Regulations 101 to 104 –. Service – Post retiral benefits - Appointment should be made after taking the approval from the competent authority – Appointment of the petitioner, without prior approval of the DIOS, is void and he is not entitled to any benefit or relief. (Para 7, 8, 22, 23)

B. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner – The petitioner's appointment made by management, without advertisement of the vacancy and without inviting applications from the candidates from open market to participate in the selection process, is void appointment. (Para 10, 16 to 20)

C. Merely because an employee had continued under cover of an order of the court, described as "litigious litigation", he would not be entitled to any right to be absorbed or made permanent in the service. – Interim order dated 04.11.1999, on the strength of which, the petitioner was continuing in service and was getting the salary from the State Exchequer, would not give any benefit or right to the petitioner. (Para 24 to 28)

Writ petition dismissed. (E-4)

Precedent followed:

1. Jagdish Singh Vs. St. of U.P. & ors., (2006) 3 UPLBEC 2765 (Para 7, 22)

2. National Fertilizers Ltd. & ors. Vs. Somvir Singh, (2006) 5 SCC 493; 2006 SCC (L&S) 1152 (Para 17)

3. U.P.S.C. Vs. Girish Jayanti Lal Vaghela, (2006) 2 SCC 482; 2006 SCC (L&S) 339 (Para 17)

4. Secretary, St. of Karnataka & ors. Vs. Umadevi & ors., (2006) 4 SCC 1; 2006 SCC (L&S) 753 (Para 25)

5. Shesh Mani Shukla Vs. District Inspector of Schools, Deoria & ors., (2009) 15 SCC 436 (Para 27)

6. Raghvendra Rao etc. Vs. St. of Karnataka & ors., JT 2009 (20) SC 520 (Para 28)

Petition challenges order dated 07.09.1999, passed by District Inspector of School-II, Lucknow.

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Anurag Srivastava, learned counsel for the petitioner and Sri Gyanendra Srivastava, learned State Counsel.

2. By means of the present writ petition, a challenge has been made to the order dated 07.09.1999 (Annexure No. 9 to the writ petition), whereby the financial approval to the appointment of the petitioner on the post of Peon, in the Class-IV category, in the College known as Janta Girls Inter College, Alambagh, Lucknow (in short "College") has been rejected by the DIOS (District Inspector of School-II, Lucknow)/respondent No. 2.

3. It is stated that the petitioner was appointed by the competent authority i.e. Principal of the College/respondent No. 5 vide order dated 10.08.1997 and the required documents were sent to the DIOS for approval of appointment of the petitioner on the post of Peon, but no heed was paid by the DIOS thereupon.

4. Being aggrieved by the inaction of the DIOS, the petitioner approached this Court by means of the Writ Petition No. 4520 (S/S) of 1998, whereby this Court after considering the facts of the case passed the final order on 08.10.1998, which reads as under:-

"Heard learned counsel for the petitioner learned standing counsel and also perused the record.

By means of this petition under Article 226 of the Constitution of India, petitioner prays for issuance of a writ order or direction in the nature of mandamus commanding the District Inspector of Schools, Lucknow to accord approval to the appointment of the petitioner on Class IV post in Janta Girls Inter College, Alambagh, Lucknow.

It has been stated that after following the procedure prescribed under law, the petitioner was appointed as Class-IV employee in the aforesaid Institution by the Principal of the college, but till date District Inspector of Schools, did not accord financial approval. Consequently, petition is not being paid his salary. It has been urged that the petitioner has filed several applications/ representations for ventilation of his grievances before the District Inspector of Schools, and the Account Officer of the District Inspector of Schools, but of no avail, he had not option but to approach this Court and file the present petition.

Since the matter is pending disposal before the District Inspector of Schools, this petition is finally disposed of with the direction to District Inspector of Schools, Lucknow to look into the matter and decide the representations filed by the petitioner for according financial approval of his appointment by means of speaking order, within one month from the date a certified copy of this order is produced before him."

5. In compliance of the order passed by this Court dated 08.10.1998, the DIOS considered the case of the petitioner for approval of appointment on the post of Peon in the College in issue. The DIOS after considering the material available on record and by recording the following reasons rejected the claim of approval of appointment of the petitioner vide order dated 07.09.1999, which has been challenged in the present writ petition.

"निष्कर्ष

पत्रावली के अवलोकन से निम्न स्थिति स्पष्ट होती हैः–

1– याची द्वारा दिए गये पत्रों की प्रतियां इस कार्यालय में प्राप्त हुई नहीं प्रतीत होती हैं। याची तथा प्रधानाचार्या द्वारा संलग्न पत्रों को इस कार्यालय में प्राप्त कराने का साक्ष्य प्रस्तुत नहीं किया जा सका।

2–रिक्त पद पर नियुक्ति हेतु चयन के लिए कोई प्रक्रिया नहीं अपनाई गई।

3–रिक्त पद पर नियुक्ति हेतु चयन के लिए कोई प्रक्रिया नहीं अपनाई गई।

4–विद्यालय में अनुसूचित जाति हेतु आरक्षित कोटा पूर्ण नहीं है। रिक्त पद अनुसूचित जाति के अभ्यर्थी द्वारा भरा जाना है।

5–उ0प्र0 माध्यमिक शिक्षा अधिनियम के अन्तर्गत निर्मित विनियमावली के अध्याय 3 विनियम 101 के प्राविधानानुसार याची की नियुक्ति करने से पूर्व निरीक्षक से पूर्वानुमोदन नहीं प्राप्त किया।"

6. Assailing the order dated 07.09.1999, learned counsel for the petitioner submitted that the procedure as required under the law was followed by the appointing authority i.e. Principal of the College and thereafter, the petitioner was appointed on the post in question i.e. Peon against the post under unreserved category and the DIOS while passing the impugned order failed to consider the entire facts in its true spirit and accordingly, denial of salary from the State Exchequer is unjustified.

7. Per contra, learned State Counsel submitted that the appointment of the petitioner was made after insertion of Regulations 101 to 104 in Chapter-3 of the U.P. Intermediate Education Act, 1921 (in short "Act, 1921") vide Notification No. 4001/15-7-2-(1)(90) dated 03.07.1992 subsequently amended vide Notification No. 300/15-7(1)(90) dated 02.02.1995. The Regulations 101 to 104 provides that prior approval of DIOS for appointment on the post in issue i.e. Peon, on which the petitioner was appointed vide order dated 10.08.1997, is necessary. In the instant case, the petitioner was appointed without taking prior approval of the DIOS, as such the appointment of the petitioner is illegal and arbitrary and being so, the petitioner is not entitled to salary from the State Exchequer. In this regard, reliance has been placed on the judgment passed in the case of ***Jagdish Singh v. State of U.P. and others reported in [(2006) 3 UPLBEC 2765].*** The relevant portion of the same on reproduction reads as under:-

"9. First issue, which has arisen in these appeals, is interpretation of 'prior approval' as used in Regulation 101 of Chapter III. Prior to Insertion of Regulations 101 to 107 in U. P. Intermediate Education Act with effect from 30th July, 1992, there was no express provision under the U. P. Intermediate Education Act, 1921 and the Regulations framed thereunder requiring approval of appointment of Class III and Class IV employees, although the provisions were there in the U. P. Intermediate Education Act, 1921 regarding approval of appointment of teachers. A Division Bench of this Court in 1982 UPLBEC - 232 Om Prakash v. District Inspector of Schools. Budaun and Ors., while considering the appointment of Class IV employee took the view that there is no provision for approval of appointment of Class IV employees. Regulations 101 to 107 were added providing for prior approval before filling up the vacancy of non-teaching post and providing for the appointment of dependent of deceased employee and a procedure thereof. Regulations 101 to 104 of the Regulations, which are relevant for the present case, are extracted below:

101. Appointing Authority except with prior approval of Inspector shall not fill up any vacancy of non-teaching post of any recognised aided institution.

Provided that filling of the vacancy on the post of Jamadar may be granted by the Inspector.

"102. Information regarding vacancy as a result of retirement of any employee holding a non-teaching post in any recognised, aided institution shall be given before three months of his date of retirement and information about any vacancy falling due to death, resignation or for any other reasons shall be intimated to the Inspector by the appointing authority within seven days of the date of such occurrence.

103. Notwithstanding anything contained in these regulations, where any teacher or employee of ministerial grade of any recognised, aided institution, who is appointed accordingly with prescribed procedure, dies during service period, then one member of his family, who is not less that eighteen years in age, can be appointed on the post of teacher in train graduate grade or on any ministerial post, if he possesses prescribed requisite academic qualifications, training eligibilities, if any, and he is otherwise fit for appointment.

Provided that anything contained in this regulation would not apply to any recognised aided institution establish and administered by any minority class.

Explanation.- For the purpose of this regulation "member of the family" means widow or widower, son, unmarried or widowed daughter of the deceased employee.

Note.- This regulation and Regulations 104 to 107 would apply in relation to those employees who have died on or after 1 January, 1981.

104. Management of any recognised, aided institution within seven days of the date of death shall present a report to the Inspector about the members of the family of deceased employee, in which particulars of name of the deceased employee, post held, pay scale, date of appointment, date of death, name of the appointing institution and names of his family members, their academic and training eligibilities, if any, and age shall also be given. Inspector shall make entries of particulars of the deceased in the register maintained by himself.

10. Regulations 103 and 104, as quoted above, provide that the appointing authority shall intimate vacancy falling on account of retirement before three months of the date of retirement. In other cases vacancy was required to be communicated within 7 days from occurrence. Regulation further provides for appointment on compassionate ground to dependent of teaching or non-teaching employee in a recognized aided institution. The management was also enjoined to inform about the death of employee, dependents of the employees and the District Inspector of Schools was to put up the application, received from the member of the deceased employee for appointment, to a committee as contemplated under Regulation 105 to consider the case and thereafter the application was to be sent to the management for issuing appointment letter. Regulations 101 to 107 have to be read in a manner to give effect/and meaning to the provisions incorporated with effect from 30th July, 1992. The entire provisions requires harmonious construction, so all the regulations become workable and every part of it is given meaning.

11. Regulation 101, which is to be interpreted, uses a word "Inspector shall not fill up any vacancy". The word 'fill up', for the purpose of appointment, embraces in itself a procedure, which initiates from intimation of vacancy till selection of a candidate. The submission, which has been

placed by the learned Counsel for the appellant, is that Regulation 101 means that before starting to fill up any vacancy, prior approval of the Inspector is required. He contended that thus permission is required from Inspector by the appointing authority to start with process of selection and once the permission is granted by the Inspector, the appointing authority is free to proceed with selection and make appointment. They contended that the permission to start selection is one which is contemplated in Regulation 101.

12. As noted above, there was no provision prior to 30th July, 1992 requiring prior approval with regard to Class III and Class IV posts. It is although true that no procedure for filling up the Class III and Class IV posts is contained in the regulation, except the requirement of the qualification which has been mentioned in Chapter III Regulation 2(1) of the U. P. Intermediate Education Act. The word 'approval' as rightly contended by the learned standing counsel, is approval of certain action which has already been taken. Had the Legislature intended that no selection process for Class III and Class IV posts shall begin without permission of the District Inspector of Schools, the word 'approval' would not have been used and the word used would have been that without prior approval or permission of the District Inspector of Schools, the appointing authority shall not commence selection process. The word approval has been defined in Webster's Third New International Dictionary as 'the act of approving, approbation, sanction, certification as to acceptability.

13. A learned single Judge of this Court had considered Regulations 101 in 1997 (2) UPLBEC 102 Dingur v. District Inspector of Schools. Mirzapur and Ors. In paragraph 23 of the judgment it has been observed that prior approval, which has been referred to in Regulation 101, has to be granted after examining the proceeding relating to the appointment and finding out as to whether the appointment was really necessary and as to whether it was made after following the procedure in a fair manner in accordance with the provisions. Paragraph 23 of the judgment is quoted below:

"Further, the prior approval which has been referred to in the Regulation 101 in question has to be granted or refused by the competent authority not in an arbitrary manner but after examining the proceedings relating to the appointment and finding out as to whether the appointment was really necessary taking into consideration the norms fixed by the State Government justifying the continuance of the post and after satisfying as to whether the appointment was made after following the prescribed procedure in a fair manner and is in accordance with the provisions regulating the procedure which is prescribed for making such an appointment. It is only after the competent authority is satisfied that there is no defect in the procedure followed for making the appointment and such an appointment is infact necessary and further all the requisite conditions including the eligibility criteria etc. stand complied with and further the selection proceedings have been concluded in a fair manner that the District Inspector of Schools has to accord the prior approval which on the requisite conditions being satisfied cannot be withheld keeping in view the public interest involved as the State having undertaken to take the liability for payment of salary etc. of the teaching as well as non-teaching staff employed in a recognized Intermediate College or High School is bound to ensure

that its smooth functioning is not hampered on account of refusal to grant approval to an appointment made by the committee of management in the interest of the institution."

14. Another learned single Judge had occasion to consider Regulation 101 in Writ Petition No. 36628 of 2002 Ram Dhani v. State of U.P. and Ors. and Writ Petition No. 36630 of 2002 Kailash Prasad v. State of U.P. and Ors. Vide its judgment dated 19th October, 2005, the learned single Judge, after considering the Regulation 102, took view that previous approval under Regulation 101 is required to be taken before issuing advertisement for filling up vacancy. Following was observed by the learned single Judge:

"In the present case, from the record, it transpires that no previous approval was sought from the District Inspector of Schools before making an advertisement. In my opinion, previous approval under Regulation 101 is required to be taken before issuing an advertisement for filling up the vacancy. Previous approval is required at this stage and not at the stage when a candidate is selected after the advertisement. In the present case, no permission was sought from the District Inspector of Schools, Gorakhpur, prior to the issuance of the advertisement. The Committee of Management has also filed a counter affidavit and has no where stated that previous permission was taken from the District Inspector of Schools, Gorakhpur or that they had applied for permission before issuing the advertisement. Consequently, the appointment of the petitioner was ex-facie in violation of Regulation 101 of the Regulations. Consequently, no financial approval could be accorded by the District Inspector of Schools, Gorakhpur."

15. Against the above judgment of the learned single Judge dated 19th October, 2005, special appeal was filed, which was decided by our Division Bench vide judgment dated 22nd February, 2006 in special appeal. Only two submissions, raised before us, were dealt with by us i.e. firstly if the District Inspector of Schools fails to communicate its decision within reasonable time, the appointment shall be deemed to have been made and secondly, Regulation 101 gives uncanalised and unguided power to the District Inspector of Schools to grant or refuse approval, which itself is violative of Article 14 of the Constitution. Both the above contentions were repelled by us in our judgment dated 22nd February, 2006. While considering the concept of approval, we made the following observation in the said judgment:

"The concept of the approval of an appointment is a well known concept under the U. P. Intermediate Education Act, 1921 with regard to the appointment by the Selection Committee for direct recruitment as well as in the case of promotion. For appointment the procedure is prescribed in the various Regulations. The qualification for appointment is also provided in Chapter-Ill and other provisions of the Act and the Regulations framed. While considering the question of approval of appointment of a candidate, the District Inspector of Schools has to act in accordance with the other express provisions provided for qualification, eligibility and procedure prescribed for selection. It cannot be said that the power of approval as contemplated under Regulation 101 is not hedged by any guidance or qualification. It is not in the discretion of the District Inspector of Schools to pass an order for approval or disapproval at his sweet will. He has to pass an order taking into consideration the

other provisions and Regulations of the Act. Thus the submission of the learned Counsel for the appellant that the said power is uncanalised and the provision itself is arbitrary, cannot be accepted."

16. The submission, which is now being raised before us in these appeals, was neither considered by us nor was pressed before us in the special appeal decided on 22nd February, 2006, although we have approved the judgment of the learned single Judge dismissing the writ petition but the question as to whether the prior approval is required to be taken before issuing an advertisement for filling up vacancy was neither canvassed before us nor felt for our consideration.

17. Original Notification by which Regulation 101 to 107 was inserted in Chapter III is in Hindi. It is useful to reproduce the original Regulation 101 which is as follows:

"101.नियुक्ति प्राधिकारी, निरिक्षक के पूर्वानुमोदन के सिवाच किसी मान्यताप्राप्त, सहायताप्राप्त संस्था के शिक्षणेत्तर स्टाफ की किसी रिक्ति को नहीं भरोगा:

प्रतिबन्ध यह है कि जमादार के पद की रिक्ति को निरीक्षक द्वारा भरने की अनुमति दी जा सकती है।"

18. Regulation 101, as quoted above, uses two words, namely, 'पूर्वानुमोदन' and 'अनुमति'. The first part of the Regulation provides that appointing authority except with prior approval of Inspector shall not fill up any vacancy of non-teaching post of any recognised aided institution whereas second part of the Regulation provides that permission for filling of post of sweeper (Jamadar) can be given by Inspector. Second part of the Regulation is In the nature of proviso. The main part of the Regulation contains word 'पूर्वानुमोदन' i.e. prior approval whereas second part of the Regulation uses word 'अनुमति', i.e. permission. Thus, the Statute uses both the word 'prior approval' and 'permission'. The meaning of both the word cannot be the same. In view of this, the submission of the learned Counsel for the appellant that Regulation 101 requires only permission to issue advertisement by appointing authority and if such permission is granted by Inspector, the appointing authority can fill up the post. Regulation 101 provides prior approval with regard to vacancy of non-teaching staff and permission is contemplated only for filling the post of sweeper. Regulation thus indicates that when the permission is given to the appointing authority to fill up post of sweeper. There is no further prior approval is required. This provision being in nature of proviso to the main Regulation shall operate as an inception to the first part of Regulation. Thus, the use of two words in Regulation 101 i.e. 'prior approval' and 'permission' itself negates construction of Regulation as contended by the counsel for the appellant.

19. When the prior approval of the Inspector is contemplated in Regulation 101, that prior approval embraces itself an examination of all aspects of the matter including existence of the vacancy, nature of the vacancy whether vacancy is to be filled up by management or it be filled by appointing the dependent of deceased employee who has claimed for appointment under the scheme of the Regulations 101 to 107.

20. Scheme of Regulations 101 to 107 makes it clear that after receiving an intimation of vacancy, the District Inspector of Schools is empowered to send the application of member of deceased employee, who is entitled for compassionate appointment to the institution, who has to issue appointment letter to such candidate. It is, however,

implied in the scheme that in the event there is no candidate entitled for compassionate appointment to fill a particular vacancy, the intimation of which has been received by the District Inspector of Schools, the District Inspector of Schools can direct the appointing authority to fill up vacancy by direct recruitment but even in a case the selection is made by direct recruitment by the Principal/committee of management, prior approval is required of the District Inspector of Schools before issuing an appointment letter to the selected candidate. Without prior approval of the Inspector, the Principal or the committee of management cannot issue an appointment letter or permit joining of any candidate. The requirement of prior approval in Regulation 101 is a condition precedent before issuing an appointment letter and is mandatory. The observation of the learned single Judge in the case of Dingur v. District Inspector of Schools, Mirzapur (supra) as quoted above, is also to the effect that approval has to be considered by the District Inspector of Schools after examining ,the proceeding relating to appointment and after examining as to whether prescribed procedure in a fair manner has been followed or not.

21. The observation "of the learned single Judge in Ram Dhani's case (supra) that previous approval under Regulation 101 is required to be taken before issuing advertisement for filling up vacancy does not lay down correct law. We, however, make it clear that although prior approval is required from the District Inspector of Schools after completion of process of selection but there is no prohibition in the Principal/Management to seek permission of the District Inspector of Schools for filling up vacancy by direct recruitment. The permission may or may not be granted by the District Inspector of Schools but even if such permission to start the selection process or to issue advertisement is granted that is not akin to prior approval as contemplated under Regulation 101.

22. In view of the aforesaid, we are of the considered opinion that prior approval contemplated under Regulation 101 is prior approval by the District Inspector of Schools after completion of process of selection and before issuance of appointment letter to the selected candidate."

8. It is further submitted that the petitioner was appointed by the Principal of the College but prior to issuing of the order of appointment dated 10.08.1997, the approval, as required under the Regulations 101 was not taken by the appointing authority from the competent authority i.e. DIOS/opposite party No. 2. Thus, the impugned order being just and proper is not liable to be interfered with by this Court.

9. Keeping in view the provisions as envisaged under Regulation 101 in the Chapter III of the Act, 1921, the DIOS denied the approval of appointment of the petitioner, as such there is no illegality and infirmity in the impugned order.

10. Sri Srivastava, learned State Counsel, further submitted that a perusal of the averments made in the writ petition and the documents annexed thereto would show that prior to appointment, the post in issue was not advertised in two daily newspapers having vide circulation. Thus, the settled procedure required for recruitment was not followed and being so, the appointment of the petitioner is vitiated under the law and the petitioner is not entitled to the relief of

payment of salary from the State Exchequer.

11. It is further stated that on the post for reserved category candidate, the petitioner was appointed. Thus also the appointment of the petitioner is not legal.

12. In view of the above, the prayer is to dismiss the writ petition.

13. In rebuttal, learned counsel for the petitioner submitted that while entertaining the present writ petition, this Court on 04.11.1999 passed an interim order, which is quoted below, and on the strength of the interim order, the petitioner is still continuing in service in the pay band of Rs. 5200-20200/- with grade pay of Rs. 1800/- and is getting the salary from the State Exchequer and in view of the same, the petitioner may be allowed to continue in service and the writ petition for the reliefs sought may be allowed.

"Notice on behalf of opp. parties 1 to 3 has been accepted by the learned Chief Standing Counsel.

Issue notice to opp. parties 4 and 5.

Learned counsel for the opp. parties prays for and is granted four weeks time to file counter affidavit. List thereafter.

In the meantime it is provided that in case the petitioner's appointment has been made against a sanctioned post after selection and the petitioner is actually working on that post, he shall be paid salary regularly till further order of this Court. The operation of impugned order dated 7-9-99 as contained in Annexure-9 to the writ petition shall remain stayed till further orders of this Court."

14. In response to the arguments raised by the learned counsel for the petitioner in regard to continuance of the petitioner in service and payment of salary from State Exchequer on the strength of interim order, learned State Counsel submitted that the petitioner cannot get any benefit from the interim order, as the appointment of the petitioner is not valid.

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

16. In regard to submissions made by the learned State Counsel that the vacancy was not published in newspaper, which process is mandatory, this Court considered the pleadings and documents on record and it appears therefrom, particularly para 16 of the writ petition, that the vacancy in issue i.e. the vacancy of the post of Peon was notified on the "Notice Board" of the Institution and it was not advertised in two daily newspapers having vide circulation.

17. In *National Fertilizers Ltd.* [(2006) 5 SCC 493 : 2006 SCC (L&S) 1152] this Court referred to the decision in *Union Public Service Commission v. Girish Jayanti Lal Vaghela* [(2006) 2 SCC 482 : 2006 SCC (L&S) 339] wherein the Court had observed as under: (SCC p. 490, para 12)

"The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the

advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution."

18. It is true that, at relevant time, the provisions of Chapter III of the U. P. Intermediate Education Act, 1921, did not provide any procedure for selection on the post of the Peon. In the absence of any prescribed procedure under the rules, it is open to the management to adopt a procedure which conforms the provisions of Articles 14 and 16 of the Constitution of India. The committee of management was free to issue advertisement in the news paper and to call names from the Employment Exchange for making selection.

19. In the aided Institution, the salary to the teachers and the staff is paid by the State Government. Since the salary is paid by the State Government, for all purposes the employment to the post of clerk is public employment. For a public employment, the minimum requirement which is needed is to advertise the post to enable all the eligible candidates to apply for the post. The committee of management cannot claim to select any person on its own choice without advertising the post in any news paper.

20. In view of the above, the petitioner's appointment made by the management, without advertisement of the vacancy and without inviting applications from the candidates from open market to participate in the selection process, is void appointment.

21. It appears from the pleadings on record that the specific stand taken by the State, based on Regulation 101 in the Chapter III of the Act, 1921, that the appointment of the petitioner was not made after seeking prior approval of competent authority i.e. DIOS/opposite party No. 2, is undisputed. The specific plea, based on the Regulation 101, taken in the counter affidavit has not been denied by the petitioner.

22. The Division Bench of this Court in the case of Jagdish Singh (supra) held that the appointment should be made after taking the approval from the competent authority, as provided under Regulation 101 in the Chapter III of the Act, 1921. At the cost of repetition, the relevant portion of the judgment passed by the Division Bench of this Court in the case of Jagdish Singh (supra) is quoted below for ready reference:-

"20. Scheme of Regulations 101 to 107 makes it clear that after receiving an intimation of vacancy, the District Inspector of Schools is empowered to send the application of member of deceased employee, who is entitled for compassionate appointment to the institution, who has to issue appointment letter to such candidate. It is, however, implied in the scheme that in the event there is no candidate entitled for compassionate appointment to fill a particular vacancy, the intimation of which

has been received by the District Inspector of Schools, the District Inspector of Schools can direct the appointing authority to fill up vacancy by direct recruitment but even in a case the selection is made by direct recruitment by the Principal/committee of management, prior approval is required of the District Inspector of Schools before issuing an appointment letter to the selected candidate. Without prior approval of the Inspector, the Principal or the committee of management cannot issue an appointment letter or permit joining of any candidate. The requirement of prior approval in Regulation 101 is a condition precedent before issuing an appointment letter and is mandatory. The observation of the learned single Judge in the case of Dingur v. District Inspector of Schools, Mirzapur (supra) as quoted above, is also to the effect that approval has to be considered by the District Inspector of Schools after examining ,the proceeding relating to appointment and after examining as to whether prescribed procedure in a fair manner has been followed or not.

21. The observation "of the learned single Judge in Ram Dhani's case (supra) that previous approval under Regulation 101 is required to be taken before issuing advertisement for filling up vacancy does not lay down correct law. We, however, make it clear that although prior approval is required from the District Inspector of Schools after completion of process of selection but there is no prohibition in the Principal/Management to seek permission of the District Inspector of Schools for filling up vacancy by direct recruitment. The permission may or may not be granted by the District Inspector of Schools but even if such permission to start the selection process or to issue advertisement is granted that is not akin to prior approval as contemplated under Regulation 101.

22. In view of the aforesaid, we are of the considered opinion that prior approval contemplated under Regulation 101 is prior approval by the District Inspector of Schools after completion of process of selection and before issuance of appointment letter to the selected candidate."

23. In view of the above also, the appointment of the petitioner, without prior approval of the DIOS, is void and being so he is not entitled to any benefit or relief.

24. With regard to payment of salary and continuation on the post on the strength of the interim order dated 04.11.1999 and the arguments based on the same for seeking the reliefs sought, this Court is of the view that the interim order would not give any benefit or right to the petitioner to get the reliefs sought in the present writ petition.

25. The aforesaid view of this Court is in view of the observations made by the Constitution Bench of the Apex Court in Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753], wherein it has been observed as under:-

"43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying

down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

26. The Constitution Bench has observed that merely because an employee had continued under cover of an order of the court, which the court described as "litigious employment", he would not be entitled to any right to be absorbed or made permanent in the service.

27. Further, the Apex Court in re: Shesh Mani Shukla vs District Inspector of Schools, Deoria and others reported in (2009) 15 Supreme Court Cases 436 vide para 19 has held as under:-

"It is true that the appellant has worked for a long time. His appointment, however, being in contravention of the statutory provision was illegal, and, thus, void ab initio. If his appointment has not been granted approval by the statutory authority, no exception can be taken only because the appellant had worked for a long time. The same by itself, in our opinion, cannot form the basis for obtaining a writ of or in the nature of mandamus; as it is well known that for the said purpose, the writ petitioner must establish a legal right in himself and a corresponding legal duty in the State. (See Food Corpn. of India vs. Ashis Kumar

Ganguly.) Sympathy or sentiments alone, it is well settled, cannot form the basis for issuing a writ or or in the nature of mandamus. (See State of M.P. vs. Sanjay Kumar Pathak.)"

28. The Apex Court in the case of Raghvendra Rao etc. v. State of Karnataka and others, JT 2009 (20) SC 520 has observed as under:-

"It is now a well-settled principle of law that merely because an employee had continued under cover of an order of Court, he would not be entitled to any right to be absorbed or made permanent in the service....."

29. For the foregoing reasons, the writ petition lacks merit. Hence **dismissed** with no order as to costs.

(2020)03-05ILR A1200
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.02.2020

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 14261 of 2018

Munindra Chandra Gaur ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ashok Kumar Mishra

Counsel for the Respondents:
C.S.C.

A. Service law- Civil Service Regulations: Regulation 36-Fundamental Rule 56 –Post retiral benefits-Retiral benefits of the petitioner have been paid without counting the services rendered on ad hoc basis. The Court held that the petitioner was appointed on substantive post in permanent establishment which is pensionable. Nature of his appointment i.e. ad hoc appointment is not of much relevance inasmuch as the period spent by him as ad hoc, ultimately resulted in regularization of the petitioner without any break in service. (Para 5)

Writ petition allowed. (E-4)

Precedent followed:

1. Dr. Amrendra Narain Srivastava Vs. St. of U.P. & ors., in WP No. 61974 of 2011 (Para 3, 5)

2. Shashi Srivastava Vs. St. of U.P. & anr., [(2019) 2 UPLBEC 1326] (Para 4, 5, 8)

Present petition assails order dated 01.08.2016, passed by Principal Secretary, Public Works Department.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ashok Kumar Mishra, learned counsel for the petitioner and Sri Ran Vijay Singh, learned Addl. Chief Standing Counsel for the State-respondents.

2. By means of this petition, the petitioner has assailed the order dated 1.8.2016 passed by the Principal Secretary, Public Works Department rejecting the claim of the petitioner whereby he has prayed that his services rendered as an ad hoc employee w.e.f. 6.11.1973 to 31.12.2005 be counted in his total length of service for providing him all post retiral benefits.

3. Learned counsel for the petitioner has submitted that the petitioner had requested that he may be given the benefit of judgment and order dated 1.3.2012 passed in passed in **Dr. Amrendra Narain Srivastava Vs. State of U.P. and others**,

in Writ Petition No.61974 of 2011, whereby this Court has directed that ad hoc services so rendered by the employee shall be counted in the total length of service and such employee shall be given the retiral benefits counting said ad hoc services. The competent authority in the impugned order dated 1.8.2016 has categorically indicated that the present petitioner may not get the benefit of the order dated 1.3.2012 in re; **Dr. Amrendra Narain Srivastava** (supra) for the reason that the issue of the petitioner is different from the matter of **Dr. Amrendra Narain Srivastava** (supra). It has further been indicated in the impugned order that for providing such benefit, the provision of Regulation 361 of the Civil Service Regulations shall be abide by and since such provisions are not being abide by in the case of the petitioner, therefore, his services rendered on ad hoc basis shall not be counted.

4. Learned counsel for the petitioner has drawn attention of this Court towards the judgment of the Division Bench of this Court in re; Shashi Srivastava Vs. State of U.P. and Another, reported in [(2019) 2 UPLBEC 1326], wherein the identical controversy has been decided. For the brevity, the judgment and order dated 20.5.2019 in re; Shashi Srivastava (supra) is being reproduced herein below:-

"1. Order dated 01.05.2018 having been recalled vide order of date passed on Recall Application, writ petition is restored to its original number. As requested and agreed by learned counsel for parties, We proceed to hear and decide this case finally at this stage.

2. Heard Sri Pradeep Verma, learned counsel for petitioner and learned Standing Counsel for State of U.P. And perused the material available on record.

3. This writ petition under Article 226 of Constitution of India has been filed against order dated 21.05.2014, whereby service rendered by petitioner on adhoc basis before regularization from the years 1975 to 1992 has not been treated 'qualifying service' for the purpose of retiral benefits by referring to Article 361 of Civil Service Regulations (hereinafter referred to as "C.S.R.").

4. In the impugned order dated 21.05.2014, Director, Bal Vikas Avam Pushtahar has said that under Article 361, adhoc service does not qualify for pension.

5. It is not disputed that retirement of petitioner is governed by fundamental Rule 56 read with relevant provisions of C.S.R. Every employee, whether permanent or temporary or ad-hoc is liable to retire on attaining age of superannuation as provided under fundamental Rule 56.

6. Under U.P. Retirement Benefit Rules, 1961 (hereinafter referred to as "Rules, 1961") "qualifying service" is defined in Rule 3(8). It means 'service' which qualifies for pension in accordance with provisions of Article 368 of C.S.R. Rule 3(8) is quoted as below:-

"Rule 3(8)- " Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-

(i) periods of temporary or officiating service in a non-pensionable establishment.

(ii) periods of service in a work-changed establishment, and

(iii) periods of service in a post, paid from contingencies; shall also count as qualifying service.

Note- If service rendered in a non-pensionable establishment, work-charged establishment or in post paid form contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service."

(emphasis added)

7. Article 368, C.S.R., provides that service does not qualify, unless officer holds a substantive office in a permanent establishment. Articles 368 and 369 are quoted herein below:

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

369. An establishment, the duties of which are not continuous but are limited to certain fixed periods in each year, is not a temporary establishment. Service in such an establishment, including the period during which the establishment is not employed qualifies but the concession of counting as service the period during while the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was on actual duty on the first day on which the establishment was again re-employed."

8. It is not in dispute that petitioner was appointed on substantive post in permanent establishment which is/was pensionable. Nature of his appointment i.e. ad-hoc appointment is not of much relevance in as much as period spent by him as ad-hoc was in permanent pensionable establishment, which ultimately resulted into regularization of petitioner without any break in service.

9. Moreover, vide Sub-rule 8 of Rule 3 of Rules 1961, qualifying service includes temporary service followed by confirmation and continued without interruption. In this view of the matter, services rendered by petitioner on ad-hoc basis followed by Regularization would stand covered under "qualifying service" defined under Rule 3(8) of Rules 1961, for the purpose of pension.

10. In taking this view we are fortified by a Division Bench decision in State of U.P. and Others vs. Dr. Amrendra Narain Srivastava, 2012 (8) ADJ 376. Similar issue recently has been considered by this Court in Dr. Indrapal Singh Sachan vs. State of U.P. and 4 Others, (Writ -A o. 62179 of 2015) decided on 07.02.2018, wherein this Court has followed judgment passed in Writ Petition No. 65873 of 2014 and directed that adhoc service would be counted for payment of retiral benefit treating the same as "qualifying service". Judgment passed in Dr. Indra Pal Singh Sachan (supra) reads as under:-

"Heard Shri Ashok Khare, learned Senior Counsel, assisted by Shri Siddharth Khare, learned counsel for the petitioner and learned Standing Counsel appearing for the respondents.

Pleadings have been exchanged between the parties and we have perused the same.

The petitioner is aggrieved by the office order dated 9th September, 2015, passed by the Principal Secretary, AYUSH, State of U.P., whereby the representation of the petitioner, for payment of pensionary benefits, has been rejected.

The petitioner was appointed as Ayurvedic doctor on contract basis vide order dated 1.12.1988. The petitioner continued to function as such. A Writ Petition No. 4806 of 1990 (U.P. Anskalik Chikitsak Sangrah Samiti vs. State of U.P. and another), came to be filed by association of Ayurvedic doctors. It was

decided vide judgment and order dated 11.9.1992, with a direction to consider the claim of their regularisation within six months and for the payment of full salary of a Medical Officer.

In pursuance of the above judgment of this Court, an office order was issued on 28.2.1992, directing for treating the services of the contract basis Ayurvedic doctors on ad hoc basis. The petitioner was also included in the list attached with the aforesaid office order and his services also were treated on ad hoc basis.

Subsequently, by order dated 25th September, 2009, the services of all ad hoc doctors were regularized and, accordingly, the services of the petitioners were also regularized with effect from 16.3.2005. The petitioner, ultimately, retired on 30.9.2007. On his retirement, he raised a claim for grant of pensionary benefits, which was not accepted. Therefore, he filed Writ Petition No. 49467 of 2012 (Dr. Indrapal Singh Sachan vs. State of U.P. and others), which was disposed of on 22.4.2015, observing that the issue arising in the petition stand answered by the decision of the Court, rendered in Writ Petition No. 61974 of 2011 (Dr. Amrendra Narain Srivastava vs. State of U.P. and others), which has been followed in Writ Petition No. 65873 of 2014 (Dr. Mohd. Mahboob Husain Abbasi vs. State of U.P. and 4 others). Accordingly, the Principal Secretary, Department of Medical Education, Government of U.P., Lucknow, was directed to consider the claim of the petitioner within a time-bound period, keeping into mind the parameters as has been settled in the aforesaid two decisions.

In pursuance of the above, the impugned order has been passed, rejecting the representation of the petitioner with regard to the claim of the pentionary benefits.

The claim of the petitioner has been distinguished in it from that of Dr. Amerendra Narain Srivastava, on the ground that the petitioner was never confirmed, therefore, his services cannot be counted for the purposes of grant of pension. In the case of Amrendra Narain Srivastava, the Division Bench has dealt with the Uttar Pradesh Retirement Benefit Rules, 1965, and the period of qualifying service mentioned therein vis a vis Regulation 368 of the Civil Services Regulations and came to the conclusion that the petitioner therein shall be entitled to pension from the date on which he joined the services by adding the services rendered by him in temporary capacity to his services rendered by him with the Government Department on substantive basis. In other words, on being absorbed in the Government Department in substantive capacity or being regularized, it was provided that the services earlier rendered by him may be in a temporary capacity has to be counted for the purposes of payment of pension.

The aforesaid decision has been followed in the case of Dr. Mohd. Mahboob Husain Abbasi.

In the instant case also, the services of the petitioner, treated to be on ad hoc basis vide order dated 28.2.1992, was ultimately regularized vide order dated 25.9.229 with effect from 16.3.2005. Thus, once the petitioner stood duly regularized/confirmed, the services, rendered by him prior to his regularization on ad hoc basis, would be included in his length of service for the purposes of grant of pension. In this way, for the purposes of pension, the petitioner has rendered service with effect from 28.2.1992 till 30.9.2007. The said period is more than the qualifying

service period of 10 years necessary for the grant of pensionary benefits.

In view of the aforesaid facts and circumstances, the distinction, made by the Principal Secretary in passing the impugned order, is not tenable and, accordingly, the same is hereby quashed, holding that services rendered by the petitioner with effect from 28.2.1992, shall be counted in his services rendered by him after his regularization for the purposes of grant of pension. The respondents are, as such, directed to work out the pension admissible to the petitioner as aforesaid and to start paying the same as well as the arrears. The arrears shall be paid with interest of 8 per cent within a period of three months.

The writ petition is allowed, accordingly."

(emphasis added)

11. Even otherwise, we find that Fundamental Rule 56, as operative in Uttar Pradesh made by Provincial Legislation, clearly provides that any person, who retires under Fundamental Rule 56, would be entitled for 'retiring pension'. Fundamental Rule 56, since, it is a Provincial enactment, would prevail over C.S.R., which are pre-constitutional provision. This aspect was considered by a Division Bench of this Court in Prasidh Narain Upadhyay, 2006(1)ESC 611, and Court held:

"12. The term "qualifying service" is defined in Section 1 Chapter 16 of Article 361 of the Civil Service Regulations which provides that the service of an officer does not qualify for pension unless it conforms to the following three conditions:

(A)The service must be under Government.

(B)The employment must be substantive and permanent.

(C)The service must be paid by Government.

13. In the present case, so far as the condition Nos. A and C are concerned, they are satisfied and the dispute is only with respect to condition No. B, i.e. lack of permanent character of service. However, in our view, the aforesaid provisions stand obliterated after the amendment of Fundamental Rule 56 by U.P. Act No. 24 of 1975 which allows retirement of a temporary employee also and provides in Clause (e) that a retiring pension is payable and other retiral benefits, if any, shall be available to every Government servant who retires or is required or allowed to retire under this Rule. Since the aforesaid amendment Rule 56 was Service Regulations, which are pre-constitutional would have to give way to the provisions of Fundamental Rule 56. In other words, the provisions of Fundamental Rule 56 shall prevail over the Civil Service Regulations, if they are inconsistent. Condition B (supra) of Article 361 of Civil Service Regulations are clearly inconsistent with Fundamental Rule 56 and thus, is inoperative.

14. A similar controversy came up for consideration earlier before this court in the case of Dr. Hari Shanker Ashopa Vs State of U.P. and others, 1989 ACJ 337. After referring to the Fundamental Rule 56 and various provisions contained in Civil Service Regulations, this Court observed as under:

"Clause (e) of Rule 56 unequivocally recognizes, declares and guarantees retiring pension to every Government servant who retires on attaining the age of superannuation, or who is prematurely retired or who retires voluntarily. To be precise, every Government servant (whether permanent or temporary) who retires under Clause (a) of Clause (b), or who is required to retire, or

who is allowed to retire under Clause (C) of Rule 56, becomes entitled for a retiring pension, of course, the first and third conditions stipulated in Article 361 of the Regulations are satisfied."

(emphasis added)

12. This has been followed and further clarified in Babu Singh vs. State of U. P. and others, 2006 (8) ADJ 371 and Bansh Gopal Vs. State of U. P., 2006 (3) ESC 2248 (All.) and above decisions fully support the case of petitioner with which we are in agreement.

13. In view thereof, the writ petition is allowed. Impugned order dated 21.05.2014 is set aside. The respondents are directed to treat entire adhoc service of petitioner as 'qualifying service' for pensionary benefits. Accordingly, respondents shall also recalculate/recompute retiral benefits payable to petitioner and pay arrears within three months and regular pension shall be paid regularly. "

5. In the aforesaid judgment, the Division Bench of this Court has considered the judgment of this Court in re; **Dr. Amrendra Narain Srivastava** (supra) and also interpreted the relevant provisions of law of Civil Service Regulations. The view of the Division Bench in re; **Shashi Srivastava** (supra) is that since the petitioner of that writ petition was appointed on substantive post in permanent establishment which is pensionable, therefore, nature of his appointment i.e. ad hoc appointment is not of much relevance inasmuch as the period spent by him as ad hoc was in permanent pensionable establishment, which ultimately resulted in regularization of the petitioner without any break in service.

6. So far as this fact is concerned, there is no dispute in the present case. Further, this Court has interpreted the provisions of Fundamental Rule 56 as well as Regulation 361 of the Civil Service Regulations.

7. Learned Addl. Chief Standing Counsel has tried to justify the impugned order placing reliance upon the contents of counter affidavit but there is nothing in the counter affidavit which could dispute the settled proposition of law that the services rendered as an ad hoc employee in the permanent pensionable establishment may not be ignored by providing the retiral benefits.

8. Having heard learned counsel for the parties and having perused the material available on record and the judgment in re; **Shashi Srivastava** (supra), I am of the considered opinion that the impugned order dated 1.8.2016 passed by opposite party no.1 is not sustainable in the eyes of law, therefore, the same is liable to be quashed.

9. Accordingly, the impugned order dated 1.8.2016 passed by opposite party no.1, which is contained in Annexure No.1 to the writ petition, is hereby quashed. A writ in the nature of mandamus is issued commanding the opposite parties to revise the retiral benefits of the petitioner including pension, gratuity etc. calculating his services so rendered on ad hoc basis i.e. with effect from 6.11.1973 to 31.12.2005 and pay him such benefits.

10. Since the retiral benefits of the petitioner has been paid without counting the services rendered on ad hoc basis and without following the due procedure of law, therefore, the petitioner shall be

entitled for the interest at the rate of 6% p.a. on the arrears of retiral benefits.

11. Compliance of the aforesaid order shall be made within a period of three months from the date of production of certified copy of the order of this Court, failing which the petitioner shall be entitled for the interest at the rate of 12% p.a.

12. The writ petition is accordingly **allowed**.

13. No order as to costs.

(2020)03-05ILR A1206
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

WRIT A No. 15355 of 2019

Santosh Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Birendra Singh, Sri Syed Irfan Ali

Counsel for the Respondents:
C.S.C.

A. Service – Cancellation of provisional appointment – Concealment of pendency of criminal case – As per the guidelines issued by the Supreme Court, the employer may in its discretion, ignore suppression of fact or false information by condoning the lapse in the cases of trivial nature or in cases where the candidate was not aware about the pendency at the time of filling the form, depending upon the seriousness of crime. (Para 8)
In the present case, the petitioner had knowledge of the pendency of the criminal case which he deliberately concealed and the offence under which he is being proceeded against cannot be said to be of petty nature. Thus, the guidelines issued by the Supreme Court would not apply. (Para 9)

Petition dismissed. (E-4)

Precedent followed:

1. Avtar Singh Vs U.O.I. & ors., 2016 (8) SCC 471 (Para 2)

Petition against orders dated 03.06.2019 and 12.09.2019, passed by District Development Officer.

(Delivered by Hon'ble Manoj Kumar Gupta, J.

1. The petitioner has called in question the order dated 3.6.2019 passed by District Development Officer, the seventh respondent cancelling the provisional appointment of the petitioner dated 15.12.2018 and the order dated 12.9.2019 rejecting the representation of the petitioner made in pursuance of order of this Court dated 9.7.2019 in Writ-A No.9601 of 2019.

2. The petitioner was selected for the post of Village Development Officer (Gram Vikas Adhikari). He was given a provisional appointment by order dated 10.10.2018. On that day itself, the petitioner gave a written undertaking in shape of an affidavit that no criminal case was pending against him and if the information furnished in this regard is later found to be incorrect, it shall be open to the authorities to cancel his appointment and also take other legal measures. During verification of his antecedents and character, it was reported by Superintendent of Police that Crime Case No.56A/2011 u/s 147, 148, 149, 379, 323, 504, 506, 427 IPC P.S. Dullahpur, district Ghazipur was pending against him. He was

issued a show cause notice dated 11.12.2018 calling for his explanation with regard to concealment about pendency of criminal case. In response to the said notice, the petitioner submitted his explanation stating that on 10.10.2018, he initially affirmed an affidavit in which he disclosed about pendency of the criminal case. However, the District Development Officer refused to accept the said affidavit stating that it was not in prescribed format. The petitioner was compelled to submit another affidavit on prescribed proforma and in which certain incorrect facts were mentioned before hand including the fact that no criminal matter is pending against him. It was on account of said act of the respondents that he could not disclose about the pendency of criminal case in the affidavit submitted by him on 10.10.2018 in prescribed proforma. The petitioner, alongwith his explanation, enclosed the original affidavit dated 10.10.2018, which, according to him, he tried to submit initially, but was not accepted. The seventh respondent, after considering the explanation of the petitioner, by order dated 3.6.2019, rejected the same holding that (a) the attestation documents at serial no.10 Ka and Kha attached with the Application Form dated 6.4.2018 mentions 'No' against the column seeking information about pendency of criminal cases, which is palpably false; (b) again, after selection, when the petitioner was given provisional appointment, he was required to submit an affidavit by way of a declaration that no criminal proceedings are pending against him and regarding other antecedents. In the said affidavit, the petitioner categorically mentioned that no criminal matter is pending against him. However, upon police verification, it transpired that the said declaration is false as a criminal case was pending against him; (c) the affidavit on which reliance was placed by the petitioner in his explanation, upon verification from Public Notary before whom it purports to be sworn, was found to be a result of forgery. Aggrieved by the said order, the petitioner filed Writ-A No.9601 of 2019, which was disposed of by this Court by order dated 9.7.2019 permitting the petitioner to place all relevant material before the authority and who would consider the same in the light of law laid down by the Supreme Court in **Avtar Singh Vs. Union of India and others, 2016 (8) SCC 471.** In compliance of the said direction, the seventh respondent has now passed the impugned order dated 12.9.2019. While passing the said order, the seventh respondent has specifically considered the guidelines issued by the Supureme Court in paragraph 38 of the judgement in **Avtar Singh's case (supra)** and thereafter held that it was a case of deliberate concealment of material facts. Even a charge sheet was submitted in the said criminal case on 18.4.2011, much before the petitioner had filed application form for selection. The action taken against him is in consonance with the conditions of appointment wherein it was specifically provided that in case any thing is found incorrect in the declaration furnished, the appointment would be cancelled.

3. Learned counsel for the petitioner submitted that (a) the petitioner was not aware of the pendency of the criminal case, as pairvi of the said case was being done by his brother Sanjeev, with whom, his relationship was strained; (b) the petitioner being not aware of the pendency of the criminal case was entitled to benefit of the guidelines laid down in paragraph 38.8 and 38.4.1; (c) in the original affidavit got prepared by the petitioner on 10.10.2018, he duly mentioned about pendency of

criminal case pending against him, but which affidavit was not accepted by the seventh respondent. The petitioner was coerced to make declaration in the prescribed format. The submission is that since it was prepared before hand, therefore, the petitioner could not alter it nor mention about pendency of the criminal case; and (d) the incident was of a trivial nature; there were cross FIRs and consequently, a lenient view should have been taken.

4. Learned standing counsel, on the other hand, submitted that the petitioner is guilty of concealment of material facts. In fact, he tried to deceive the respondents in giving him appointment by deliberately suppressing the factum of pendency of criminal case against him. The offence is not of trivial nature, therefore, no sympathy could be shown to such a person.

5. The submissions made by learned counsel for the petitioner are palpably inconsistent with each other. While on one hand it is urged that the petitioner was not aware of the pendency of the criminal case, as his brother was doing pairavi in the said matter and he was informed by the counsel that criminal proceedings were no more pending, but on the other hand, it is sought to be contended that in one of the affidavits affirmed by the petitioner on 10.10.2018, but which was not accepted by the seventh respondent on the pretext that it was not on prescribed proforma, he duly mentioned about the pendency of the said criminal case. This itself is sufficient to reject the submissions made in this regard by learned counsel for the petitioner.

6. The affidavit allegedly got prepared by the petitioner on 10.10.2018, which according to him, was not accepted by the seventh respondent, mentions about pendency of Crime Case No.56A/2011 u/s 147, 148, 149, 379, 504, 506, 427 IPC P.S. Dullahpur, district Ghazipur in the Court of Third Sessions Judge, Ghazipur. The affidavit actually submitted by the petitioner before the authorities in paragraph 1 states that no criminal case is pending against the petitioner. The petitioner had also given an undertaking that in case the declaration is found to be false, it shall be open to the respondents to cancel his appointment and to take other legal proceedings as may be warranted. In the reply submitted by the petitioner in response to show cause notice, he took the stand that he never wanted to conceal any fact from the authorities. The affidavit on prescribed proforma contained certain incorrect information and under pressure he had to file it. The plea is on the face of it unacceptable. A perusal of the affidavit, which was filed by the petitioner before the authorities, reveals that the said affidavit was typed on a stamp paper. The name of the petitioner as well as of his father and his address are in same font as the remaining part of the affidavit. It is not the case of the petitioner that he had simply filled his name on any printed form made available to him on that date. The defence set up is wholly preposterous and bereft of any logic. It is interesting to note that the petitioner submitted another reply on 4.1.2019, which makes his case still worse. In the said reply, he alleged that the proforma supplied to him did not contain any column relating to pendency of criminal proceedings, on account of which information in this regard could not be furnished, while as noted above, in the affidavit filed by him, he stated in very first paragraph that no criminal case was pending against him and if the information furnished in this regard is found to be

incorrect, the authorities shall be free to cancel his appointment.

7. It is noteworthy that the respondents sent copy of both the affidavits for verification to the Notary Sri Ambika Singh Yadav Advocate, before whom the affidavits purport to have been affirmed. Sri Ambika Singh Yadav vide his letter dated 15.2.2019 informed the respondents that the affidavit dated 10.10.2018, which is written over stamp No.56 AD 276687 (in prescribed format) was duly affirmed before him and is entered at serial no.367 in his register. The other affidavit which the petitioner claimed that it was not accepted, affirmed on stamp No.62 AD 802509, according to the Notary, did not bear his signature nor his stamp. In other words, the stamp and signature of the Notary on the said affidavit was a result of forgery. Learned counsel for the petitioner did not even attempt to assail the said finding in the order dated 3.6.2019.

8. The petitioner was well aware of the fact at the time of submitting application form and also when he gave affidavit regarding his character and antecedents that in case of suppression of any material fact or furnishing of wrong information, the appointment was liable to be cancelled. In such view of the matter, the irresistible conclusion is that the petitioner had deliberately suppressed correct information from the respondents and had rather furnished incorrect information with a deliberate attempt to procure appointment which otherwise would not have been given to him. The guidelines issued by the Supreme Court in paragraph 38.4.1 and 38.8, upon which reliance has been placed by learned counsel for the petitioner, are as follows:-

38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.8. If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime."

9. I have gone through the First Information Report which was filed against the petitioner and 9 other persons. The incident was in respect of certain dispute with the rival group of villagers in connection with making of rasta over sahan land. In the said incident, one Ram Janam S/o Kumar received grievous injuries to which he ultimately succumbed. There is also cross FIR from the side of the petitioner by his cousin brother. The Police, after investigation, has submitted a charge sheet against the petitioner and other co-accused persons and the trial is continuing on basis of charge sheet dated 18.4.2011. The incident was not of such nature that the petitioner may have forgotten the same nor trivial which could be ignored from consideration. The guideline issued by the Supreme Court in paragraph 38.4.1 would thus not apply. So far as the guideline laid down in paragraph 38.8, the same also would not apply as it is applicable only in respect of a candidate, who at the time of filling of the form, was not aware of the pendency of the criminal case and the Appointing Authority, after considering the seriousness of the crime, comes to the conclusion that the same will have no adverse impact. In the instant case, as noted above, the Appointing Authority has returned a clear cut finding that the

petitioner had knowledge of the pendency of the criminal case which he deliberately concealed. The offence under which the petitioner is being proceeded against cannot be said to be of petty nature so as to extend the benefit of guidelines laid down in this regard.The Appointing Authority having considered the entire aspect and finding the petitioner not fit for job in view of his dishonest and dubious conduct, hardly any scope is left for this Court to come to the rescue of the petitioner.

10. Before parting, the Court is constrained to note that large number of such cases are coming before the Court where appointments are being cancelled on ground of furnishing of incorrect information by the candidates. The growing tendency in young people to procure appointment even at the cost of furnishing wrong information is really a disturbing trend. The Court is sanguine that deliberate misstatement and concealment would be eschewed. Even Courts would then only be able to come to their rescue.

11. The petition lacks merit and dismissed with a cost of Rs.25000/-.

(2020)03-05ILR A1210
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

WRIT A No. 16933 of 1999

Smt. Archana Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri A.K. Srivastava, Sri U.N. Khare

Counsel for the Respondents:
C.S.C., Sri H.N. Sharma, Sri Anirudha Sharma

A. Service – Appointment/Recruitment – Procedural illegality/Favoritism - Petitioner protesting against the candidature of respondent no. 3, filed the present writ petition before the result was declared. On 21.04.1999, any appointment made was made subject to the decision of the writ petition and later on 04.04.2001, the appointment of respondent no. 3 on the post of Clerk by District Magistrate was stayed. (Para 3, 9)

The Court observed that the application of respondent-3 originally was submitted for the post of Assistant Accountant and since he did not possess requisite qualification, his candidature was rejected but subsequently manipulations were done in the application form and same was accepted for post of Junior Clerk. (Para 23 to 26)

After expiry of last date, no indulgence can be granted to entertain an application or document of a candidate who has come thereafter - In the present case, respondent-3 has been allowed to participate for recruitment on the post of Junior Clerk by District Magistrate, passing order on 11.12.1998, though that is much after date of expiry of last date of submission of application form. This was clearly illegal and shows that appointment of respondent-3 was not fair but in collusion with the then District Magistrate. It is vitiated in law on account of favoritism and procedural illegality committed by concerned authority. (Para 27, 28)

Since appointment of respondent-3 was already made subject to result of writ petition and subsequently it was also stayed, the mere fact that after filing of writ petition, respondent-3 was appointed would make no difference. Appointment of respondent no. 3 is declared illegal and set aside. (Para 29)

Writ petition allowed. (E-4)

Precedent followed:

1. Rajendra Patel Vs. St. of U.P. & anr., (2016) 1 UPLBEC 331 (Para 27)

(Delivered by Hon'ble Sudhir Agarwal, J.

1. This Writ Petition under Article 226 of Constitution has been filed by Smt. Archana Srivastava, praying for a writ of mandamus directing respondents to quash candidature of candidates who applied beyond time for the post of Junior Clerk, award her weightage marks in respect to sports certificate and additional qualification possessed by petitioner in accordance with Rules and proceed accordingly.

2. The case set up by petitioner is that an advertisement was published on 10.08.1998 inviting applications for recruitment to the posts of Junior Clerk in the office of Niyantrak Pradhikari Viniyamit Kshetra, Konch, District Jalaun. Pursuant thereto, petitioner applied along with seven other candidates. Respondent-3 Rajiv Pandey, a resident of State of Bihar had applied for the post of 'Assistant Accountant' in the Office of Treasury Officer, Orai, Jalaun. His candidature for the said post was rejected but thereafter respondent-2 allowed respondent-3 to be considered for the post of Junior Clerk though he had obtained sports certificate in State of Bihar which was not recognized for weightage in the State of U.P. but that was also considered and he was allowed to appear in the selection test. When petitioner came to know about this fact, made representation dated 05.03.1999 and 30.03.1999, protesting against candidature of respondent-3 but ignoring the same, respondent-2 allowed respondent-3 to participate in selection and ignored petitioner's application.

3. Since result was not declared, therefore, writ petition was filed seeking a mandamus to respondents-1 and 2 to ignore candidature of respondent-3 for the post of Junior Clerk as he had not applied in time for the said post and thereafter make selection by awarding weightage of sports certificate to petitioner.

4. A Counter Affidavit has been filed by respondents-1 and 2 sworn by Smt. Urmila Devi, Deputy Collector, Konch, District Jalaun. It is stated therein that respondent-3 submitted form for Junior Clerk but due to clerical mistake, since the date of advertisement of vacancies for Junior Clerk and Assistant Accountant were same, therefore, his application form was forwarded to District Treasury. Thereafter by order of District Magistrate, application of two candidates, Rajiv Nayan and Rajiv Kumar Pandey were included in the list of candidates who had applied for the post of Junior Clerk. This information was also given to Karmik Department vide letter dated 11.12.1998. Mere fact that respondent-3 was resident of Bihar, was irrelevant since there was no condition of domiciliation for applying for the post of Junior Clerk. With regard to weightage to sports certificate also, it is said that there was no distinction, whether a person has participated in the prescribed sports level in State of Bihar or State of U.P. Respondent-3 submitted certificate upto School level for which he was awarded two marks while petitioner did not submit any sports proficiency certificate, therefore, she was not awarded any weightage of participation in sports.

5. Further, for the post of Junior Clerk, in type test of 20 maximum marks, petitioner could secure 13.20 marks while respondent-3 secured 15.20 marks. Selection for the post of Junior Clerk was made in accordance with Rules and only mistake happened is that the application form of Rajiv Nayan and Rajiv Kumar Pandey were forwarded to District Treasury but thereafter they were considered for the post of Junior Clerk under the orders of

District Magistrate. The marks obtained by petitioner and respondent-3 in the written test, interview and under various heads are given in para-10 of counter affidavit as under:

Sl.No.	Subject of Test	Prescribed Maximum marks	Marks obtained	
			Petitioner	Respondent-3
1	Written Test	40	20.00.	12.90.
2	50 per cent of the marks obtained in written test	20	10.00.	09.60.
3	Minimum qualification (Intermediate)	30	18.18	15.49
4	Marks of retrenched employee	15	-	-
5	Sports marks	5	00.	02.00.
6	Typing Test	20	13.20.	15.20.
7	Interview	10	06.00.	05.80.
	Total Marks	100	47.38	48.09

6. Separate Counter Affidavit has been filed by respondent-3 stating that he has been selected for the post of Junior Clerk and appointment letter dated 20.04.1999 was issued appointing him on the post of Junior Clerk. He has submitted joining report on 20.04.1999 and since then working on the post of Junior Clerk in the Office of Niyantrak Pradhikari Viniyamit Kshetra, Konch, District Jalaun. He has further stated that petitioner did not submit any certificate showing her participation in sports activity, therefore, she was not awarded any marks/weightage under the said 'Head'. With regard to his own application, in para-7 of Counter Affidavit, respondent-3 has stated that the Office committed a mistake and treated his application as it if was for the post of Assistant Accountant and hence forwarded the same to District Treasury though it ought to have been sent to concerned authorities dealing with recruitment of Junior Clerk. Similar error was committed in respect of one Rajiv Nayan hence both these applications, under the orders of District Magistrate, subsequently were sent to appropriate authority and they were allowed to participate in recruitment to the post of Junior Clerk.

7. Petitioner has filed Rejoinder Affidavit reiterating that respondent-3 actually had applied for the post of 'Assistant Accountant' and since he did not possess requisite qualification, his candidature was rejected. Subsequently District Magistrate illegally allowed interpolation in the application form and illegally accepted the same for the post of Junior Clerk. In para-6 of Rejoinder Affidavit it has specifically been said that respondent-3 never applied for the post of Junior Clerk in the Office of Niyantrak Pradhikari Viniyamit Kshetra, Konch, District Jalaun, as such he was not entitled to be considered for the post of Junior Clerk. His entitlement for weightage of sports participation is also disputed.

8. Two Supplementary Counter Affidavits have also been filed on behalf of respondent-2.

9. In the Supplementary Counter Affidavit filed on behalf of respondent-2 sworn on 02.09.2013 by Sri L. Venketshwar Loo, the then District Magistrate, Jalaun and working as Consolidation Commissioner, U.P. at the time of swearing the affidavit, it is said that a letter of appointment was issued to respondent-3 by Deepak Kumar, the then District Magistrate/ Niyantrak Pradhikari Viniyamit Kshetra, Konch, District Jalaun on 20.04.1999. On 21.04.1999 this Court passed following interim order:

"Heard learned counsel for the petitioner. The respondents 1 and 2 are directed to file counter affidavit within two months. The petitioner shall take steps to serve respondent no. 3 by registered post within one week.
List in 4th week of July 1999.

Any appointment made shall be subject to the decision of the writ petition." *(emphasis added)*

10. Subsequently, on 04.04.2001 this Court passed another interim order as under:

"The matter was fixed peremptorily today. Learned counsel for the petitioner has informed Shri H.N. Sharma in writing that this matter will be taken up today. The letter is taken on record.

Counter affidavit filed by respondent no. 3 is not on record. Counter affidavit has been filed by standing counsel in the office on 16-9-99. Office shall trace out the counter affidavit and place it on record.

Standing counsel has produced a copy of counter affidavit wherein it has been stated that respondent no. 3 has been appointed by District Magistrate Jalaun during the pendency of the writ petition but copy of a appointment letter has not been filed.

Until further orders of this court, the appointment of respondent no. 3 on the post of Clerk by District Magistrate Jalaun shall remain stayed." *(emphasis added)*

11. Thereafter, petitioner filed Contempt Application No 2793 of 2001 but the same was rejected, hence respondent-3 has been continuously working on the post of Junior Clerk and getting the salary.

12. Another Supplementary Affidavit has been filed on behalf of respondent-2 sworn by Sri Sanjay Kumar, Naib-Tehsildar, Tehsil Konch, District Jalaun appending therewith a copy of sports certificate dated 24.07.1987 showing participation of respondent-3 in Football and Athletics at School Level, i.e. B.B. High School, Begusarai, Bihar. Copy of advertisement dated 09.08.1998 for the post of Junior Clerk has also been filed as Annexure SCA-2 wherein last date of submission of application form was 31.08.1998. The format of application shows that for School level sports also weightage was provided. A copy of Government Order dated 29.08.1998 has also been filed as Annexure SCA-3 showing procedure for direct recruitment on Group-C posts which clarifies that recruitment shall be made by holding a written test of 100 marks which will comprise of examination in general Hindi, General Knowledge and General Studies which will be of value of 40 per cent marks. 30 per cent marks are provided for marks obtained in minimum educational qualification, 15 per cent marks for retrenched employees, five marks for International level sportsman, 4 marks for

National level, 3 marks for State level and 2 marks for University/College or Schools level sportsman. 20 per cent marks for typing and stenography wherever it is necessary and thereafter interview. A copy of application form of petitioner has also been placed on record as SCA-4 to show that she did not append any certificate of sports participation along with her application form.

13. Respondent-3 in his affidavit sworn on 02.09.2013 has stated specifically that he as well as petitioner both applied for appointment to the post of Junior Clerk pursuant to advertisement, copy whereof has been filed as Annexure-8 to the writ petition, and he was entitled to get weightage for sports quota certificate. It is also said that he has been issued letter of appointment on 20.04.1999 and his appointment has never been challenged by petitioner, therefore, writ petition is liable to be dismissed since he has already been appointed and the same has not been challenged.

14. This Court took it seriously as to why respondent-3 was allowed to continue since his appointment itself was stayed by order dated 04.04.2001 and consequently on 06.08.2013, it passed following order:

"Affidavit filed by the learned counsel for the respondent is taken on record.

The petitioner has challenged the selection of respondent no.3 on the ground that selection was unfair and illegal.

At the time of moving of this writ petition this Court passed the following order on 21.4.99 :

"Heard learned counsel for the petitioner. The respondents 1 and 2 are directed to file counter affidavit within two months. The petitioner shall take steps to serve respondent no. 3 by registered post, within one week.

List in 4th week of July, 1999.

Any appointment made shall be subject to the decision of the writ petition."

It appears that District Magistrate appointed respondent no. 3 on 20.4.1999. The matter was again heard on 4.4.2001. On the said date the learned counsel for the respondent no.3 did not appear before the Court inspite of written notice given by learned counsel for the petitioner. Learned Standing Counsel who represent the District Magistrate informed the Court that respondent no.3 has already been appointed by the District Magistrate during the pendency of the writ petition.

Having taken note of the said fact the Court has stayed the appointment of the respondent no.3. The order passed by this Court on 4.4.2001 reads as under :-

"The matter was fixed peremptorily today. Learned counsel for the petitioner has informed Shri H.N.Sharma in writing that this matter will be taken up today, the letter is taken on record.

Counter affidavit filed by respondent no.3 and standing counsel is not on record. Counter affidavit has been filed by standing counsel in the office on 16.9.99. Office shall trace out the counter affidavit and place it on record.

Standing counsel has produced a copy of counter affidavit wherein it has been stated that respondent no.3 has been appointed by District Magistrate, Jalaun during the pendency of the writ petition but copy of appointment letter has not been filed.

Until further orders of this court, the appointment of respondent no.3 on the post of clerk by District Magistrate, Jalaun shall remain stayed."

From the record ***it appears that petitioner aggrieved by the contemptuous and illegal action of the District Magistrate preferred Contempt Petition No. 2793 of 2001*** *before this Court. It appears that only part of the order dated 4.4.2001 was placed before the Contempt court which has been quoted by the Contempt Court in its order.* ***It is admitted case of the respondent no.3 that inspite of positive direction of this Court on 4.4.2001 he is continuing and receiving salary.***

From the record it is also evident that after filing counter affidavit the respondent no.3 and learned Standing Counsel has not taken any steps to get the interim order vacated.

Let notice be issued to the then District Magistrate to explain his conduct. The respondent no.3 is represented by Sri Anirudh Sharma, learned counsel. ***Four weeks time is granted to the District Magistrate and the respondent no.3 for filing reply to the show cause as to why respondent no.3 is continuing even after order of this Court dated 4.4.2001.*** *(emphasis added)*

The District Magistrate shall redirect this order to the then District Magistrate, wherever he is currently posted.

List the matter after four weeks."

15. When the matter was further heard, a serious dispute arose as to, whether respondent-3 had applied for the post of 'Assistant Accountant' or 'Junior Clerk' and application was submitted within prescribed time or not. Consequently, this Court required respondent-2 to produce original record of recruitment/selection before Court vide order dated 21.10.2019. The same has been produced for my perusal.

16. Original Application form of respondent-3 shows that in the Column of post, initially 'Kanishtha Lipik' is mentioned but the same is scored out. Thereafter, post of 'Sahayak Lekhakar' is mentioned. The same is also scored out. Then again, post 'Kanishtha Lipik' is mentioned. Application is signed on 06.09.1998 by respondent-3 though demand draft mentioned in Application is No. 359629 dated 08.09.1998 which shows that demand draft was prepared subsequently and appended to application form which was signed on 06.09.1998. On the photograph, there is signature of respondent-3 and date 07.09.1998 is mentioned with some illegible endorsement. On the left side of application form, there is endorsement of receipt dated 11.09.1998 and thereafter there is an endorsement of necessary action made and signed by Senior Treasury Officer. Thereafter somebody has signed on behalf of District Magistrate on 11.09.1998. On the right side of application form, there is an endorsement of District Magistrate, Jalaun at Orai which is undated and there is a seal of District Magistrate with following endorsement:

''आवेदित पद के लिये ***निर्धारित योग्यता के अन्तर्गत न होने के कारण आवेदन पत्र निरस्त किया जाता है।''***

"The application form is rejected due to not being under the prescribed qualification *for the post applied."*

(English Translation by Court)

(emphasis added)

17 . Then in the middle of Application Form, there is another endorsement with the seal of District Magistrate stating as under:

"Allowed for regulated area"

18. At the bottom of Application Form, somebody has made endorsement mentioning the date of 17.09.1998 as under:

*''महोदय, **इसका सम्बन्ध उरई कोषागार में विरूपित पदों से नहीं है। कृपया वापसी स्वीकार करें।''***

*"Sir, **It is not related to the post advertised in Treasury Office, Orai.** Please acknowledge the return."*

(English Translation by Court)

(emphasis added)

19. Not only this, I find that there are several applications in which interestingly manipulations have been made. There is an Application From of Vijay Shankar Mahajan where in the Column of Post, there is a separate Paper pasted on which post mentioned is 'Kanishtha Lipik' but that paper pasting is slightly open and I find mention of Post of 'Sahayak Lekhakar' on the Application Form, originally. This has been tried to be concealed by pasting a paper and mentioning the post of Junior Clerk. Who has done and why has done I find nothing is clear.

20. A similar application is that of A.U. Siddiqui. Therein also the post mentioned in the Application Form is different but it is in the Treasury Department, as paper pasting is slightly torn on the side but paper pasted on it mentions the post as 'Junior Clerk' and this manipulation has also been done subsequently but without any initials etc.

21. In the case of Rajiv Nayan also I find that his application is signed on 30.08.1998. His candidature was also rejected by District Magistrate but subsequently District Magistrate has allowed it for regulated area. The application form appears to have been received in the Treasury Department on 16.09.1998. Original Record also contains letter of one Rajiv Nayan dated 11.12.1998 addressed to the District Magistrate stating that he received letter dated 28.11.1998 on 07.12.1998 informing that his candidature has been rejected on the ground of lack of qualification though he has never applied for the post of Assistant Accountant but submitted application for the post of Junior Clerk and, therefore, he should be allowed to participate in recruitment of Junior Clerk. Thereon, Sri Vinod Kumar Srivastava, Treasury Officer submitted a report on 11.12.1998 stating that application form mentioned the post 'Junior Clerk' but Department was not mentioned and there was some mistake and considering this aspect, District Magistrate passed order permitting him to be considered for the post of Junior Clerk. Communicating the said information, Sri Amit Mohand Prasad, the then District Magistrate, Jalaun sent a letter to Special Secretary, U.P. Government on 11.12.1998.

22. Heard Sri A.K. Srivastava, Advocate, for petitioner; learned Standing Counsel appearing for State-respondents-1 and 2 and Sri Prabhakar Awasthi, Advocate, holding brief of H.N. Sharma, Advocate, appearing for respondent-3.

23. As discussed above, original record shows that the candidates who have submitted applications for the posts in Treasury, have been allowed subsequently to change the post after expiry of last date for submission of application form. Respondent-3's application clearly mentioned initially post of 'Junior Clerk'/ 'Assistant Accountant' and both were scored out. Thereafter the post of Junior

Clerk is mentioned. The application was submitted for Assistant Accountant. It was rejected by District Magistrate in September' 1998 but subsequently District Magistrate allowed him to appear in selection for the post of Junior Clerk. The alteration on the application form in respect of the post is not initialed by any one. The order sheet containing notes of Treasury Officer and concerned Clerks are dated December, 1998. It shows that subsequently when respondent-3 was allowed to appear for the post of 'Junior Clerk', Order sheet was got prepared accordingly and then District Magistrate, Deepak Kumar, allowed respondent-3 to appear for the post of Junior Clerk though his application was already rejected in September, 1998. This is a serious matter and shows an extraordinary indulgence on the part of the then District Magistrate in permitting respondent-3 to participate for the post of Junior Clerk. The extraordinary favour to respondent-3 by District Magistrate is writ large from the fact that even when the order of appointment was stayed by this Court on 04.04.2001, still he was allowed to continue and salary was paid.

24. In the matter of recruitment and appointment, corruption and manipulation by concerned officials with the record of candidates, for the reasons other than bona fide, has become a matter of routine. This case is glaring example of such an illegality. Once an application has been submitted by a candidate, which is not properly filled in or properly submitted or various columns are not properly filled in, in normal course it ought to be rejected. It appears, however, that concerned authorities whenever are interested they find out the ways and means to favour the candidates in whom they are interested. This is what has been done in the case in hand also. Various scoring out on the original application form of respondent-3 and the factum that District Magistrate had rejected the said application, how could review its decision and allowed respondent-3 to participate, could not be explained by learned Standing Counsel. He tried to rely on the defence taken that the application was wrongly forwarded to Treasury Officer though respondent-3 had submitted application for the post of 'Junior Clerk' yet failed to explain various erases made on the application form and also the endorsement of District Magistrate and that too without any date. It appears that initially respondent-3 submitted application mentioning both the posts, i.e., 'Junior Clerk and Assistant Accountant', and that is why stroke has been added between the words "Junior Clerk" and "Assistant Accountant" but later on "Junior Clerk" was scored out and that action has been done with a different pen and in a different manner. Later when he was not found eligible for the post of 'Assistant Accountant', as he did not fulfill requisite qualification for the said post, his application was rejected by District Magistrate. Then in December, 1998 when he allowed respodnent-3 to appear in the recruitment to the post of Junior Clerk with a different pen, he was allowed to score out the words "Assistant Accountant" and in a different handwriting and pen, "Kanishtha Lipik" again has been mentioned in the Application form. At the end of application form, there is an endorsement by someone as subordinate officer, as under:

''महोदय, इसका सम्बन्ध उरई कोषागार में विरूपित पदों से नहीं है। कृपया वापसी स्वीकार करें। ह0 17/9/98''

"Sir, It is not related to the post advertised in Treasury Office, Orai. Please acknowledge the return. Sig. 17/9/98"

(English Translation by Court)

25. Who has made this endorsement and what for, particularly when application was already rejected by District Magistrate and more so, after rejection of application form, letter was also sent in November, 1998 to the concerned candidates communicating rejection, I find no explanation. Further the documents in original file have been placed in a suspicious manner, inasmuch no application of respondent-3 permitting him to appear for the post of Junior Clerk is on record. There is an application of Rajiv Nayan and original file submitted to this Court mentions the said application as Paper Sl.No.-1. The said application is undated. There are three endorsement on the said letter and all are dated 11.12.1998. Then the order sheet starts and on the one side, it is marked as Sl.No.-2 while there is Sl.No.-4 on the right hand side but that serial number is scored out. Then comes, another paper which is marked as Sl.No.-5. On the back side of it there is Sl.No. 3 and on the right side, there is Sl.No.-6 which is scored out. It shows that order-sheet is also arranged in the manner which suits to the authorities concerned. Then there is Noting dated 11.12.1998 of Additional District Magistrate (Finance and Revenue) addressed to District Magistrate and it is a separate order sheet with Sl.No. 4. Then again comes the order sheet Sl.No. 5 whereunder Sl.No. 1 is also mentioned which is scored out and it contains a noting of Prescribed Authority dated 20.04.1999 and then signature of Deepak Kumar, District Magistrate, Jalaun at Orai and that too dated 20.04.1999. Then again a photocopy of order sheet which is on record and marked as Sl.No.-6 and Sl.No.-4 is also mentioned which is scored out. Then there is another separate order sheet which is shown as Sl.No.-5 and on the back side Sl.No.-7 is mentioned and on the right side also Sl.No. 6 is also mentioned which is scored out and it contains endorsement of A.D.M. dated 11.12.1998. Various documents in the file, which are tagged at top are letters dated 11.12.1998 sent by District Magistrate to State Government and it contains Paper Sl. No.-56 whereafter there is another Paper Sl. No.-56 which is original copy of appointment letter sent to respondent-3. The Application Form placed on record contains three page numbers two of them are scored out. It also shows that documents in the original file have not been maintained in regular course of business.

26. Be that as it may, the fact remains that application of respondent-3 originally was submitted for the post of Assistant Accountant and it also mentioned on the top endorsement AA196 which appears to be short form of Assistant Accountant but subsequently all the manipulations have been done in which respondent-2 obviously must have been instrumentality otherwise nothing could have been permitted.

27. A Full Bench of this Court in **Rajendra Patel Vs. State of U.P. and another (2016) 1 UPLBEC 331** has clearly held that after expiry of last date, no indulgence can be granted to entertain an application or document of a candidate who has come thereafter.

28. In the present case, respondent-3 has been allowed to participate for recruitment on the post of Junior Clerk by District Magistrate passing order on 11.12.1998 though that is much after date of expiry of last date of submission of application form. This was clearly illegal and shows that appointment of respondent-3 was not fair but in collusion with the then District Magistrate. It is vitiated in law on account of favoritism and procedural

illegality committed by concerned authority. Since appointment of respondent-3 was already made subject to result of writ petition and subsequently it was also stayed, the mere fact that after filing of writ petition, respondent-3 was appointed would make no difference.

29. In the result, writ petition is allowed. Appointment of respondent-3 is declared illegal and hereby set aside.

30. The facts disclosed above show that despite interim order passed by this Court, respondent-3 was allowed to continue and paid salary, therefore, for the period subsequent to order 04.04.2001, the amount of salary which has been paid to respondent-3 is clearly unauthorized and illegal. However, since he has worked, I do not find it appropriate to direct recovery of salary from respondent-3 but this illegality and contemptuous act has been perpetuated/be allowed by the then District Magistrate, therefore, in my view entire amount which has been paid towards salary to respondent-3, on and after the stay order passed by this Court on 04.04.2001, must be recovered from concerned Officials who held Office of District Magistrate from that date till now and allowed this illegality. I order accordingly. The respondent-1 shall give opportunity to concerned District Magistrate(s) who held the Office during this period and make recovery of the amount which has been paid as salary to respondent-3 from such District Magistrate(s) who held Office during this period and allowed salary to be paid to respondent-3 despite stay order passed by this Court on 04.04.2001.

31. Considering the facts and circumstances and also the fact that original application form of petitioner nowhere shows that he submitted certificate of sports and even otherwise almost 20 years have passed, I find it appropriate that the vacancy on the post of 'Junior Clerk', after setting aside the appointment of respondent-3, will be filled in by initiating process of recruitment, afresh.

32. However, petitioner shall be entitled to cost which I quantify to Rs. 1 lac against respondents-1 and 2.

(2020)03-05ILR A1219
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.02.2020

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 24576 of 2019

Navanit Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Jagdambika Prasad Tripathi, Indra Jeet Yadav, Vishwanath Prasad Tripathi

Counsel for the Respondents:
C.S.C.

A. Criminal Law-Indian Penal Code-Section 147,323,504 & 506-Service–Appointment– Petitioner was declared unfit for the post of Junior Assistant after selection. Reason mentioned was the pendency of a criminal case against the petitioner u/s 147, 323, 504 and 506 IPC. The Court held that, as the petitioner was not aware about the pendency of criminal case at the time of submitting his declaration, he could not have disclosed the same. Also, his offence was not so serious to refuse appointment. (Para 9, 10)
Writ petition allowed. (E-4)

Precedent followed:

1. Avtar Singh VsU.O.I. & ors., (2016) 8 SCC 471 (Para 7, 11)

2. Commissioner of Police & ors. Vs. Sandeep Kumar, (2011) 4 SCC 644 (Para 8)

Petition assails order dated 09.08.2019, passed by Regional Food Controller, Ayodhya Region, Ayodhya.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri J.P. Tripathi, learned counsel for the petitioner and Dr. Udai Veer Singh, learned Addl. C.S.C. for the State respondents.

2. This Court has passed order dated 5.2.2020 which reads as under :

"By means of this petition the petitioner has assailed the order dated 9.8.2019 passed by the Regional Food Controller, Ayodhya Region, Ayodhya declaring the petitioner unfit for the post of Junior Assistant on which he was finally selected. The reasons so indicated in the impugned order is that the petitioner while submitting his information on 6.8.2018 has concealed the fact that one criminal case bearing Crime No. 238/2017 under section 147, 323, 504 and 506 I.P.C. at P.S. Naunhara, District Ghazipur was pending wherein the charge-sheet has been filed against the petitioner on 13.1.2018.

The learned counsel for the petitioner has categorically indicated in para 10 of the writ petition that petitioner was absolutely unaware about the aforesaid criminal case and charge-sheet inasmuch as the petitioner could know about the aforesaid fact on the police verification being made against him in the month of March, 2019 and immediately after knowing the aforesaid fact the petitioner intimated the authorities that he has obtained bail in the aforesaid case. Not only the above the petitioner has preferred a letter to the department on 13.5.2019 which has been enclosed with the counter affidavit wherein the petitioner has intimated the fact that he was absolutely unaware about the aforesaid case and since he has been released on bail and the matter is pending before the criminal court, therefore, if the petitioner is held guilty in the aforesaid criminal case his services may be terminated. On that application of the petitioner the appointing authority has preferred a letter dated 13.6.2019 (Annexure no. 7) to the Commissioner, Food and Civil Supplies apprising the fact that as per opinion of D.G.C.(Civil), Ayodhya there is no legal impediment appointing the petitioner on the post in question. However, on the said letter the Additional Commissioner, Food and Civil Supplies has written letter dated 12.7.2019 (Annexure no. 8) to the Regional Food Controller, Ayodhya to take appropriate decision as he is the appointing authority, thereafter the Regional Food Controller has passed the impugned order dated 9.8.2019. In the counter affidavit this fact has not properly been replied as to whether the petitioner was informed about the pending criminal case and the charge-sheet which was filed on 13.1.2018. If the aforesaid fact was not within the knowledge of the petitioner then the premise of the authorities on which the impugned order has been passed would not be said to be correct.

Therefore, in view of the above the learned Addl. C.S.C. is directed to obtain the information from the Court concerned wherein the charge-sheet dated 13.1.2018 has been filed against the petitioner regarding the information of the criminal case being given to the petitioner

on or before 8.6.2018 when the petitioner has submitted his declaration. The aforesaid exercise shall be carried out within a period of two weeks.
List this petition on 24.2.2020 within top 10 cases.

Learned counsel for the petitioner may also file the order-sheet of the Court concerned to convince the Court that on or before 8.6.2018 the information of pendency of any criminal case or charge-sheet has not been provided to him. "

3. In compliance of the aforesaid order learned counsel for the petitioner has already filed affidavit bringing on record the certified copy of the order-sheet of the learned court-below i.e. A.C.J.M., Ghazipur demonstrating the fact as to when the petitioner could know about the pendency of the criminal case.

4. Learned Addl. C.S.C. has also produced the letter dated 22.2.2020 preferred by the Regional Food Controller, addressing to the C.S.C. of this Court enclosing therewith some relevant correspondences, the same are taken on record. As per aforesaid instructions this much has been indicated that the charge-sheet in the issue in question has been submitted before the Court concerned on 13.1.2018 and the petitioner has filed his declaration before the competent authority on 8.6.2018, before submission of charge-sheet, therefore, the fact was known to the petitioner regarding pendency of criminal case. In the aforesaid instruction it has nowhere been indicated as to how such information was provided to the petitioner.

5. The affidavit so filed by Sri Tripathi, learned counsel for the petitioner clearly indicates that the learned court-below has issued notice to the petitioner on 17.10.2018 directing him to appear before the Court concerned on 5.1.2019. Therefore, there is no doubt that the petitioner could know about the pendency of criminal case only after the notice has been issued by the Court concerned on 17.10.2018 for his appearance on 5.1.2019.

6. In view of the above it is clear that when the petitioner has filed declaration on 8.6.2018 he was absolutely unaware about the pendency of the criminal case inasmuch as he could know about the aforesaid fact on or after 17.10.2018.

7. The issue in question has already been settled by the Hon'ble Apex Court while issuing guidelines in such type of matters as to how those circumstances can be dealt with, in re: ***Avtar Singh vs. Union of India & others reported in (2016) 8 SCC 471.*** The relevant para of the judgment in re: Avtar Singh (supra) are 38.1 to 38.4, 38.5 and 38.6, which are being reproduced herein below :

"38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2.While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3. The employer shall take into consideration the Government orders/ instruction/ rules, applicable to the employee, at the time of taking the decision.

38.4. In case there is suppression or false information of involvement in a

criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted:

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case."

8. The Hon'ble Apex Court in re: ***Commissioner of Police and others vs. Sandeep Kumar, (2011) 4 SCC 644,*** in para 12 has held as under :

"12. It is true that in the application form the respondent did not mention that he was involved in a criminal case under Sections 325/34 IPC. Probably he did not mention this out of fear that if he did so he would automatically be disqualified. At any event, it was not such a serious offence like murder, dacoity or rape, and hence a more lenient view should be taken in the matter."

9. The Hon'ble Apex Court has held that the offence under Section 325/34 IPC is not so serious to refuse appointment of any person. In the light of the aforesaid dictum of the Hon'ble Apex Court, in the present case, the offence of the petitioner is less serious than the offence under Section 325 IPC inasmuch as under Section 325 IPC, the punishment prescribed as seven years whereas in none of the sections, the petitioner's charge is having punishment of about seven years. Therefore, it appears that while passing the impugned order dated 09.08.2019, the competent authority has not invoked his discretion reasonably.

10. In view of the above, I am of the considered opinion that since the petitioner was not aware about the pendency of the criminal case at the time of submitting his declaration, therefore, he could have not disclosed such fact in his declaration. Therefore, it appears that the impugned order dated 9.8.2019 is liable to be revisited inasmuch as the order impugned suffers from arbitrariness and discrimination, hence, the same is liable to be set aside.

11. Accordingly, a writ in the nature of certiorari is issued quashing the order dated 9.8.2019 passed by the Regional Food Controller, Ayodhya Region, Ayodhya (Annexure no. 1). The matter is remitted back to the authority concerned to pass appropriate orders strictly in accordance with law considering the facts and circumstances of the issue in question as well as the dictum of Hon'ble Apex Court in re: Avtar Singh (supra). The compliance of the aforesaid order shall be made with promptness preferably within a period of one month.

12. In view of above observations, writ petition is ***Allowed***.

13. No order as to costs.

(2020)03-05ILR A1223
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

WRIT A No. 30517 of 2005

Radhey Shyam Birla ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kshetresh Chandra Shukla, Sri Vivek Kumar Singh

Counsel for the Respondents:
S.S.C., Sri Devendra Pratap Singh, Sri Jitendra Nath Sharma, Kirtika Singh, Sri V.B. Singh

A. Service Law –General Clauses Act, 1897-: Section 27;- Indian Evidence Act, 1872:- Section 114(e), 114(f);- Indian Post Office Act, 1898:- Sections 2(f), 3, 4, 17, 14 – Voluntary Retirement Scheme - Resignation - It is for the sendee, who deny service of registered letter upon him and attempted to challenge endorsement of "refusal" made by Postman, to lead evidence which includes examination of "Postman" also and in case he fails to do so, legal presumption will go against him and will remain to be unrebutted unless there is other material to show otherwise.
Nothing of this sort has been shown in the case in hand. (Para 45)
Petitioner withdrew his resignation and communicated this fact to the respondents vide letters dated 07.07.2003 and 21.07.2003 which was sent by registered post. It is not the case of the respondents that registered letter is not properly addressed and, hence, presumption of service lies in favour of petitioner unless proved otherwise by respondents. Respondents as per the own case set up finally accepted resignation of petitioner vide letter dated 30.01.2004 i.e. after withdrawal of resignation which could not have been done. Therefore, acceptance of resignation letter dated 31.07.2002 is invalid and not in accordance with law. (Para 7, 16, 46)

B. Meaning of words "resign" and "resignation" referred to – A conditional resignation is not a valid resignation (Para 52 to 62) - It can be safely said that letter of resignation tendered by petitioner in the present case is a conditional letter of resignation. It states that resignation may be accepted on payment of all outstanding dues, which shows that resignation was simultaneous to payment of all outstanding dues. Hence, it could not have been accepted. (Para 50, 51)
Therefore, the contention of the respondent that withdrawal of resignation being conditional, will not be treated to be a withdrawal, does not suffice, as the resignation itself is rendered invalid. (Para 49)

C. Constitution of India: Article 12 – A public functionary cannot be permitted to act like a dictator causing harassment to a common man and in particular when the person subject to harassment is his own employee - The respondents being "State" under Art. 12, its officers are public functionaries. Petitioner has placed on record certain documents to show that some employees have been retained by respondents which is sought to be explained by respondents that a skeleton staff was maintained to take out formal closure activities. This means that entire staff has not been terminated. In these facts and circumstances, there is no reason to deny relief to petitioner to which he is entitled, particularly when respondent-Employer has committed fault. They cannot be allowed to take advantage of their own wrong. (Para 64, 65, 66, 73, 74)
Therefore, the contention that Unit in which petitioner was working is closed in 2004 itself and, therefore, petitioner neither can be given re-employment or reinstatement nor any other service benefit, does not suffice. (Para 63)
Writ petition allowed. (E-4)

Precedent followed

1. Whitfield Vs. Lord Le Despencer, (1778) 2 Cowp. 754 (Para 20, 23)

2. Triefus & Co. Ltd. Vs. Post Office, (1957) 2 Q.B. 352 (Para 21, 23)

3. U.O.I. Vs. Mohd. Niazim, AIR 1980 SC 431 (Para 23)

4. Harihar Banerji & ors. Vs. Ramashashi Roy & ors., AIR 1918 PC 102 (Para 26)

5. Sukumar Guha Vs. Naresh Chandra Ghosh, AIR 1968 Cal. 49 (Para 27)

6. Wasu Ram Vs. R.L. Sethi, 1963 AWR 472 (Para 28)

7. Asa Ram Vs. Ravi Prakash, AIR 1966 All. 519 (Para 30)

8. Ganga Ram Vs. Phulwati, AIR 1970 All. 446 (Para 31, 35)

9. Vaman Vithal Vs. Khanderao Ram Rao, AIR 1935 Bom 247 (Para 34)

10. Jankiram Narhari Vs. Damodhar Ramchandra, AIR 1956 Nag. 266 (Para 34)

11. Tekchand Devidas Vs. Gulab Chand Chandan Mal, AIR 1957 Madh B. 151 (Para 34)

12. Samittri Devi & anr. Vs. Sampuran Singh & anr., (2011) 3 SCC 556 (Para 35)

13. Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana, AIR 1976 SC 869 (Para 36)

14. Har Charan Singh Vs. Shiv Rani, AIR 1981 SC 1284 (Para 37)

15. Anil Kumar V.s Nanak Chandra Verma, AIR 1990 SC 1215 (Para 38)

16. Shiv Dutt Singh Vs. Ram Das, AIR 1980 All. 280 (Para 38)

17. Jagdish Singh Vs. Natthu Singh, AIR 1992 SC 1604 (Para 39)

18. Gujarat Electricity Board Vs. Atmaram Sungomal Poshani, AIR 1989 SC 1433 (Para 40, 41)

19. Jhabul Ram Vs. D.J., Ballia, 1994 (23) ALR 464 (Para 41)

20. Basant Singh Vs. Roman Catholic Mission, 2003 (1) AIC 1 (SC) (Para 42)

21. Noor Mohammad & anr. Vs. XIV A.D.& S.J., Kanpur Nagar, 2006 (63) ALR 244 (Para 43)

22. Brij Nandan Gupta Vs. III A.D.J., Rampur & anr., Writ-A No. 24853 of 1989 (Allahabad) (Para 44)

23. U.O.I. etc. Vs. Gopal Chandra Misra & ors., (1978) 2 SC 301 (Para 47)

24. U.O.I. & anr. ther Vs. Wing Commander T. Parthasarathy, (2001) 1 SCC 158 (Para 47)

25. Srikantha S.M. Vs. Bharath Earth Movers Ltd., (2005) 8 SCC 314 (Para 47)

26. Shambhu Murari Sinha Vs. Project & Development India Ltd. & anr., (2002) 2 SCC 437 (Para 48)

27. R.J. Maurya Vs. St., 1967 SLR 823 (Para 55)

28. Ramchand Nihalchand Advani Vs. Anandlal Bapalal Kothari & anr., AIR 1962 Gujrat 21 (Para 56)

29. Hirdeyashawer Singh Chauhan Vs. St. of M.P., 1987 Jabalpur Law Journal 566 (Para 57)

30. Prabha Atri (Dr.) Vs. St. of U.P. & ors., 2003 (1) UPLBEC 772; AIR 2003 SC 534 (Para 58, 59)

31. Phool Chandra Singh Vs. The Chairman, Vindhyavasini Gramin Bank & ors., 2006 (6) AWC 5513 (All.) (Para 62)

32. Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027 (Para 67)

33. Lord Devlin in Rooks Vs. Barnard & ors., 1964 AC 1129 (Para 67)

34. L.D.A. Vs. M.K. Gupta, JT 1993 (6) SC 307 (Para 67)

35. Ghaziabad Development Authorities Vs. Balbir Singh, JT 2004 (5) SC 17 (Para 68)

36. Registered Society Vs. Union of India & ors., (1996) 6 SCC 530 (Para 70)

37. Shivsagar Tiwari VsU.O.I., (1996) 6 SCC 558 (Para 71)

38. D.D.A. Vs. Skipper Construction & anr., AIR 1996 SC 715 (Para 72)

Referred to:

1. Corpus Juris Secundum, Vol. 77, page 311 (Para 52)

2. Words and Phrases, Permanent Edition, Vol. 37, Page 473 (Para 53)

3. Black's Law Dictionary, Sixth Edition, Page 1310 (Para 54)

Petition assails orders dated 31.07.2003 and 31.01.2004, passed by National Textiles Corporation (UP) Ltd.

(Delivered by Hon'ble Sudhir Agarwal, J.

1. Heard Sri Vivek Kumar Singh, learned counsel for petitioner and Sri Devendra Pratap Singh, learned counsel for respondents.

2. Petitioner was an employee of National Textiles Corporation (U.P.) Limited *(hereinafter referred to as "NTCL")* which was having its unit New Victoria Mills at Kanpur. He was appointed on 27.04.1984 as Cotton Selector (non-gazetted post). Several units of NTCL suffered losses and declared sick, therefore, Modified Voluntary Retirement Scheme *(hereinafter referred to as "MVRS")* was launched by Respondent-Employer and pursuant whereto, petitioner submitted letter dated 31.07.2002 resigning from service. Said letter reads as under:-

''राष्ट्रीय पुनर्वास योजना द्वारा संचालित ***संसोधित स्वैच्छिक सेवानिवृत्ति योजना के अन्तर्गत*** *मिल की सूचना दिनांक 13–6–2002, एवं 27–7–2002 के परिप्रेक्ष्य में अपना त्याग पत्र देना चाहता हूं।*

अतः निवेदन है कि प्रार्थी के ***सेवाकाल से सम्बन्धित समस्त देयों का भुगतान सुनिश्चित करते हुए त्याग पत्र स्वीकार करने की कृपा करें।***''

"Under amended Voluntary Retirement Scheme run by National Rehabilitation Plan, in the light of information dated 13.6.2002 and 27.7.2002, I wish to tender my resignation.

It is, therefore, requested that resignation of applicant be kindly accepted ensuring all payments payable to him relating to his service period."

(Emphasis added)

(English Translation by Court)

3. However, before it could be accepted, petitioner submitted another letter dated 07.07.2003 withdrawing his resignation letter dated 31.07.2002. A reminder letter dated 21.07.2003 was also submitted by petitioner to Officer on Special Duty Unit at Kanpur intimating that he is withdrawing his resignation and in this regard he has already submitted letter dated 07.07.2003, therefore, his resignation should not be accepted. Averments in respect of withdrawal of resignation vide letters dated 07.07.2003 and 31.07.2003 have been made in paras- 14 and 15 of writ petition which read as under:-

"14. That the petitioner withdrawn his resignation as tendered on 31.07.2002 by means of letter dated 7.7.2003 given to respondent no. 4. The said applicatioin dated 7.7.2003 was duly received by Factory Manager/ Manager

(Industial Relation) on same date which was duly endorsed on the Register of New Victoria Mills.

15. That the petitioner also sent withdrawal application dated 21.07.2003 through registered post to respondent-4 and the copy of the same also forwarded before the respondent no. 3 for revocation of his resignation dated 31.07.2002 tendered in pursuance to modified Voluntary Retirement Scheme."

4. However, respondents communicated to petitioner that his resignation has been accepted with effect from 01.08.2003.

5. It is contended that since petitioner has already withdrawn resignation, subsequent acceptance of resignation is patently illegal and of no legal consequence.

6. Sri D.P. Singh, learned counsel for respondent-Employer drew my attention to the averments contained in para-8 of counter affidavit wherein it is stated that letter dated 07.07.2003 was not received by Office/Management and has wrongly been annexed as Annexure-3 to the writ petition. It is further stated that it was a conditional withdrawal of resignation to provide a job in the Mill which was not possible. Reply to para-15 of the writ petition has been given in para-9 of the counter affidavit wherein it is stated that letter dated 31.07.2002 mentioned in said letter, was not actually received in the Office. He also submitted that Mill has already been closed, therefore, it is not possible to take petitioner into service.

7. The first question up for consideration before Court is, "whether acceptance of resignation letter dated 31.07.2002 is valid and in accordance with law".

8. Parties have not disputed that resignation letter dated 31.07.2002 was given by petitioner. Its contents are already reproduced in para-2 of the judgement. Respondents claim to have accepted petitioner's resignation after an year i.e. vide order dated 31.07.2003. Petitioner was sought to be relieved on 01.08.2003. The letter/ notice dated 31.07.2003 issued by Sri N.K. Pandey, Officer on Special Duty *(hereinafter referred to as "OSD")* is Annexure-5 to the writ petition and it reads under:-

"Notice

It is, hereby, informed to the following employees that their resignation under M.V.R.S., have been accpeted by the management. Accordingly, they are, hereby, retired/relieved from the services of the mills w.e.f. 01.08.2003 (before duty).

S.No.	*Name*	*Deoig*	*Deptt.*	*P.F. No.*
1	*Sri R.K. Verma*	*By. Psocg Mastor*	*Procg.*	*8082*
2	*Sri S.K. Dixit*	*Shift Incharge*	*Wvg.*	*5112*
3	*Sri R.S. Birla*	*Cotton Selector*	*Spg.*	

(N.K. Pandey)

Officer on Spl. Duty"

9. There is another office order dated 10.09.2003 issued by OSD Sri N.K. Pandey which clearly states that due to some

unavoidable circumstances, acceptance of resignations under MVRS is not possible and, hence, they (petitioner and another) are desired to continue in service and for the gap, if any, they may avail earned leave. Said office order is annexed as Annexure-6 to the writ petition and it reads as under:-

"Due to some unavoidable circumstances, ***till further orders to accept the resignation under MVRS of the following officials of the mills is not possible and as such they are desired to continued their services.*** *For the gap, if say in between, they may avail their earned leave.*

1. Sri Mohd. Yunus, Jr. Asstt. W/H/ Incharge.

2. Sri R.S.Birla, Cotton Selector."

(Emphasis added)

10. The facts about office order dated 10.09.2003 have been mentioned by petitioner in para-22 of the writ petition. It has been replied in para-11 of the counter affidavit wherein, though, it has been denied but subsequent explanation shows admission of issue of said letter dated 10.09.2003 by Sri N.K. Pandey, OSD. It would be appropriate to reproduce para-11 of the counter affidavit as under:-

"11. That the contents of paragraph Nos. 22 and 23 of the writ petition as stated are denied. The letter of a OSD of N.V.M. Dated 10.09.2003 is not the denial of MVRS or non acceptance of his resignation submitted by him dated 31.07.2002. It was merely a letter for taking work from the petitioner as a temporary measure for which necessity arose as a wining up operation. Few skeleton hands were required for closing of operation. But it does not effect the status of the petitioner to claim continuance of service in the Mill which is not existence."

11. Then, there is another letter dated 23.10.2004 (Annexure-1 to the counter affidavit) filed on behalf of respondents-1 to 4 wherein it is stated that petitioner's resignation has been accepted and he has been relieved from service with effect from 01.02.2004. Here the date of relieving, after acceptance of resignation, has changed from 01.08.2003 to 01.02.2004. Respondents have also filed a copy of letter dated 16.02.2004 stating that original copy of letter dated 30.01.2004 regarding acceptance of petitioner's resignation under MVRS with effect from 31.01.2004 is enclosed and the same was also displayed on notice board. This letter dated 16.02.2004 (Annexure- CA-2) reads as under:-

"Shri R.S. Birla, Ex.Cotton Selector

H.No. 11/249,
Opp: G.C.T.I. Hostel,
Souterganj,
Kanpur

Dear Sir,

Enclosed please find herewith the original copy of this letter dated 30.01.2004 regarding accpetance of your resignation under Modified Voluntary Retirement Scheme w.e.f. 31.01.2004 (After duty). A copy of the same has already been displayed at the Notice Board of the mills. Please also submit your Bank Account number immediately.

Thanking you,
Yours faithfully,
for New Victoria Mills,
Unit of NTC (UP) Limited,

(Govind Singh)

Officer on Spl. Duty"

12. A copy of letter dated 31.01.2004 is Annexure-10 to the writ petition and this shows that alleged acceptance of resignation under MVRS was vide letter dated 31.01.2004 and petitioner was sought to be relieved in the afternoon on 31.01.2004. It also directed petitioner to collect his dues from office. The contents of letter dated 31.01.2004 reads as under:-

''आपके संशोधित स्वैच्छिक सेवानिवृत्ति योजना के अन्तर्गत जो त्याग पत्र दिया गया है, उसे सवीकार कर लिया गया है। आपको दिनांक 31.01.2004 (ड्यूटी उपरानत) से मिल की सेवाओं से सेवानिवृत्त किया जाता है।

आपका जो भी धन बनता है उसे 25 दिन के बाद किसी कार्य दिवस में मिल कार्यालय से प्राप्त कर ले।''

"The resignation tendered by you under the Modified Voluntary Retirement Scheme has been accepted. You stand retired from the Mill services w.e.f. 31.01.2004 (after duty).

You may on expiry of 25 days receive your dues from the Mill office in any working day."

(English Translation by Court)

13. In between, I find that there is one more letter dated 07.10.2003 which informs petitioner that his resignation under MVRS has been accepted by Management and shortly he shall be relieved. This letter dated 07.10.2003 is Annexure-7 to the writ petition and contents thereof reads as under:-

''सूचनीय है कि संशोधित स्वैच्छिक सेवानिवृत्ति के अन्तर्गत आपके द्वारा दिया त्याग पत्र दिनांक 12.07.2002 प्रबन्ध तंत्र द्वारा स्वीकार किया जाता है। तथा आपको शीघ्र सेवा से मुक्त कर दिया जायेगा।''

"Be informed that your resignation tendered under the Modified Voluntary Retirement Scheme stands accepted by the Management on 12.07.2002 and you will be relieved of your duties at the earliest."

(English Translation by Court)

14. Therefore, as per the case set up by respondents, resignation submitted by petitioner on 31.07.2002 was accepted, firstly, vide letter dated 31.07.2003 and he was relieved on 01.08.2003; thereafter vide letter dated 10.09.2003, petitioner was informed that it is not possible to accept his resignation and he will continue to work. Again, vide letter dated 07.10.2003, respondents claim to have accepted petitioner's resignation but state that he shall be relieved shortly. Then comes third letter dated 31.01.2004 informing petitioner that his resignation has been accepted and he is being relieved in the afternoon on 31.01.2004. In the meantime, respondents admit that petitioner had continued to work and one of such letter dated 07.01.2004 (Annexure-9 to the writ petition) shows that earlier he was attached with Vigilance Department of the Unit, vide order dated 09.01.2001 which was withdrawn and he was directed to report to his place of new posting. He was relieved by Vigilance Officer on 07.01.2004. Subsequent vide letter dated 16.02.2004 issued by respondents refers to resignation of petitioner vide letter dated 30.01.2004 and his relieving in the afternoon on 31.01.2004 which means that earlier acceptance was not acted upon by respondents or it was not accepted or there was no such valid acceptance at all. In the meantime, petitioner submitted letter dated 07.07.2003 withdrawing his resignation. Then letter dated 21.07.2003 (Annexure-4 to the writ

petition) was also given referring to withdrawal letter dated 07.07.2003. It was sent by registered post. Interestingly, facts regarding withdrawal letters dated 07.07.2003 and 21.07.2003 have been stated in paras- 14, 15 and 16 to the writ petition and it read as under:-

"14. That the petitioner withdrawn his resignation as tendered on 31.07.2002 by means of letter dated 7.7.2003 given to respondent no.4. The said application dated 7.7.2003 was duly received by Factory Manager/ Manager (Industrial Relation) on same date which was duly endorsed on the Register of New Victoria Mills.

15. That the petitioner also sent withdrawal application dated 21.07.2003 through registered post to respondent-4 and the copy of the same also forwarded before the respondent no. 3 for revocation of his resignation dated 31.07.2002 tendered in pursuance to Modified Voluntary Retirement Scheme.

16. That it is noteworthy here that the office of respondent no. 4 had received the said registered revocation letter dated 23.07.2003."

15. Respondents have replied aforesaid paragraphs in paras- 8 and 9 of counter affidavit and the same read as under:-

"8. That the contents of paragraph Nos. 12, 13 and 14 of the writ petition as stated are denied. The letter of resignation dated 31.07.2002 has been accepted and acted upon by the management. By letter dated 07.07.2003 ***which has not been received by the management*** *and has wrongly been annexed as Annexure No. 3 in the writ petition, even its perusal tells different story. It is a conditional withdrawal of resignation and provide a job in the mill was impossibility for the management. It is reiterated that the letter is a manufactured document only to create a confusion.*

9.That contents of paragraph Nos. 15, 16 and 17 of the writ petition as stated are denied. It is too late for the petitioner to take Summer Sault. ***His resignation dated 31.07.2002 was accepted and on the Notice Board pasted on 31.07.2003. Petitioner has been relieved from duty w.e.f. 01.08.2003,*** *his name appears at Sl.No.3 vide Annexure-5 in the writ petition annexed by the petitioner. As stated above,* ***even the withdrawal of resignation which has never received by the management was conditional as sated by the petitioner by a document*** *Annexure No. 3 not received by the management. In the alternative, the petitioner will have no other remedy in the matter as due to the closure of mill, no relief can be granted. It is wrong to allege that the registered letter dated 23.07.2003 was ever received by the management rather the management is always informed even personally to the petitioner that he stood relieved. His resignation has been accepted and his MVRS is ready can be collected by him. The petitioner was fluctuating in the decision."*

(Emphasis added)

16. The provisions of MVRS also shows that once resignation is accepted, incumbent could not have been allowed to continue since that will have resulted in abolition of post. Hence, if resignation of petitioner was accepted by respondents vide letter dated 31.07.2003, neither it could have been deferred nor petitioner could have been allowed to continue nor there would have arisen any other occasion

to accept resignation at two different times i.e. 07.10.2003 and 30.01.2004. This shows that respondents have taken inconsistent stand in the matter though, in the meantime, petitioner already withdrew his resignation and communicated this fact to the respondents vide letter dated 07.07.2003 and again vide letter dated 21.07.2003 which was sent by registered post. The registered receipt is shown as Annexure-8 to the rejoinder affidavit and copy of said letter was also addressed to Chairman and Managing Director, N.T.C. (U.P.) Limited, Kanpur. It is not the case of respondents that registered letter is not properly addressed and, hence, presumption of service lie in favour of petitioner unless proved otherwise by respondents. In taking above view, I am fortified by Statute and may refer the same as under.

17. First, is Section 27 of General Clauses Act, 1897 (hereinafter referred to as "Act, 1897" which reads as under:

*"**27. Meaning of service by post.-** Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, where the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, **the service shall be deemed to be effected** by properly addressing pre-paying and posting by registered post, a letter containing the document, **and unless the contrary is proved,** to have been effected at the time at which the letter would be delivered in the ordinary course of post."*

18. Another relevant provision is Section 114, Illustrations (e) and (f), Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1972") which reads as under:

*"**114. Court may presume existence of certain facts.-** The Court **may presume** the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

Illustrations

The Court may presume-

...

(e) The judicial and official acts have been regularly performed;

(f) That the common course of business has been followed in particular cases;"

19. The third is Indian Post Office Act, 1898 (hereinafter referred to as "Act, 1898"). Section 3 and 14 thereof, relevant for the purpose of present case, are reproduced as under:

*"**3. Meanings of "in course of transmission by post" and "delivery".-** For the purposes of this Act,-*

a) a postal article shall be deemed to be in course of transmission by the post from the time of its being delivered to a post office to the time of its being delivered to the addressee or of its being returned to the sender or otherwise disposed of under Chapter VII;

b) the delivery of a postal article of any description to a postman or other person authorized to receive postal articles of that description for the post shall be deemed to be a delivery to a post office; and

*c) **the delivery of a postal article at the house or office of the addressee,** or to the addressee or his servant or agent or other person considered to be authorized to receive the article according to the usual manner of delivering postal articles to the addressee, **shall be deemed to be delivery to the addressee."***

*"**14. Post Office marks prima facie evidence of certain facts denoted.-**In every proceeding for the recovery of any postage or other sum alleged to be due under this Act in respect of a postal article,-*

*(a) the production of the postal article, having thereon the **official mark of the Post Office denoting that the article has been refused,** or that the addressee is dead or cannot be found, **shall be prima facie evidence of the fact so denoted, and***

(b) the person from whom the postal article purports to have come, shall, until the contrary is proved, be deemed to be the sender thereof."

20. Though in the three statutes referred to above, the oldest one is Act, 1872 but in fact the provisions relating to Post Office Act are older, going to 1866 when the first Post Office Act was enacted. In the then British Indian Territory governed by the British Government, postal services were established by appointing a Director, Post Office by the Governor General in Council in order to regulate this branch of public service and revenue, in the light of experiences gained by English postal legislation and development of Post Offices. Commenting upon the Post Office service in England, in **Whitfield Vs. Lord Le Despencer (1778) 2 Cowp. 754,** Lord Mansfield had said:

*"The Post Master has no hire, enters into no contract, carries on no merchandise or commerce. But **the post office is a branch of revenue, and a branch of police, created by Act of Parliament.** As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under government, and entrusts the management and direction of it to the crown, and officers appointed by the crown. **There is no analogy therefore between the case of the Post Master and a common carrier."***

21. Following the above decision, in a recent case in **Triefus & Co. Ltd. Vs. Post Office (1957) 2 Q.B. 352,** it was held that Post Office is a branch of Revenue and Post Master General does not enter into any contract with a person who entrusted to the Post Office a postal packet for transmission overseas.

22. Presently also the Post Office service in India, with which this Court is concerned, is not in the hands of any private individual or corporate body but it is a Department of Government of India and on certain matters, it is regulated by various Statutes including Act, 1898.

23. I have referred to the above two decisions in **Whitfield Vs. Lord Le Despencer (1778) 2 Cowp. 754** and **Triefus & Co. Ltd. Vs. Post Office (1957) 2 Q.B. 352** for the reason that the system of Post Office in India has been observed to be similar as it was in England. Apex Court referring to the certain provisions of Act, 1898 has said, in Union of India Vs. Mohd. Niazim AIR 1980 SC 431, as under:

"These are only some of the provisions of the Act which seem to indicate that the post office is not a common carrier, it is not an agent of the sender of the postal article for reaching it to the addressee. It is really a branch of the public service providing postal services subject to the provisions of the Indian Post Office Act and the rules made thereunder.

The law relating to the post office in England is not very much different from that in this country. "

24. The aforesaid decision was rendered considering the provisions in Act, 1898 which was enacted by repealing previous Act of 1866 so as to consolidate and amend the law relating to Post Office in India.

25. The Post Office in India, thus, is an institution established by a statute. "Postage" required to avail of the postal services has been defined in section 2 (f) of Act, 1898 as "the duty chargeable for the transmission by post of postal articles". Under section 4 the exclusive privilege of conveying letters is reserved to the Central Government with certain exceptions which are not significant. Section 17 of the Act says that "postage stamps" shall be deemed to be issued by Government for the purpose of revenue. The provisions of the Act indicate that the Post Office is not a common carrier. It is not an agent of sender of the postal article for reaching it to the addressee. It is really a branch of the public service providing postal services subject to the provisions of Act, 1898 and the Rules made thereunder. It is in this context, Section 14 of Act, 1898 would also be a matter of relevance which says that the production of the postal article, having thereon the official mark of Post Office denoting that the article has been refused, or that the addressee is dead or cannot be found, shall be prima facie evidence of the fact so denoted. The Statute provides a prima facie evidence of the mark given by Postal Department on the postal article sent by post regarding its correctness, though the word "prima facie" shows that it is liable to be disproved by adducing evidence otherwise. Meaning thereby the mere denial by the party in respect to whom the endorsement has been made by postal agent otherwise, would not be sufficient unless he adduce evidence to discredit prima facie evidence in the shape of endorsement made by postal department on the article concerned. This provision read with Section 114 of Act, 1872 and Section 27 of Act, 1897 makes the situation quite clear. It appears that in various decisions, while considering the question of service of notice, most of the times, provisions of Act, 1898 and its implication have been omitted even when the service was sought to be effected by registered post.

26. Initially the issue of service of notice under Section 106 of Transfer of Property Act, 1882 *(hereinafter referred to as "Act, 1882")* was considered by Privy Council in **Harihar Banerji and others Vs. Ramshashi Roy and others AIR 1918 PC 102.** Court said, if a letter, properly directed, containing a notice to quit, is proved to have been put into Post Office, it is presumed that letter reached its destination at the proper time according to the regular course of business of Post Office and was received by the person to whom it was addressed. The presumption would apply with still greater force to such letters for which the sender has taken precaution to register and is not rebutted but strengthened by the fact that a receipt for the letter is produced, signed on behalf of the addressee by some person other than the addressee himself. Here was a case where service of notice was not denied by all and one of the person has admitted its service, therefore, a presumption was drawn. So the facts of this case makes it clear that the presumption was rightly drawn.

27. In **Sukumar Guha Vs. Naresh Chandra Ghosh AIR 1968 Cal. 49,** a Single Judge (Hon'ble Amresh Roj, J.) referring to Section 114, Illustration (f) of Act, 1872, Section 106 of Act, 1882 and Section 27 of Act, 1897 said that

presumption under Section 27 of Act, 1897 can arise only when a notice is sent by registered post while there may arise a presumption under Section 114 of Act, 1872 when notice is sent by ordinary post or under certificate of posting. Both the presumptions are rebuttable. When the cover containing notice has been returned to the sender by postal authorities, then that fact is direct proof of the fact that the notice sent by post was not delivered to the party to whom it was addressed. Whether it was tendered and, if so, to whom tendered, remains a matter to be ascertained on evidence. If acceptable evidence is available that it was tendered to the party personally, then such facts may bring the service of notice within the second mode, namely, tendered or delivered personally to such party. If however, tender or delivery is not to the party personally but to a member of his family or a servant, then it may be effective tender or delivery only when the notice was addressed to the residence of the party. Such personal tender or vicarious tender may be effective even if it was through the agency of post office, and proof of that tender comes from testimony of any person present at the event, and not only by examining the postman. Here what I find is that when Court talks of evidence, when we read it in the context of Section 114 of Act, 1872, a registered envelop received back from postal authority with the endorsement of postman of "refusal" will constitute a valid evidence to show that it was served upon the addressee but he refused to accept unless proved otherwise and for that purpose the examination of postman for constituting a prima facie evidence further would not be required in view of Section 14 of Act, 1898. This Section 14 of Act, 1898 has not been noticed by the Court.

28. This Court in **Wasu Ram Vs. R.L. Sethi 1963 AWR 472** said:

"The question whether a communication sent through the post was received by the address is one of fact, but in many cases it may be difficult and inconvenient if not impossible, to produce the postal official who delivered the letter or the money order. To obviate this difficulty the Evidence Act permits certain presumptions to be made under certain circumstances. S. 16 provides that "when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact". The illustration (a) to this section explains that in a question "whether a particular letter was despaired, the facts that it was the ordinary course of business for all letter put in a certain place to be carried to the post, and that particular letter was put in that place, are relevant". S. 114 provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and proper business, in their relation to the facts of the particular case. Illustration (e) to this section says that "the court may presume that judicial and official acts have been regularly performed"; and Illustration (f) says that the court may presume that "the common course of business has been followed in particular cases". The combined effect of these two sections is

to raise a presumption that a communication sent by post was received in the ordinary course by the addressee, and if it was returned to the sender with the endorsement "refused", the postman must have tendered it but delivery could not be made because of the refusal of the addressee. These presumptions are based on human experience and common sense. Our experience tells us that millions of letters which are posted are delivered in due course to the address, though in exceptional cases letters do get lost. The onus of proof is on the person who asserts that the abnormal happened in his case and the communication sent by post did not follow its normal course to destination."

29. This Court further held:

"Whenever a communication is sent by post there is a presumption that it was duly delivered or tendered. If the communication is returned by the post office with the endorsement "refused" the presumption will be that it was tendered by the postal authorities in their ordinary course of business to the addressee who refused. The strength of the presumption will vary according to the fact of each case, being strong in the case of registered letters, and strongest in the case of money orders and insured articles the delivery of which cannot be made without observing certain precautions which are prescribed. Rules u/Chap. VII of the Post and Telegraph Guide provide that in case of refusal the money order shall be returned to the remitter with the endorsement "refused". If the addressee states on oath that he never received the communication, the Court must decide after considering all the surrounding circumstances, whether he should be believed. The question is always one of fact, though I would add as a matter of plain common sense that a denial which is not only bare but bare-faced and made by a person who stood to profit by his denial and, therefore, had all the motive in the word to deny, will not ordinarily weaken the presumption."

30. The above view was followed in **Asa Ram Vs. Ravi Prakash AIR 1966 All. 519** and relevant observation in para 3 reads as under:

"3. Mr. Sinha then argued that a presumption of refusal could arise only if the endorsement 'refused' was proved by evidence, and this could only be done by producing the postman who made the endorsement. I do not agree. If the landlord deposes that he sent an envelop containing the notice and that the same envelop was received by him with the endorsement 'refused' which was not there before and he produces the envelop with the endorsement, this is a sufficient evidence to prove the endorsement. In this case the respondent appeared as a witness and proved the sending and the return of the envelope. On this evidence the Court could rely on the presumption authorized under S. 114 of the Evidence Act."

31. Thereafter, the issue came to be considered by a Full Bench in **Ganga Ram Vs. Phulwati AIR 1970 All. 446.** One of the three questions referred for consideration before Full Bench was "whether it is incumbent on the plaintiff to prove the endorsement of refusal on the notice sent by registered post by producing the postman or other evidence in case the defendant denies service on him? Full Bench considered this question referring to provisions of all three Statutes, namely, Act, 1872; Act, 1897 and Act, 1898.

Besides others, it also referred to Rule 64 (1) of Indian Post Office Rules which reads as under:

"64 (1). If the sender of a registered article pays at the time of posting the article a fee of one anna in addition to the postage and registration fee, there shall be sent to him on the delivery of the article a form of acknowledgement which shall be signed by the addressee or if the addressee refuses to sign shall be accompanied by a statement to the effect that the addressee has refused to sign."

32. Having referred to various provisions of Act, 1898 and Rules framed thereunder, Court said, when the postmen or the clerks at the station of destination are required to do and what endorsements they are required to make, all such acts are clearly provided in the Statute. All such acts are done by them and all such endorsements are made by them in discharge of their official duties. Court, thus, proceeded further and held that a notice sent by registered post will be entitled to draw a presumption regarding due service of that notice vide Illustration (e) and (f) of Section 114 of Act, 1872. In this regard, Court also referred to Section 16 of Act, 1872 and said that as a proposition, it cannot be disputed that when a letter is delivered to an accepting or receiving post office it is reasonably expected that in the normal course it would be delivered to the addressee. That is the official and the normal function of the post office.

33. Having said so, Court further proceeded to hold that taking into consideration the manner in which Post Office deals with registered letters, the endorsement on the notice "Refused" strengthens the presumption that an attempt was made to deliver the notice to the addressee. Court in para 22 of the judgment clearly said:

"... with the endorsement "Refused" the presumption of service could be raised under Section 27 of the General Clauses Act, and it would be a presumption of law, and not of fact."

34. It also held that a presumption of law is rebuttable unless it is made unrebuttable by some provision of law. Full Bench disagreed with the view taken by the Bombay High Court in **Vaman Vithal Vs. Khanderao Ram Rao. AIR 1935 Bom 247,** Nagpur High Court in **Jankiram Narhari Vs. Damodhar Ramchandra, AIR 1956 Nag. 266** and Madhya Bharat High Court in **Tekchand Devidas Vs. Gulab Chand Chandan Mal, AIR 1957 Madh B. 151** where the said three Courts have taken a view that there can be no presumption that the endorsement of refusal was made by the postman unless the postman is examined and such endorsement was inadmissible in evidence. Full Bench thus answered the question accordingly holding that postman is not necessarily to be examined by plaintiff.

35. The above Full Bench judgment in **Ganga Ram (supra)** has been referred to and approved in **Samittri Devi and another Vs. Sampuran Singh and another (2011) 3 SCC 556** (para 26).

36. This issue also came up for consideration in **Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana AIR 1976 SC 869** and in para 10 of the judgment, it has held:

"It is not always necessary, in such cases, to produce the postman who tried to effect service. The denial of service

by a party may be found to be incorrect from its own admissions or conduct."

37. In **Har Charan Singh Vs. Shiv Rani AIR 1981 SC 1284,** a three-Judge Bench (by majority held) with respect to notice when registered letter is returned with endorsement of "refusal", said:

"Section 27 of the General Clauses Act, 1897 deals with the topic 'Meaning of service by post' and says that where any Central Act or Regulation authorities or requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting it by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The section thus raises a presumption of due service or proper service if the document sought to be served is sent by properly addressing, prepaying and posting by registered post to the addressee and such presumption is raised irrespective of whether any acknowledgement due is received from the addressee or not. It is obvious that when the section raises the presumption that the service shall be deemed to have been effected it means the addressee to whom the communication is sent must be taken to have known the contents of the document sought to be served upon him without anything more. Similar presumption is raised under Illustration (f) to s. 114 of the Indian Evidence Act whereunder it is stated that the Court may presume that the common course of business has been followed in a particular case, that is to say, when a letter is sent by post by pre-paying and properly addressing it the same has been received by the addressee. Undoubtedly, the presumptions both under s. 27 of the General Clauses Act as well as under s. 114 of the Evidence Act are rebuttable but in the absence of proof to the contrary the presumption of proper service or effective service on the addressee would arise."

38. Again this issue came to be considered by a two-Judge Bench in **Anil Kumar Vs. Nanak Chandra Verma AIR 1990 SC 1215.** Overruling this Court's decision in **Shiv Dutt Singh Vs. Ram Das AIR 1980 All. 280** Court held in para 2, as under:

"2. The question considered in both the decisions was to the statement on oath by the, tenant denying the tender and refusal to accept delivery. It was held that the bare statement of the tenant was sufficient to rebut the presumption of service. In our opinion there could be no hard and fast rule on that aspect. Unchallenged testimony of a tenant in certain cases may be sufficient to rebut the presumption but if the testimony of the tenant itself is inherently unreliable, the position may be different. It is always a question of fact in each case whether there was sufficient evidence from the tenant to discharge the initial burden."

39. In **Jagdish Singh Vs. Natthu Singh AIR 1992 SC 1604,** Court confirmed a decision of this Court in respect of presumption about service of notice received with the endorsement of "refusal" and held that presumption contemplated by Section 27 of Act, 1897 must be drawn to deem service upon the addressee. In para 8 of the judgement, the Court said:

"In our opinion, the High Court was right in its view. The notices must be presumed to have been served as contemplated by S. 27 of the General Clauses Act."

40. I find a straight answer as to who should disprove the factum of offer of registered letter when returned by postal authority with the endorsement of "refusal" in **Gujarat Electricity Board Vs. Atmaram Sungomal Poshani AIR 1989 SC 1433** where it has been observed:

"There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. ***The burden to rebut the presumption lies on the party, challenging the factum of service.*** *In the instant case,* ***the respondent failed to discharge this burden*** *as he failed to place material before the court to show that the endorsement made by the postal authorities was wrong and incorrect.* ***Mere denial made by the respondent in the circumstances of the case was not sufficient to rebut the presumption relating to service of the registered cover."***

(emphasis added)

41. Following Apex Court decision in **Gujarat Electricity Board (supra),** this Court in **Jhabul Ram Vs. District Judge, Ballia 1994 (23) ALR 464** has also said in para 9 as under:

"9. Bald denial of the petitioner could not absolve him from the burden of rebutting the presumption of service of notice arising from the endorsement by the postal authorities on the registered cover containing the notice. The court below did not commit any error, muchless an error apparent on the face of record, in holding that the notice in question was duly served on the petitioner."

42. I find another Apex Court's decision straight on this issue i.e. **Basant Singh Vs. Roman Catholic Mission 2003 (1) AIC 1 (SC).** In paras 8 and 10 of the judgment, Court has observed:

"The presumptions are rebuttable. It is always open to the defendants to rebut the presumption by leading convincing and cogent evidence."

"As already noticed, Hari Singh appeared and save and except the bald statement that registered letter was not tendered to him, no evidence whatsoever was led to rebut the presumption. He could have examined the postman, who would have been the material witness and whose evidence would have bearing for proper adjudication. He has failed to discharge the onus cast upon him by the Statute."

43. This Court has followed above decision in **Noor Mohammad and another Vs. XIV Additional District and Sessions Judge, Kanpur Nagar 2006 (63) ALR 244.** Therein Revisional Court reversed Trial Court's order on the ground that tenant has tendered rent to landlord through money order which was received with the endorsement "refusal" by the postman but when landlord denied the tender of money order, tenant did not examine the postman and hence failed to discharge burden lying upon him. In other

words, Revisional Court said that it is the sender who should examine the postman and not the sendee/addressee for whom the postal authorities have endorsed that it has refused to accept the article. This view of Revisional Court was reversed by this Court by observing:

"In respect of endorsement of refusal by the postman, there is no necessity to examine the postman to prove that. If there is any such duty then it is ***for the person denying tender by the postman."***

(Emphasis added)

44. This Court also in **Brij Nandan Gupta Vs. III Addl. District Judge, Rampur and another (Writ-A No. 24853 of 1989)** decided on 30.7.2012 in para 21 of judgment said:

"Similarly, if a notice has been sent by landlord by registered post and it is received back with an endorsement made by an official of Post Office namely Postman that it was refused by the addresee, presumption of service upon addressee shall be drawn unless the tenant prove that the letter was never offered to him by the Postman and endorsement made thereon is not correct. The tenant's bare denial would not be sufficient in such a case and he will have to prove his case by adducing relevant evidence. Such denial can be by making statement on oath and in such case onus would shift on the landlord to prove that refusal was by the tenant which he can show by summoning the postman and adducing his oral evidence. However, this is one aspect of the matter. Sometimes from the conduct of tenant or other circumstances, his denial even if on oath, can justifiably be disproved by the Court without having Postman examined."

45. The above authorities leave no manner of doubt that it is for the sendee, who deny service of registered letter upon him and attempted to challenge endorsement of "refusal" made by Postman, to lead evidence which includes examination of 'Postman' also and in case he fails to do so, legal presumption will go against him and will remain to be unrebutted unless there is other material to show otherwise. Nothing of this sort has been shown in the case in hand.

46. Hence, I answer the question in favour of petitioner that he withdrew his resignation in July, 2003 itself while respondents as per the own case set up finally accepted resignation of petitioner vide letter dated 30.01.2004 i.e. after withdrawal of resignation which could not have been done.

47. The exposition of law that once resignation is withdrawn, it could not have been accepted, has not been disputed by learned counsel for respondents before this Court in view of law laid down in **Union of India etc. Vs. Gopal Chandra Misra and Others (1978) 2 SC 301; Union of India and Another Vs. Wing Commander T. Parthasarathy (2001) 1 SCC 158 and Srikantha S.M. Vs. Bharath Earth Movers Ltd. (2005) 8 SCC 314.**

48. In **Shambhu Murari Sinha Vs. Project & Development India Ltd. & Another(2002) 2 SCC 437,** it was held, if voluntary retirement is withdrawn by an employee, he continue to remain in service and the relationship of Employer and employee would not come to an end.

49. The next submission is, "whether withdrawal being conditional, it will not be treated to be a withdrawal".

50. Here, I find that the very resignation letter itself, if read properly, it is clearly a conditional resignation. The second para of resignation letter dated

31.07.2003 states that resignation may be accepted on payment of all outstanding dues. Therefore, condition imposed by petitioner for acceptance of resignation was simultaneous payment of all outstanding dues. If resignation is conditional, it could not have been accepted.

51. Resignation in relation to an office connotes the act of giving up or relinquishment of the office. To relinquish office means to cease to hold office or to lose hold of the office. Therefore, it means that the employee wants to sever his relation from the employer without any riders and then only it would amount to resignation.

52. **Corpus Juris Secundum** Vol.77 page 311 defines the words "resign' and "resignation' as under: -

*"**RESIGN.** To give up; to surrender by a formal act; to yield; to relinquish; to give up one's office or position; to withdraw from. The word "resign," in its ordinary and usual sense, imports a voluntary act, and has been held not to include the act of one whose continuance in a position has been terminated by death or by induction into the armed forces under the Selective Service Act.*

"Resign" has been held equivalent to, or synonymous with, "abandon" see 1 C.J.S. p 41 note 38, "renounce" see 76 C.J.S. p 206 notes 90.2, 90.3."

*"**RESIGNATION.** It has been said that "resignation" is a term of legal art, having legal connotations which describe certain legal results. It is characteristically the voluntary surrender of a position by the one resigning, made freely and not under duress, and the word is defined generally as meaning the act of resigning or giving up, as a claim, possession, or position."*

53. The **Words and Phrases Permanent Edition** Vol.37 Page 473 defines the word "Resign' denoting voluntarily act, to give up, surrender by formal act, yield, relinquish, give up one's office or position, or withdraw from. It is synonymous with words "abandon" and "renounce". At Page 474 the word "Resignation' has been defined and at Page 476 it provides that the resignation must be unconditional and with the intent to operate as such.

54. **Black's Law Dictionary Sixth Edition** Page 1310 defines the resignation as formal renouncement or relinquishment of an office. It must be made with intention of relinquishing the office accompanied by act of relinquishment. It is said that resignatio est juris proprii spontanea refutatio i.e. resignation is spontaneous relinquishment of one's own right.

55. In the case of **R.J. Maurya Versus State, 1967 SLR 823** it was held that the term resignation implies voluntary surrender of the position by a person resigning and acting freely and not under duress and it becomes effective when the authority competent to make appointment accepts it.

56. In **Ramchand Nihalchand Advani Versus Anandlal Bapalal Kothari and another, AIR 1962 Gujrat 21,** it was held that the letter of resignation must be unambiguous and where an ambiguous letter of resignation is submitted, the authority should right to the employee to explain or clear the ambiguity instead of proceeding to accept the same.

57. Madhya Pradesh High Court in **Hirdeyashawer Singh Chauhan Versus State of Madhya Pradesh, 1987 Jabalpur Law Journal 566** observed that "the resignation denotes voluntary surrender of a position by one resigning, made freely and not under duress. The resignation denotes, therefore, a spontaneous relinquishment of one's own right. It is conveyed by maxim resignatio est juris proprii spontanea refutatio."

58. Recently, the question, when a resignation would be conditional and what are the requirement of a valid letter of resignation has been considered in **Prabha Atri (Dr.) Versus State of U.P. and others, 2003 (1) UPLBEC 772, AIR 2003 SC 534** wherein it has been held:

"The only question that mainly requires to be considered is as to whether the letter dated 9.1.1999 could be construed to mean or amounted to a letter of resignation or merely an expression of her intention to resign, if her claims in respect of the alleged lapse are not viewed favourably. Rule 9 of the Hospital Service Rules provided for resignation or abandonment of service by an employee. It is stated therein that a permanent employee is required to give three months notice of resignation in writing to the appointing authority or three months salary in lieu of notice and that he/she may be required to serve the period for such notice. In case of non-compliance with the above, the employee concerned is not only liable to pay an amount equal to three months salary but such amount shall be realizable from the dues, if any, of the employee lying with the Hospital. In Words and Phrases (Permanent Edition) Vol. 37 at page 476, it is found stated that, "To constitute a "resignation", it must be unconditional and with intent to operate as such. There must be an intention to relinquish a portion of the term of office accompanied by an act of relinquishment. It is to give back, to give up in a formal manner, an office." At page 474 of the very same book, it is found stated: "Statements by club's President and corresponding Secretary that they would resign, if constant bickering among members did not cease, constituted merely threatened offers, not tenders, of their resignations." It is also stated therein that "A `resignation' of a public office to be effective must be made with intention of relinquishing the office accompanied by act of relinquishment". In the ordinary dictionary sense, the word `Resignation' was considered to mean the spontaneous relinquishment of one's own right, as conveyed by the maxim: Resignatio est juris proprii spontanea refutatio [Black's Law Dictionary 6th Edition]. In Corpus Juris Secundum. Vol.77, page 311, it is found stated "It has been said that `Resignation' is a term of legal art, having legal connotations which describe certain legal results. It is characteristically, the voluntary surrender of a position by the one resigning, made freely and not under duress and the word is defined generally as meaning the act of resigning or giving up, as a claim, possession or position. " (Para-7)

"We have carefully considered the submissions of the learned counsel appearing on either side, in the light of the materials and principles, noticed supra. This is not a case where it is required to consider as to whether the relinquishment envisaged under the rules and conditions of service is unilateral or bilateral in character but whether the letter dated 9.1.1999 could be treated or held to be a letter of resignation or relinquishment of the office, so as to severe her services once

and for all. The letter cannot be construed, in our view, to convey any spontaneous intention to give up or relinquish her office accompanied by any act of relinquishment. To constitute a `resignation', it must be unconditional and with an intention to operate as such. At best, as observed by this Court in the decision in P.K. Ramachandra Iyer (supra) it may amount to a threatened offer more on account of exasperation, to resign on account of a feeling of frustration born out of an idea that she was being harassed unnecessarily but not, at any rate, amounting to a resignation, actual and simple. The appellant had put in about two decades of service in the Hospital, that she was placed under suspension and exposed to disciplinary proceedings and proposed domestic enquiry and she had certain benefits flowing to her benefit, if she resigns but yet the letter dated 9.1.99 does not seek for any of those things to be settled or the disciplinary proceedings being scrapped as a sequel to her so-called resignation. The words 'with immediate effect' in the said letter could not be given undue importance dehors the context, tenor of language used and the purport as well as the remaining portion of the letter indicating the circumstances in which it was written. That the management of the Hospital took up such action forthwith, as a result of acceptance of the resignation is not of much significance in ascertaining the true or real intention of the letter written by the appellant on 9.1.1999. Consequently, it appears to be reasonable to view that as in the case reported in P.K. Ramachandra Iyer (supra) the respondents have seized an opportunity to get rid of the appellant the moment they got the letter dated 9.1.1999, without due or proper consideration of the matter in a right perspective or understanding of the contents thereof. The High Court also seems to have completely lost sight of these vital aspects in rejecting the Writ Petition." (Para-10)

59. It would also be appropriate to quote the letter of resignation which was considered in **Prabha Atri (Dr.) Versus State of U.P. and others (Supra)** which is as under: -

"Your letter is uncalled for and should be withdrawn. I have been working in this Hospital since May, 10, 1978 and have always worked in the best interest of the patients. It is tragic instead of taking a lenient view of my sickness you have opted to punish me.

If the foregoing is not acceptable to you then, I have no option left but, to tender my resignation which immediate effect."

60. Considering the kind of letter of the resignation, Court in **Prabha Atri (Dr.) Versus State of U.P. and others (Supra)** found it a conditional letter and, therefore, not a valid resignation in the eyes of law.

61. It can be safely said that letter of resignation tendered by petitioner in the present case is also a conditional letter of resignation. A reading of the entire letter dated 31.07.2002 shows that it is not unconditional.

62. A Division Bench of this Court in **Phool Chandra Singh Vs. The Chairman, Vindhyavasini Gramin Bank and Others 2006 (6) AWC 5513 (All.)** has also taken a similar view that a conditional resignation is not a valid resignation, hence, it could not have been accepted.

63. The last submission is that Unit in which petitioner was working is closed in

2004 itself and, therefore, petitioner neither can be given re-employment or reinstatement nor any other service benefit.

64. This fact could not be disputed by learned counsel for petitioner. The question is, "whether for the fault of respondents, petitioner can be allowed to suffer and despite the fact that injustice has been caused to petitioner, can he be denied ultimate relief to which he otherwise is entitled".

65. The respondents being "State" under Article 12 of the Constitution of India, its officers are public functionaries. As observed above, under our Constitution, sovereignty vest in the people. Every limb of constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this Court should remind respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large and in particular their ex-employees and their legal heirs like the petitioner. The respondents have the support of entire machinery and various powers of statute. An ordinary citizen or a common man is hardly equipped to match such might of State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match inaction in public oriented departments gets frustrated and it erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended. No authority can allow itself to act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to occasion otherwise the confidence of the common man would shake. It is the responsibility of Court in such matters to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain arbitrary and arrogant, unlawful inaction or illegal exercise of power on the part of the public functionaries.

66. In our system, the Constitution is supreme, but the real power vest in the people of India. The Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man and in particular when the person subject to harassment is his own employee.

67. Regarding harassment of a common man, referring to observations of Lord Hailsham in **Cassell & Co. Ltd. Vs.**

Broome, 1972 AC 1027 and **Lord Devlin in Rooks Vs. Barnard and others 1964 AC 1129,** the Apex Court in **Lucknow Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307** held as under:

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law..... A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous." (para 10)

68. The above observations as such have been reiterated in **Ghaziabad Development Authorities Vs. Balbir Singh JT 2004 (5) SC 17.**

69. In a democratic system governed by rule of law, the Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this Court that the Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has never been a silent spectator but always reacted to bring the authorities to law.

70. In **Registered Society Vs. Union of India and Others (1996) 6 SCC 530** the Apex court said:

"No public servant can say "you may set aside an order on the ground of mala fide but you can not hold me personally liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary".

71. In **Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558** the Apex Court has held:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

72. In **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715** has held as follows:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

73. Petitioner has placed on record certain documents to show that some employees have been retained by respondents which is sought to be explained by respondents that a skeleton staff was maintained to take out formal closure activities. This means that entire staff has not been terminated.

74. In these facts and circumstances of the case, I find no reason to deny relief of petitioner to which he is entitled, particularly when I find respondent-Employer to have committed fault. They

cannot be allowed to take advantage of their own wrong.

75. In view thereof, writ petition is allowed. Impugned orders dated 31.07.2003 and 31.01.2004 passed by respondents are hereby set aside. Petitioner shall be entitled to all consequential benefits in accordance with law.

(2020)03-05ILR A1244
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.02.2020

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 31482 of 2019

Deen Dayal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Lalendra Pratap Singh

Counsel for the Respondents:
C.S.C.

A.– Service law-Central Civil Services (Pension) Rules, 1972-Rule 26–ensionary benefits- Petitioner tendered his resignation, instead of submitting his defence reply to the charge sheet. The Court held it to be a mode of avoiding disciplinary proceedings, and rejected the claim regarding payment of retiral dues. (Para 10)

B. 'Resignation' and 'retirement' are the different expressions, therefore, both may not be treated at par - The concept of "resignation" and retirement" are different, and in same regulations these expressions are used in different connotations. The benefit cannot be extended, especially as resignation is one of the disqualifications for seeking pensionary benefits, under the Regulations. (Para 8)
The decision to 'resign' is materially distinct from a decision to seek 'voluntary retirement'. The decision to resign results in the legal consequences that are distinct from the consequences flowing from voluntary retirement and the two may not be substituted for each other based on the length of an employee's tenure, which shall stand forfeited upon resignation. (Para 9)

Writ petition dismissed. (E-4)

Precedent followed:

1. Senior Divisional Manager, L.I.C. & ors. Vs. Shree Lal Meena, (2019) 4 SCC 479 (Para 3, 4, 8)

2. BSES Yamuna Power Ltd. Vs. Ghanshyam Chand Sharma & anr., Civil Appeal No. 9076 of 2019 @ SLP (C) No. 6553 of 2018, decided on 05.12.2019 (Para 9)

Precedent cited:

1. Asger Ibrahim Amin VsL.I.C., 2015 (6) AWC 5829 (SC) (Para 4, 7, 8)

Petition challenges order dated 20.09.2019, passed by Sub Divisional Officer, Hasanganj, Unnao.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri L.P. Singh, learned counsel for the petitioner and Sri Ran Vijay Singh, learned Addl. Chief Standing Counsel for the State-respondents.

2. By means of this petition, the petitioner has assailed the order dated 20.9.2019 passed by the Sub Divisional Officer, Hasanganj, Unnao rejecting the claim of the petitioner regarding payment of retiral dues.

3. As per the impugned order, the petitioner was initially appointed on the post of Lekhpal in the year 1953 and he discharged his duties as Lekhpal till 1975. While discharging the duties of Lekhpal, the petitioner had discharged the services

of Assistant Registrar, Kanoongo as an officiating basis w.e.f. 1975 to the year 1980. However, the petitioner was placed under suspension on 29.11.1979 and a charge sheet has been issued on 19.4.1980. The petitioner opted not to reply the charge sheet and submitted his resignation on 28.4.1980. The reason assigned in the resignation letter is that the petitioner was willing to contest the election of Legislative Assembly, therefore, he requested that his resignation be accepted. Accordingly, resignation of the petitioner has been accepted. Thereafter, the petitioner claimed that since his resignation has been accepted, therefore he be paid pension and other retiral benefits. The competent authority has rejected said claim of the petitioner placing reliance upon the judgment of the Hon'ble Supreme Court in re; **Senior Divisional Manager, Life Insurance Corporation of India and others v. Shree Lal Meena, (2019) 4 SCC 479.**

4. Learned counsel for the petitioner has contended that instead of deciding the issue in the light of the dictum of the Hon'ble Apex Court in re; **Shree Lal Meena** (supra), it should have been decided in the light of the decision of the Hon'ble Apex Court in re; **Asger Ibrahim Amin v. Life Insurance Corporation of India, 2015 (6) AWC 5829 (SC).**

5. At this juncture, resignation application of the petitioner, which has been enclosed as Annexure No.1 to the counter affidavit, would be relevant to refer. The aforesaid resignation application of the petitioner is having as many as eleven paragraphs. Paragraph-4 of the said application categorically provides that the petitioner was aware about the charge sheet, however, he has submitted that the charges of the charge sheet are baseless, therefore, the petitioner shall not submit his defence reply to the charge sheet.

6. This is an admission on the part of the petitioner that instead of filing his defence reply to the charge sheet, he opted to tender his resignation.

7. In the case of **Asger Ibrahim Amin** (supra), the question before the Hon'ble Apex Court was that "whether the appellant is entitled to claim pension even though he resigned from service of his own volition and, if so, whether his claim on this count had become barred by limitation or laches. The Hon'ble Apex Court has held that the appellant had worked continuously for 23 years, sought to discontinue his service and requested waiver of three months notice in writing and the said notice was accepted by the respondent corporation and the appellant was thereby allowed to discontinue his services. It has further been held that the appellant ought not to be deprived of pensionary benefits merely because he styled his termination of service as resignation or because there is no provision to retire voluntarily at that time. Therefore, the Hon'ble Apex Court has finally held that termination of services of the appellant was voluntary retirement within the ambit of rules.

8. The facts of the present case are not similar to the case in re; **Asger Ibrahim Amin** (supra). Rather the Hon'ble Apex Court in re; **Shree Lal Meena** (supra) has dealt the similar issue and has held that the resignation and retirement are the different expressions, therefore, both may not be treated at par. In para-33 of the judgment, the Hon'ble Apex Court has observed that if the employee had not been removed by discharge due to misconduct, the discharge

by resignation in such circumstances may be different. However, in the present case, since the petitioner did not submit his defence reply to the charge sheet after being placed under suspension, therefore, the factum of misconduct could not be proved. Vide para-42, the Hon'ble Apex Court has held that service jurisprudence, recognising the concept of "resignation" and "retirement" as different, and in the same regulations these expressions being used in different connotations, left no manner of doubt that the benefit could not be extended, especially as resignation was one of the disqualifications for seeking pensionary benefits, under the Regulations. Paras-33 & 42 of the case in re; **Shree Lal Meena** (supra) are being reproduced herein below:-

"33. In order to elucidate the legal principle further, we may note that Sheelkumar Jain [Sheelkumar Jain v. New India Assurance Co. Ltd., (2011) 12 SCC 197] took note of the judgment of the three-Judge Bench in Sudhir Chandra Sarkar v. Tisco Ltd. [Sudhir Chandra Sarkar v. Tisco Ltd., (1984) 3 SCC 369 : 1984 SCC (L&S) 540] An uncovenanted employee of the respondent Company, paid on a monthly basis, sought to recover a sum as gratuity, for continued service rendered over 29 years, under the Retiring Gratuity Rules, 1937, after having resigned from service. The employee was paid the provident fund dues. The High Court of Patna opined [Tisco Ltd. v. Sudhir Chandra Sarkar, 1968 SCC OnLine Pat 96 : AIR 1969 Pat 53] against the employee. When the matter reached this Court, one of the contentions raised by the respondent Company was that the employee had resigned and not retired from service. It was noticed that Rule 1(g) defines "retirement" as "the termination of service by reason of any cause other than removal by discharge due to misconduct". The employee had not been removed by discharge due to misconduct. The termination of service, being on account of resignation, it was held to qualify within the definition of "retirement" under the Rules. The rest of the judgment, dealing with the principles as to how gratuity should be treated, is not relevant.

42. It is relevant to note that M.R. Prabhakar [M.R. Prabhakar v. Canara Bank, (2012) 9 SCC 671 : (2012) 2 SCC (L&S) 802] dealt with a similar scheme for employees of Canara Bank, and the plea was that such of the employees who had resigned must be construed as voluntarily retired, thus, entitling them to pensionary benefits. Suffice to say that, once again, the principle was of differentiation between the concept of "voluntary retirement" and "resignation". Regulation 2(y) as applicable to the employees of Canara Bank, being pari materia to Rule 2(y) under the Pension Regulations of 1995, had brought in "voluntary retirement" in the definition of "retirement", but had not considered it appropriate to bring in the concept of "resignation". Service jurisprudence, recognising the concept of "resignation" and "retirement" as different, and in the same regulations these expressions being used in different connotations, left no manner of doubt that the benefit could not be extended, especially as resignation was one of the disqualifications for seeking pensionary benefits, under the Regulations."

9. The Hon'ble Apex Court in re; **BSES Yamuna Power Ltd. v. Ghanshyam Chand Sharma and Another, Civil Appeal No.9076 of 2019 @ SLP (C) No.6553 of 2018,** decided on 5.12.2019 has considered the decision of the Hon'ble Apex Court in re; **Asger**

Ibrahim Amin (supra) and distinguished the same. Paras 14 & 19 of the aforesaid judgment are being reproduced herein below:-

"14. The view in Asger Ibrahim Amin was disapproved and the court held that the provisions providing for voluntary retirement would not apply retrospectively by implication. In this view, where an employee has resigned from service, there arises no question of whether he has in fact ?voluntarily retired? or ?resigned?. The decision to resign is materially distinct from a decision to seek voluntary retirement. The decision to resign results in the legal consequences that flow from a resignation under the applicable provisions. These consequences are distinct from the consequences flowing from voluntary retirement and the two may not be substituted for each other based on the length of an employee's tenure.

19. On the issue of whether the first respondent has served twenty years, we are of the opinion that the question is of no legal consequence to the present dispute. Even if the first respondent had served twenty years, under Rule 26 of the CCS Pension Rules his past service stands forfeited upon resignation. The first respondent is therefore not entitled to pensionary benefits."

10. Having heard learned counsel for the parties and perused the relevant material available on record as well as the aforesaid dictums of the Hon'ble Apex Court, I am of the considered opinion that since the resignation may not be treated at par with the other mode of dispensing with the service including the voluntary retirement, therefore the petitioner shall not be entitled to the pensionary benefits. Further, the petitioner has tendered his resignation to avoid the disciplinary proceedings as instead of submitting his defence reply to the charge sheet, he tendered his resignation, therefore the intent of the resignation is not appreciated. The reasons so given in the impugned order are appropriate and correct law of the Hon'ble Apex Court has been cited while rejecting the claim of the petitioner vide impugned order dated 20.9.2019.

11. Accordingly, the writ petition is devoid of merit, the same is **dismissed** being misconceived.

12. No order as to costs.

(2020)03-05ILR A1247
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.04.2020

BEFORE

THE HON'BLE RAJAN ROY, J.

Civil Revision No. 35 of 2012

Arun Kumar Kedia ...Revisionist
Versus
Harvansh Lal Matanheliya...Opposite Party

Counsel for the Revisionist:
Shafiq Mirza

Counsel for the Opposite Party:
G. Haider, M.A. Siddiqui, Rajeiu Kumar Tripathi

Civil Law- U.P. Provincial Small Causes Courts Act, 1887-Limitation Act, 1963-SCC Revision u/s 25-application for substitution-beyond limitation-Article 121 of Act, 1963-not applicable-as it applies to Appeal or suit-not revision-Article 137 of Act, 1963 applicable-limitation -3 years-Application within time-Revision allowed.

Held, *Now on the analogy of the ratio laid down by the Full Bench decision even if the provisions of Order XXII CPC do not apply to revisional proceedings such as an SCC Revision under Section 25 of the Act, 1887, inspite of Section 17 thereof, an order cannot be passed against a dead person, therefore, the legal representatives of a dead party have to be brought on record. Now, as the revision at hand is neither a suit nor an appeal, Article 121 of the Schedule to the Act, 1963 would not apply as the said Article would apply to an application to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent to be made a party in a suit or appeal under the Code of Civil Procedure, 1908 which is not attracted herein. Therefore, in these circumstances on the analogy of the Full Bench decision in Chandradeo Pandey, as this revision under Section 25 of the Act, 1887 is before the High Court, it is Article 137 of the Act, 1963 which applies and the limitation in such circumstances for filing the application for substitution in an SCC revision under Section 25 of the Act, 1887 would be 3 years.*(para 8) (E-9)

Cases cited:

1. Mohd. Sadat Ali Khan Vs. The Administrator, Corporation of City of Lahore, AIR 1949 Lahore 186

2. Ram Datt Singh & anr. Vs. Ajodhia Singh & ors., AIR 1952 Allahabad 446

3. Khuda Bux Khan vs. Maha Nand Tewari & anr. AIR 1948 Oudh 84

4. U.O.I., Ministry of Commerce and Industry, Govt. of India vs. Seth Shanti Sarup & ors., AIR 1966 Allahabad 530

5. Baksho & anr. Vs. Piaro & ors., AIR 1920 Sind 120

6. Surat and others versus Bhragunath Upadhya & ors., 1989 RD 298

7. Chandradev Pandey & ors.Vs. Sukhdev Rai & ors., AIR 1972 Allahabad 504

(Delivered by Hon'ble Rajan Roy, J.)

1. In this SCC revision, under Section 25 of the U.P. Provincial Small Causes Courts Act, 1887 (herein after referred as Act, 1887), an application for substitution has been filed by the revisionist to which an objection has been raised by Shri Rajeev Kumar Tripathi, learned counsel for the opposite party that it is beyond the period of limitation prescribed under Article 121 of the Limitation Act, 1963. On being confronted learned counsel for the revisionist submitted that Article 121 of the Act, 1963 does not apply to the case at hand as it is a revision and in view of the full bench decision of this Court reported in AIR 1972 Allahabad 504, Chandradev Pandey and others Vs. Sukhdev Rai and others, Article 137 of the Act, 1963 is applicable, according to which, the period of limitation is 3 years, therefore, the application for substitution, considering the date of death, is within the prescribed period of limitation.

2. The Provincial Small Causes Courts Act, 1887 is a pre-constitution Act which continues to be in force. The revision at hand has been filed under Section 25 of the said Act, 1887. Section 17 of the Act deals with application of the Code of Civil Procedure to the Court of small causes and in all proceedings arising out of the suits before it, which would include a revision under Section 25. According to Sub-section 1 of Section 17, the procedure prescribed in the Code of Civil Procedure, 1908 shall save in so far as is otherwise provided by that Code or by this Act be the procedure followed in a Court of small causes in all suits cognizible by it and in all proceedings arising out of such suits. The proviso to the said Sub-section is not relevant. A Reference may be

made in this regard to Section 7 of the Code of Civil Procedure, 1908 which reads as under:-

*"7. **Provincial Small Cause Courts.**- The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887 (9 of 1887). [or under the Berar small Cause Courts Law, 1905], or to Courts exercising the jurisdiction of a Court of Small Causes [under the said Act or Law], [or to Courts in [any part of India to which the said Act does not extend] exercising a corresponding jurisdiction] that is to say, -*

(a) so much of the body of the Code as relates to-

(i) suits excepted from the cognizance of a Court of Small Causes;

(ii) the execution of decrees in such suits;

(iii) the execution of decrees against immovable property; and

(b) the following sections, that is to say,-

Section 9,

Sections 91 and 92,

Sections 94 and 95 [so far as they authorise or relate to-

(i) orders for the attachment of immovable property,

(ii) injunctions,

(iii) the appointment of a receiver of immovable property, or

(iv) the interlocutory orders referred to in clause (e) of Section 94], and Sections 96 to 112 and 115."

3. Thus Section 7 prescribes the provisions of CPC which do not extend to the Courts constituted under the Act, 1887. The said provision does not mention Order XXII CPC which relates to substitution of legal representatives in the case of death of plaintiff, defendant etc. Now reference may be made to Order 50 CPC which reads as under in its application in the State of U.P.:-

*"1. **Provincial Small Cause Courts.**- The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887)9 of 1887), [or under the Berar Small Cause Courts Law, 1905] or to Courts exercising the jurisdiction of a Court of Small Causes [under the said Act or Law], or to Courts exercising the jurisdiction of a Court of Small causes in [under the said Act or Law], [or to Courts in [any part of India to which the said Act does not extend] exercising a corresponding jurisdiction] that is to say-*

(a) so much of this schedule as relates to-

(i) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;

(ii) the execution of decrees against immovable property or the interest of a partner in partnership property;

(iii) the settlement of issues; and

(b) the following rules and orders:-

Order II, Rule 1 (frame of suit);

Order X, Rule 3 (record of examination of parties);

Order XV, except so much of Rule 4 as provides for the pronouncement at once of judgment and Rule 5;

Order XVIII, Rules 5 to 12 (evidence);

Orders XLI to XLV (appeals);

Orders XLVII, Rules 2, 3, 5, 6, 7 (review);

Order LI."

4. A reading of the aforesaid provision shows that it mentions the

provisions of CPC which shall not extend to the Courts under the Act, 1887 and it does not include Order XXII CPC as referred herein above. However, the case at hand is a revision and not a suit nor an appeal and it has been the consistent view that Order XXII Rule 2 to 10(a) applies to suits and by virtue of Rule 11 thereof to appeals but these provisions do not apply to a revision under Section 115 CPC as the word revision has not been used therein and it is distinct from a suit or appeal under the CPC. A reference may be made in this regard to the Full Bench decision reported in Mohd. Sadat Ali Khan Vs. The Administrator, Corporation of City of Lahore, AIR 1949 Lahore 186; as also other decisions reported in Ram Datt Singh and another Vs. Ajodhia Singh and others, AIR 1952 Allahabad 446; Khuda Bux Khan vs. Maha Nand Tewari and Anr., AIR 1948 Oudh 84; The Union of India, Ministry of Commerce and Industry, Government of India vs. Seth Shanti Sarup and others, AIR 1966 Allahabad 530; Baksho and another Vs. Piaro and others, AIR 1920 Sind 120; and another Full Bench decision in the case of Chandradeo Pandey (supra). In fact, the Full Bench in Chandradeo Pandey, after coming to the conclusion that the provisions of Order XXII do not apply to revisions also considered the question whether any period of limitation has been prescribed in the Code of Civil Procedure for an application to bring the heirs of a deceased party on record in a revision application? After considering the relevant provisions, Full Bench opined that Article 137 of the Schedule contained in the Act, 1963 was applicable to such applications in revisional proceedings under Section 115 CPC which prescribed a limitation of 3 years from the date the right to apply accrues. Having held as above the Full Bench also expressed its opinion about the desirability of requisite amendment in the Rules of the Code on the administrative side so as to prescribe a uniform period of limitation of 90 days for bringing heirs of a deceased party on record even in revision applications.

5. As regards the reliance placed by Shri Tripathi upon the decision of the Supreme Court in Shankar Ramchandra Abhyankar's (supra) case, in the said case the Supreme Court observed that when the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the Code of Civil Procedure circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court and it is only one of the modes of exercising power conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. It did so in the context as to whether the judgment of this Subordinate Court would merge in an order passed by the High Court on the revisional side and therefore it went on to hold that it did not therefore consider that the principle of merger of order of inferior Courts in those of superior Courts would be affected or would become inapplicable by making a distinction between a petition for revision and an appeal. The question being considered by the Supreme Court was as to whether after the revision under Section 115 CPC against the order of the subordinate Court had been dismissed a writ petition challenging the said order of the subordinate Court should have been entertained. It went on to opine that even if the order of the appellate Court had not

merged in the order of the single Judge passed in exercise of revisional powers under Section 115 it was of the view that a writ petition ought not to have been entertained by the High Court when the respondent had already chosen the remedy under Section 115 of the Code of Civil Procedure. The context in which the said observations have been made was very different than the context which presents itself before this Court in this case and which was present before the Full Bench in the case of Chandradeo Pandey. Although the term appeal has not been defined in the Code of Civil Procedure there can be no doubt on a reading of Order XXII CPC that the words suit and appeal have been specifically and categorically used therein and the provisions of Rule 2 to 10(a) of Order XXII have been specifically made applicable to appeals vide Rule 11 which is obviously a reference to the appeals prescribed under the Code of Civil Procedure. The appeals under the Code of Civil Procedure are prescribed under different Sections and Orders viz-a-viz revisions.

6. A Single Judge Bench of this Court had the occasion to consider the applicability of Order XXII CPC to proceedings other than suits and appeals in the case of Surat and others versus Bhragunath Upadhya and others, 1989 RD 298 and it opined as under:-

"Order XXII admittedly by the use of the language was made applicable to the suits or original proceedings but by virtue of Order XXII, Rule 11 it was made applicable to appeals. It is significant while under rule 11 the provisions of Order XXII has been made applicable to the appeals it was not made applicable either to revision or other miscellaneous proceedings. If Order XXII was applicable to all proceedings referred to in section 141 apart from suit or original proceeding there was no need to include appeals by making such provision. This further clarifies that Order XXII since being procedure providing and refer to substantive right like abatement has not been made applicable to other proceedings."

7. As regards the reliance placed by Shri Tripathi upon a Single Judge Bench decision of the Guwahati High Court reported in (2016) 6 Gauhati Law Reports 774, with respect, when there is a Full Bench decision of this Court, the ratio of which applies to the case at hand, propriety demands that I should follow it, therefore, the said decision of the Guwahati High Court does not help the Counsel for the opposite party especially in view of the reasons given herein above regarding the inapplicability of the decision in Shankar Ramchandra Abhyankar's case to the issue involved herein.

8. Now on the analogy of the ratio laid down by the Full Bench decision even if the provisions of Order XXII CPC do not apply to revisional proceedings such as an SCC Revision under Section 25 of the Act, 1887, inspite of Section 17 thereof, an order cannot be passed against a dead person, therefore, the legal representatives of a dead party have to be brought on record. Now, as the revision at hand is neither a suit nor an appeal, Article 121 of the Schedule to the Act, 1963 would not apply as the said Article would apply to an application to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent to be made a party in a suit or appeal under the Code of Civil Procedure, 1908 which is not attracted herein. Therefore, in these

circumstances on the analogy of the Full Bench decision in Chandradeo Pandey, as this revision under Section 25 of the Act, 1887 is before the High Court, it is Article 137 of the Act, 1963 which applies and the limitation in such circumstances for filing the application for substitution in an SCC revision under Section 25 of the Act, 1887 would be 3 years. It being so, the application of the revisionist is within time. As no objections have been filed to the application for substitution on any other ground nor any other objection has been raised during argument therefore the same is **allowed**. Let necessary substitution be carried out. List immediately after regular work is resumed in the Courts.

(2020)03-05ILR A1252
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2020

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Crl. Misc. Anticipatory Bail Application No. 597 of 2020

Shahaab Ali (Minor) & Anr. ...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Sri Vinay Kumar Upadhyay, Sri Pramod Bhardwaj

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

A. Criminal Law- Indian Penal Code,1860- Sections 420,467,468, 471, 120B,504, 506 & Code of Criminal Procedure,1973- Section 438-application-rejection-challenge to- maintainability of section 438 at the behest of a minor-once a first information is registered with regard to a child in conflict with law, the provisions of Section 438 stand impliedly excluded-the 2015 Act dealing with arrest and detention must prevail over any other law-section 438 can be applied at pre recordal of information stage-when the information recorded u/s 10 of the 2015 Act, section 438 cannot be applied.(Para 3 to 43)

In the present case, a first information report has already come to be lodged against the two applicants.the police cannot apprehend the applicants and procedure prescribed by section 10 and 12 will have to be followed**.**(Para 42)

The application is dismissed. (E-6)

List of Cases Cited:-

1. Gopakumar Vs. St. Of Kerala (2012) SCC Online Ker 27614

2. Preetam Pathak Vs. St. Of Chh. (2014) SCC Online Chh 125

3. Mr. X S/O Baby V.M. Vs. St. Of Ker,Bail Application No. 3320 of 2018

4. Vishwa Mitter Vs. O.P. Poddar, AIR (1984) SC 5

5. Sudhir Sharma Vs. St. Of Chh. (2017) SCC Online Chh 1554

6. Birbal Munda & Ors Vs. St. Of Jhar.(2019) SCC Online Jhar 1794

7. K. Vignesh Vs. St.(2017) SCC Online Mad 28442

8. Satendra Sharma Vs. St. Of M.P.,MCRC No. 4183 of 2014

9. Kapil Durgawani Vs. St. Of M.P. (2010) 4 MPJR 155

10. Sandeep Singh Tomar Vs. St. Of M.P.,MCRC No. 9816 of 2013

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard learned counsel for the applicants, Sri Vikas Sahai learned A.G.A. for the State and perused the record.

2. The applicants who are minors have petitioned this Court through their natural guardian seeking anticipatory bail in Case Crime No. 305 of 2019 under Sections 420, 467, 468, 471, 120B, 504 and 506 IPC, Police Station Tanda, District Rampur.

3. The principal question which has been raised is whether a petition under Section 438 of the Criminal Procedure Code at the behest of a child in conflict with law would be maintainable. According to Sri Vikas Sahai, the learned A.G.A., the application under Section 438 of the Criminal Procedure Code at the behest of a minor is not maintainable since the apprehension of arrest is misplaced. According to the learned A.G.A. the **Juvenile Justice (Care and Protection of Children)** Act 20151 and more particularly Sections 10 and 12 thereof put in place a detailed procedure to deal with the investigation and trial of cognizable offences that may be committed by minors. It was submitted that in terms of Section 10 of the 2015 Act, a child cannot be arrested and since he is only apprehended and placed in the charge of the Special Juvenile Police Unit2 or the designated Child Welfare Police Officer3 for production before the concerned Juvenile Justice Board4 within 24 hours of such apprehension, the jurisdiction of the Court under Section 438 of the Criminal Procedure Code is not liable to be invoked. The Court notes that different High Courts of the country have taken a conflicting view on the maintainability of a petition for anticipatory bail at the behest of a minor. There is however no authoritative pronouncement of this Court on the question that is raised. In view thereof and since the issue is likely to arise in future also, it would be appropriate to clarify the legal position. The position with respect to the maintainability of a petition in light of the inherent attributes of the remedy provided by Section 438 would have to be decided bearing in mind the twin scenarios in which a petition for anticipatory bail by a minor may be presented before this Court. The first and obvious situation would be where the minor approaches this Court after the registration of a first information report alleging commission of a cognizable offence while the second could be where a minor apprehends arrest and detention prior to the registration of a first information report. The Court proposes to deal with and answer the question of maintainability with reference to the two foreseeable situations noted above.

4. In order to deal with the question that is raised, it would firstly be necessary to notice the provisions made in the 2015 Act as also the provisions that were engrafted and put in place in the **Juvenile Justice (Care and Protection of Children) Act, 2000 Act**5 which since stands repealed. Dealing firstly with the provisions contained in the 2000 enactment, it becomes pertinent to notice the provisions made in Section 1(4) thereof:

"1. [(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law.]"

5. The 2000 Act envisaged the constitution of a Board in terms of Section 4 that read thus: -

"**4. Juvenile Justice Board**.--(1)Notwithstanding anything contained in

the Code of Criminal Procedure, 1973 (2 of 1974), the State Government may,[within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the Official Gazette, constitute for every district], one or more Juvenile Justice Boards for exercising the powers and discharging the duties conferred or imposed on such Boards in relation to juveniles in conflict with law under this Act.

(2)A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974), on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class and the Magistrate on the Board shall be designated as the principal Magistrate."

6. Section 10 of the 2000 Act was framed in the following terms: -

"**10.Apprehension of juvenile in conflict with law.** --(1)As soon as a juvenile in conflict with law is apprehended by police, he shall be placed under the charge of the special juvenile police unit or the designated police officer, who shall produce the juvenile before the Board without any loss of time but within a period of twenty-four hours of his apprehension excluding the time necessary for the journey, from the place where the juvenile was apprehended, to the Board:

Provided that in no case, a juvenile in conflict with law shall be placed in a police lockup or lodged in a jail.]

(2)The State Government may make rules consistent with this Act,--

(i)to provide for persons through whom (including registered voluntary organisations) any juvenile in conflict with law may be produced before the Board;

(ii) to provide the manner in which such juvenile may be sent to an observation home."

7. The subject of bail of a juvenile was governed by the provisions of Section 12 which read thus: -

"**12.Bail of juvenile.** --(1)When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety [or placed under the supervision of a Probation Officer or under the care of any fit institution of fit person] but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

(2)When such person having been arrested is not released on bail under sub-section (1) by the officer incharge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.

(3)When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the

inquiry regarding him as may be specified in the order."

8. The commission of an offence allegedly committed by a *"child in conflict with law"* was to be enquired into by the Board in accordance with the procedure prescribed in Section 14. On the Board being satisfied after due enquiry that a juvenile had committed an offence, it was obliged to pass further orders as enumerated in Section 15. Section 16 of the 2000 Act injuncted the Board or the competent court from passing any sentence of death or imprisonment which may extend to imprisonment for life. It also injuncted passing of orders committing a juvenile to prison in default of payment of fine or failure to furnish security.

9. The 2000 Act was repealed and replaced by the 2015 enactment which came into force on 31 December 2015. The S.O.R. of the amending Act read thus:-

"**Statement of Objects and Reasons.-** Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Articles 39 (e) and (f), 45 and 47 further makes the State responsible for ensuring that all needs of children are met and their basic human rights are protected.

2. The United Nations Convention on the Rights of Children, ratified by India on 11 December, 1992, requires the State Parties to undertake all appropriate measures in case of a child alleged as, or accused of, violating any penal law, including (a) treatment of the child in a manner consistent with the promotion of the child's sense of dignity and worth (b) reinforcing the child's respect for the human rights and fundamental freedoms of others (c) taking into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

3. The Juvenile Justice (Care and Protection of Children) Act was enacted in 2000 to provide for the protection of children. The Act was amended twice in 2006 and 2011 to address gaps in its implementation and make the law more child-friendly. During the course of the implementation of the Act, several issues arose such as increasing incidents of abuse of children in institutions, inadequate facilities, quality of care and rehabilitation measures in Homes, high pendency of cases, delays in adoption due to faulty and incomplete processing, lack of clarity regarding roles, responsibilities and accountability of institutions and, inadequate provisions to counter offences against children such as corporal punishment, sale of children for adoption purposes, etc. have highlighted the need to review the existing law.

4. Further, increasing cases of crimes committed by children in the age group of 16-18 years in recent years makes it evident that the current provisions and system under the Juvenile Justice (Care and Protection of Children) Act, 2000, are ill equipped to tackle child offenders in this age group. The data collected by the National Crime Records Bureau establishes that crimes by children in the age group of 16-18 years have increased especially in certain categories of heinous offences.

5. Numerous changes are required in the existing Juvenile Justice (Care and Protection of Children) Act, 2000 to address the above mentioned issues and therefore, it is proposes to repeal existing Juvenile Justice (Care and Protection of Children) Act, 2000 and re-enact a comprehensive legislation inter alia

to provide for general principles of care and protection of children, procedures in case of children in need of care and protection and children in conflict with law, rehabilitation and social re-integration measures for such children, adoption of orphan, abandoned and surrendered children and offences committed against children. This legislation would thus ensure proper care, protection, development, treatment and social re-integration of children in difficult circumstance by adopting a child-friendly approach keeping in view the best interest of the child in mind.

6. The notes on clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives."

Section 1(4) of the 2015 enactment stipulates: -

"1 (4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including –

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social reintegration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, reintegration, and restoration of children in need of care and protection."

10. The expression *"child in conflict with law"* is defined in Section 2(13) to mean a child who is alleged or found to have committed an offence and who has not completed 18 years of age on the date of commission of such offence. Section 4 which is in terms similar to the provisions made in the 2000 Act reads as under:-

"**4. Juvenile Justice Board.**-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the State Government shall, constitute for every district, one or more Juvenile Justice Boards for exercising the powers and discharging its functions relating to children in conflict with law under this Act.

(2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class."

11. Since the answer to the question posited would turn on the provisions made in Section 10 and 12, it would be apposite to extract the two sections herein below: -

"**10.Apprehension of child alleged to be in conflict with law.**- (1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated Child Welfare Police Officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:

Provided that in no case, a child alleged to be in conflict with law shall be

placed in a police lock-up or lodged in a jail.

(2) The State Government shall make rules consistent with this Act,--

(i) to provide for persons through whom (including registered voluntary or non-governmental organisations) any child alleged to be in conflict with law may be produced before the Board;

(ii) to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case may be.

....

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

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

(2) When such person having been apprehended is not released on bail under sub-section(1)by the officer in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section(1)by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

12. Section 10 places safeguards with respect to a juvenile who is alleged to have committed a cognizable offence by providing that he shall be put in the charge of the SJPU or the designated CWPO who shall be obliged to produce the child before the Board without any loss of time and in any case within 24 hours of apprehension. The authorities including the Board enjoined with undertaking an enquiry are obliged to follow the procedure as prescribed in the 2015 Act and as far as possible also to bear in mind the procedure as laid down in the Criminal Procedure Code for trial of summons cases. Section 14 prescribes the procedure to be adhered to in respect of the enquiry to be initiated in respect of a child in conflict with law. The 2015 enactment then makes special provisions with respect to preliminary assessment in enquiries in respect of heinous offences committed by a juvenile. The expression *"heinous offence"* has been explained in Section 2(33) to include offences for which the minimum punishment under the I.P.C. or any other law for the time being in force is imprisonment of seven years or more.

13. Exercising powers conferred by Section 110 of the 2015 Act, the Union Government has also framed model rules titled the **Juvenile Justice (Care and Protection of Children) Model Rules**

20166. Rule 8 deals with the subject of pre production action by the police and other agencies. The said rule reads thus: -

"8. Pre-Production action of Police and other Agencies.-(1) No First Information Report shall be registered except where a heinous offence is alleged to have been committed by the child, or when such offence is alleged to have been committed jointly with adults. In all other matters, the Special Juvenile Police Unit or the Child Welfare Police Officer shall record the information regarding the offence alleged to have been committed by the child in the general daily diary followed by a social background report of the child in Form 1 and circumstances under which the child was apprehended, wherever applicable, and forward it to the Board before the first hearing:

Provided that the power to apprehend shall only be exercised with regard to heinous offences, unless it is in the best interest of the child. For all other cases involving petty and serious offences and cases where apprehending the child is not necessary in the interest of the child, the police or Special Juvenile Police Unit or Child Welfare Police Officer shall forward the information regarding the nature of offence alleged to be committed by the child along with his social background report in Form 1 to the Board and intimate the parents or guardian of the child as to when the child is to be produced for hearing before the Board.

(2) When a child alleged to be in conflict with law is apprehended by the police, the police officer concerned shall place the child under the charge of the Special Juvenile Police Unit or the Child Welfare Police Officer, who shall immediately inform:

(i) the parents or guardian of the child that the child has been apprehended along with the address of the Board where the child will be produced and the date and time when the parents or guardian need to be present before the Board;

(ii) the Probation Officer concerned, that the child has been apprehended so as to enable him to obtain information regarding social background of the child and other material circumstances likely to be of assistance to the Board for conducting the inquiry; and

(iii) a Child Welfare Officer or a Case Worker, to accompany the Special Juvenile Police Unit or Child Welfare Police Officer while producing the child before the Board within twenty- four hours of his apprehension.

(3) The police officer apprehending a child alleged to be in conflict with law shall:

(i) not send the child to a police lock-up and not delay the child being transferred to the Child Welfare Police Officer from the nearest police station. The police officer may under sub-section (2) of section 12 of the Act send the person apprehended to an observation home only for such period till he is produced before the Board i.e. within twenty-four hours of his being apprehended and appropriate orders are obtained as per rule 9 of these rules;

(ii) not hand-cuff, chain or otherwise fetter a child and shall not use any coercion or force on the child;

(iii) inform the child promptly and directly of the charges levelled against him through his parent or guardian and if a First Information Report is registered, copy of the same shall be made available to the child or copy of the police report shall be given to the parent or guardian;

(iv) provide appropriate medical assistance, assistance of interpreter or a special educator, or any other assistance which the child may require, as the case may be;

(v) not compel the child to confess his guilt and he shall be interviewed only at the Special Juvenile Police Unit or at a child-friendly premises or at a child friendly corner in the police station, which does not give the feel of a police station or of being under custodial interrogation. The parent or guardian, may be present during the interview of the child by the police;

(vi) not ask the child to sign any statement; and

(vii) inform the District Legal Services Authority for providing free legal aid to the child.

(4) The Child Welfare Police Officer shall be in plain clothes and not in uniform.

(5) The Child Welfare Police Officer shall record the social background of the child and circumstances of apprehending in every case of alleged involvement of the child in an offence in Form 1 which shall be forwarded to the Board forthwith. For gathering the best available information, it shall be necessary upon the Special Juvenile Police Unit or the Child Welfare Police Officer to contact the parent or guardian of the child.

(6) A list of all designated Child Welfare Police Officers, Child Welfare Officers, Probation Officers, Para Legal Volunteers, District Legal Services Authorities and registered voluntary and non-governmental organisations in a district, Principal Magistrate and members of the Board, members of Special Juvenile Police Unit and Childline Services with contact details shall be prominently displayed in every police station.

(7) When the child is released in a case where apprehending of the child is not warranted, the parents or guardians or a fit person in whose custody the child alleged to be in conflict with law is placed in the best interest of the child, shall furnish an undertaking on a non-judicial paper in Form 2 to ensure their presence on the dates during inquiry or proceedings before the Board.

(8) The State Government shall maintain a panel of voluntary or non-governmental organisations or persons who are in a position to provide the services of probation, counselling, case work and also associate with the Police or Special Juvenile Police Unit or the Child Welfare Police Officer, and have the requisite expertise to assist in physical production of the child before the Board within twenty-four hours and during pendency of the proceedings and the panel of such voluntary or non-governmental organisations or persons shall be forwarded to the Board.

(9) The State Government shall provide funds to the police or Special Juvenile Police Unit or the Child Welfare Police Officer or Case Worker or person for the safety and protection of children and provision of food and basic amenities including travel cost and emergency medical care to the child apprehended or kept under their charge during the period such children are with them."

14. The process to be followed for production of a child is set forth in Rule 9 which is in the following terms: -

9. Production of the child alleged to be in conflict with law before the Board.- (1) When the child alleged to be in conflict with law is apprehended, he shall be produced before the Board within twenty-

four hours of his being apprehended, along with a report explaining the reasons for the child being apprehended by the police.

(2) On production of the child before the Board, the Board may pass orders as deemed necessary, including sending the child to an observation home or a place of safety or a fit facility or a fit person.

(3) Where the child produced before the Board is covered under section 83 of the Act, including a child who has surrendered, the Board may, after due inquiry and being satisfied of the circumstances of the child, transfer the child to the Committee as a child in need of care and protection for necessary action, and or pass appropriate directions for rehabilitation, including orders for safe custody and protection of the child and transfer to a fit facility recognised for the purpose which shall have the capacity to provide appropriate protection, and consider transferring the child out of the district or out of the State to another State for the protection and safety of the child.

(4) Where the child alleged to be in conflict with law has not been apprehended and the information in this regard is forwarded by the police or Special Juvenile Police Unit or Child Welfare Police Officer to the Board, the Board shall require the child to appear before it at the earliest so that measures for rehabilitation, where necessary, can be initiated, though the final report may be filed subsequently.

(5) In case the Board is not sitting, the child alleged to be in conflict with law shall be produced before a single member of the Board under sub-section (2) of section 7 of the Act.

(6) In case the child alleged to be in conflict with law cannot be produced before the Board or even a single member of the Board due to child being apprehended during odd hours or distance, the child shall be kept by the Child Welfare Police Officer in the Observation Home in accordance with rule 69 D of these rules or in a fit facility and the child shall be produced before the Board thereafter, within twenty-four hours of apprehending the child.

(7) When a child is produced before an individual member of the Board, and an order is obtained, such order shall be ratified by the Board in its next meeting.

15. Rule 10 prescribes the procedure to be adopted by the Board post production of the child in conflict with law and stipulates:-

"10. Post-production processes by the Board.- (1) On production of the child before the Board, the report containing the social background of the child, circumstances of apprehending the child and offence alleged to have been committed by the child as provided by the officers, individuals, agencies producing the child shall be reviewed by the Board and the Board may pass such orders in relation to the child as it deems fit, including orders under sections 17 and 18 of the Act, namely:

(i) disposing of the case, if on the consideration of the documents and record submitted at the time of his first appearance, his being in conflict with law appears to be unfounded or where the child is alleged to be involved in petty offences;

(ii) referring the child to the Committee where it appears to the Board that the child is in need of care and protection;

(iii) releasing the child in the supervision or custody of fit persons or fit institutions or Probation Officers as the case may be, through an order in Form 3,

with a direction to appear or present a child for an inquiry on the next date; and

(iv) directing the child to be kept in the Child Care Institution, as appropriate, if necessary, pending inquiry as per order in Form 4.

(2) In all cases of release pending inquiry, the Board shall notify the next date of hearing, not later than fifteen days of the first summary inquiry and also seek social investigation report from the Probation Officer, or in case a Probation Officer is not available the Child Welfare Officer or social worker concerned through an order in Form 5.

(3) When the child alleged to be in conflict with law, after being admitted to bail, fails to appear before the Board, on the date fixed for hearing, and no application is moved for exemption on his behalf or there is not sufficient reason for granting him exemption, the Board shall, issue to the Child Welfare Police Officer and the Person-in-charge of the Police Station directions for the production of the child.

(4) If the Child Welfare Police Officer fails to produce the child before the Board even after the issuance of the directions for production of the child, the Board shall instead of issuing process under section 82 of the Code of Criminal Procedure, 1973 pass orders as appropriate under section 26 of the Act.

(5) In cases of heinous offences alleged to have been committed by a child, who has completed the age of sixteen years, the Child Welfare Police Officer shall produce the statement of witnesses recorded by him and other documents prepared during the course of investigation within a period of one month from the date of first production of the child before the Board, a copy of which shall also be given to the child or parent or guardian of the child.

(6) In cases of petty or serious offences, the final report shall be filed before the Board at the earliest and in any case not beyond the period of two months from the date of information to the police, except in those cases where it was not reasonably known that the person involved in the offence was a child, in which case extension of time may be granted by the Board for filing the final report.

(7) When witnesses are produced for examination in an inquiry relating to a child alleged to be in conflict with law, the Board shall ensure that the inquiry is not conducted in the spirit of strict adversarial proceedings and it shall use the powers conferred by section 165 of the Indian Evidence Act, 1872 (1 of 1872) so as to interrogate the child and proceed with the presumptions in favour of the child.

(8) While examining a child alleged to be in conflict with law and recording his statement during the inquiry under section 14 of the Act, the Board shall address the child in a child-friendly manner in order to put the child at ease and to encourage him to state the facts and circumstances without any fear, not only in respect of the offence which has been alleged against the child, but also in respect of the home and social surroundings, and the influence or the offences to which the child might have been subjected to.

(9) The Board shall take into account the report containing circumstances of apprehending the child and the offence alleged to have been committed by him and the social investigation report in Form 6 prepared by the Probation Officer or the voluntary or non- governmental organisation, along with the evidence produced by the parties for arriving at a conclusion.

10 A. Preliminary assessment into heinous offences by Board.- (1) The Board shall in the first instance determine whether the child is of sixteen years of age or above; if not, it shall proceed as per provisions of section 14 of the Act.

(2) For the purpose of conducting a preliminary assessment in case of heinous

offences, the Board may take the assistance of psychologists or psycho-social workers or other experts who have experience of working with children in difficult circumstances. A panel of such experts may be made available by the District Child Protection Unit, whose assistance can be taken by the Board or could be accessed independently.

(3) While making the preliminary assessment, the child shall be presumed to be innocent unless proved otherwise.

(4) Where the Board, after preliminary assessment under section 15 of the Act, passes an order that there is a need for trial of the said child as an adult, it shall assign reasons for the same and the copy of the order shall be provided to the child forthwith."

16. The answer to the question as framed would principally depend upon recognising the scope and essential intent underlying Section 1(4) which underscores that the provisions of the 2015 Act insofar as they relate to the subject of apprehension, detention, prosecution, penalty or imprisonment would apply in respect of a children in conflict with law notwithstanding anything contained in any other law for the time being in force. It would also be relevant to note that the provisions of Section 5 of the Criminal Procedure Code, strictly speaking, may have no application since it relates to enactments that were in force when that Code was promulgated. Undisputedly the 2015 Act is a subsequent legislation and its provisions consequently would not be effected by Section 5. However Section 4 (2) of the Criminal Procedure Code would have limited application and be recognised as governing the field in areas for which no special procedure or provision is made under the 2015 Act. What impact Section 4 (2) would ultimately have on the question that is raised shall be dealt with a little later. Having set out the relevant provisions engrafted in the 2015 Act and the Model Rules, it would be apposite to briefly recognise and underscore the nature of the safeguards that are put in place in relation to the arrest of a child in conflict with law and the enquiry which is to be undertaken by the Board.

PRE PRODUCTION STAGE

17. Section 10 apart from enjoining the police to place the apprehended juvenile in the custody of the SJPU or the CWPO also restrains the authorities from placing the juvenile in a police lock up or jail. The provision mandates the placement of the juvenile in an observation home or place of safety till such time as he is produced before the Board. In terms of the Proviso appended to Rule 8 (1) of the Model Rules, no child is to be apprehended except in the case of commission of a heinous offense or where it is otherwise in his best interest. The Rule prescribes that no FIR shall be lodged or registered except where a heinous offense is alleged to have been committed by a child. In all other cases, the SJPU or the CWPO shall enter the information received in the General Diary, apprise the parents of the child and transmit the information along with the social background report to the Board. Rule 8 (3) reiterates the statutory restraint against transmitting the child to jail, placement of handcuffs or any other fetter, his placement in the custody of the SJPU or the CWPO and being accommodated in a welfare home till his production before the Board. It further mandates the child being apprised of the charges levelled against him and being provided with a copy of the FIR if lodged. Additionally it provides for the

child being interviewed at the SJPU or a child friendly place or corner of the police station. The Rule requires the parents or the guardian to be present during the interview and also obliges the authorities to inform the District Legal Services Authority to enable it to provide legal aid to the child. The Rule prescribes that the juvenile shall not be compelled to sign any statement. After the completion of these formalities and not later than 24 hours from apprehension the child is to be produced before the concerned Board. On a reading of the aforesaid Rule and the numerous obligations and safeguards put in place it is evident that the apprehension of a child under the 2015 Act is not akin to incarceration or arrest as otherwise effected under the Criminal Procedure Code. The 2015 Act appears to put in place a comprehensive, distinct and special procedure insofar as the apprehension of a child is concerned.

POST PRODUCTION STAGE

18. Upon being presented before the Board, the opening and foremost issue which arises is the consideration of bail. In terms of Section 12 of the 2015 Act, the Board is mandated to release the child on bail unless it forms the opinion that the child is likely to fall into the association of known criminals, the release is likely to have a negative physical, moral or psychological impact or otherwise defeat the ends of justice. Where the Board decides to refuse bail, the child is liable to be placed in an observation home till the completion of the enquiry initiated under the 2015 Act. These provisions are mirrored in Rule 9 of the Model Rules.

19. Upon a thoughtful consideration of the provisions noticed above, it is manifest that the 2015 Act and the Model Rules lay in place a special and overarching procedure dealing with the apprehension of a child in conflict with law. The procedure so laid in place constitutes a distinct and significant departure from the power and procedure for arrest and detention as contained in the Criminal Procedure Code. Upon a holistic consideration of the provisions engrafted in the 2015 Act and the Model Rules, it is also manifest that they construct and put in place a self contained and compendious code to deal with issues arising in relation to a child in conflict with law. They clearly and unmistakably represent the intent of the Legislature to lay in place an independent, inclusive and all embracing statutory regime to deal with the issues of arrest and enquiry of a child who is alleged to have committed a crime.

20. Having noticed the relevant provisions and the underlying scheme of the 2015 Act the stage is now set to consider the decisions rendered by different High Courts on the subject. Before proceeding to notice the judgments rendered and which directly deal with the question posed here, it would be relevant to note the following two decisions rendered by learned Judges of the Kerala and the Chhattisgarh High Court. In **Gopakumar v. State of Kerala**7 a learned Judge of the Kerala High Court held: -

8. However, right of the juvenile or juvenile in conflict with law to seek pre-arrest bail having apprehension of his arrest on accusation of a non-bailable offence is not the decisive question that may emerge for consideration before the court when such a request is made by such a person. That has necessarily to be considered and examined with reference to the laudable

objectives behind the enacting of the 'Act' and the duty cast upon the court to see that the right of a juvenile or juvenile in conflict with law is not in any way impaired. More so, to ensure that none of the provisions of the Act in relation to such juvenile is violated. The Act has been primarily enacted taking note that the justice system as available for adults is not suitable and cannot be applied to a juvenile or a child. A new system 'Juvenile justice system' is provided under the Act to protect the interests of the juvenile. Even when a juvenile in conflict with law is apprehended or arrested by police, the mandate of the Act is that such juvenile shall be placed under the charge of the special juvenile police unit or the designated police officer. What should be done on apprehension of a juvenile in conflict with law is covered by S. 10 of the Act, which commands that the special juvenile police unit or the designated police officer, to which/whom the juvenile is handed over, shall immediately report to the member of the Board. Juvenile Justice Board is the authority before which the apprehended or arrested juvenile has to be produced, and on such production, it has to pass orders whether he is to be released on bail with or without sureties. Release of the juvenile even where he is accused of a non-bailable offence can be denied only where the Board is satisfied that there are reasonable grounds for believing that his release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. When such be the law governing the grant of bail to a juvenile even when he is accused of a non-bailable offence on the authority Juvenile Justice Board, after his arrest or apprehension and production, the directions issued under Annexure-V order by the learned Sessions Judge, which have been referred to earlier, compelling the juvenile to report before the police station during the investigation of the crime, are totally unsustainable. Where the salutary provisions covered by the Act insulate the juvenile or the child from being exposed to the vagaries of the police, and also from the justice system applicable to the rest of the society, mandating how they are to be dealt with even on arrest or apprehension, and a separate body and other authorities are provided constituting a juvenile justice system to deal with them, the directions given under Annexure-V order exposing and compelling the juvenile to suffer at the hands of police, asking him to report to the police station and investigating officer is violative of the Act.

9. What should have been done by the learned Sessions Judge when the juvenile applied for anticipatory bail, which in the present case was opposed by the Public Prosecutor, has also to be looked into. So far as the juvenile in conflict with law, the competent authority to deal with him is the Juvenile Justice Board. But, it has to be noticed whatever powers enjoined by the Juvenile Justice Board can be exercised by the High Court or the Court of Session. S. 6 of the Act deals with the powers of the Juvenile Justice Board. Sub-s.(2) of that section reads thus:

6. Powers of Juvenile Justice Board:

(1) X X X

(2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise.

10. So much so, when any proceeding in relation to a juvenile comes before the High Court or the Court of

Session all powers conferred on the Board under the Act can be exercised. Such proceeding need not arise from appeal or revision. The words "or otherwise" used in sub-s.(2) of S 6 of the Act is quite significant and it has to be given true meaning and spirit taking note of the objectives of the enactment when that be so, even in an application moved under S. 438 of the Code, orders could be passed by the Sessions Judge exercising the powers of the Juvenile Justice Board. At any rate, orders passed by the Sessions Judge should be in conformity with the provisions of the Act and not against or violative of the spirit and objectives of that Act. Where the police apprehends a juvenile in conflict with law, the Act mandates for placing the juvenile in charge of the special juvenile police unit or the designated police officer, and, such unit or police officer further bound to report the matter immediately to a member of the Juvenile Justice Board, there could be no direction or order to release the juvenile in the event of his arrest on execution of a bond as passed under Annexure-V order. Mandatory prescriptions covered by S. 10 of the Act have to be complied with by the police officer in the event of apprehension/arrest of juvenile in conflict with law, and once custody of the apprehended juvenile is handed over to the juvenile special unit or the designated police officer, what is his control over the juvenile is also taken care of under S. 11 of the Act. Such being the provisions covered by the Act to ensure the right of the juvenile in conflict with law, to prevent him from being exposed to police and police stations, Annexure-V order passed directing execution of bond by the petitioner in the event of his arrest and all other conditions imposed thereunder have no sanction of law, and they are vacated."

21. While the said decision proceeds to enter certain observations which may be interpreted as being in support of the proposition that an anticipatory bail petition could be moved by a child in conflict with law, it becomes pertinent to note that **Gopakumar** itself was principally dealing with the validity of certain conditions which were imposed by the Sessions Judge while according pre-arrest bail to the applicant there. The decision clearly does not deal with the question posited before us, namely, the maintainability of a petition for anticipatory bail at the behest of a child.

22. In **Preetam Pathak v. State of Chhattisgarh**8, a learned Judge of the Chhattisgarh High Court held thus: -

6. A close and careful perusal of Section 12 of the Act, 2000 would show that an application for bail of juvenile would be entertainable by the Board only if he is arrested and brought before the Board where he is accused of bailable or non-bailable offences and the condition precedent to the juvenile would be, he is arrested or detained or appears or is brought before a Board, then only his application filed under Section 12 of the Act, 2000 shall be decided by the Board. Apart from Section 12 of the Act, 2000, there is no other provisions in the Act, 2000 like Section 438 of Cr.P.C. giving powers to the Board to grant anticipatory bail to the juvenile and thus, power and jurisdiction to grant anticipatory bail has not been conferred to the juvenile Justice Board, and therefore, the provisions contained in Section 438 of Cr.P.C. cannot be exercised by this court or court of session to grant anticipatory bail to the juvenile by virtue of provisions contained in Section 6(2) of the Act, 2000.

7. The aforesaid question came to be considered before the High Court of Madhya Pradesh in case of *Kapil Durgawani v. State of Madhya Pradesh* (2010 (IV) MPJR 155), in which, after consideration it has been held that provisions of Section 12 of the Act, 2000 do not provide such power to the Board which is equivalent to Section 438 of Cr.P.C. and the Board has no jurisdiction to entertain application under Section 438 of Cr.P.C. by holding as under:

"Provisions of Section 12 of the Act, 2000, do not provide such powers to the Board which is equivalent to Section 438 of Cr.P.C. The Board has no jurisdiction to entertain application under Section 438 of Cr.P.C."

8. Again similar proposition has been reiterated by the MP High Court in case of *Sandeep Singh Tomar v. State of M.P*. (2014(IV) MPJR 49)

9. I am in respectful agreement with the view taken by the High Court of Madhya Pradesh in *Kapil Durgawani (Supra)* and *Sandeep Singh Tomar (Supra)*, and in the considered opinion of this court juvenile is not entitled to maintain application under Section 438 of Cr.P.C. in absence of specific provisions in the Act, 2000. Accordingly, the application filed Section 438 of Cr.P.C. for anticipatory bail is dismissed as not maintainable in law. However, the applicant is at liberty to appear before the Board and to move appropriate application under Section 12 of the Act, 2000."

23. This decision deals with the question of whether the Board constituted under the 2000 Act could entertain a petition under Section 438. The learned Judge held that in the absence of a specific conferment or extension of power to grant anticipatory bail, the Board could not entertain a petition for grant of anticipatory bail. The learned Judge took note of Section 6 (2) of the 2000 Act which extended powers conferred upon the Board also to a Court of Sessions or the High Court while dealing with maters arising from that enactment. It becomes pertinent to note that similar provisions stand engrafted in the 2015 Act by virtue of Section 8(2). The learned Judge consequently proceeded to hold that by extension the petition for anticipatory bail before the High Court was not maintainable. In the respectful opinion of this Court, the contemporaneous powers conferred upon a Court of Sessions or the High Court by virtue of Section 8 (2) of the 2015 Act or Section 6 (2) of the 2000 Act would really not furnish an answer to the question posed since it would still leave the issue of whether the powers comprised in Section 438 stand excluded by implication open to debate.

24. That takes the Court to the principal decision in support of the issue of maintainability of the Kerala High Court in **Mr. X S/O Baby V.M. v. State of Kerala**9 rendered by a learned Judge of that Court. This decision directly deals with the question that arises for our consideration in this application. While dealing with the right of a child in conflict with law to maintain an application for anticipatory bail, the learned Judge held:-

"17. Section 10 of the Act empowers the police for apprehending a child alleged to be in conflict with law. It does not provide for arresting a child alleged to be in conflict with law. Section 46(1) of the Code deals with how arrests are to be made. It provides that in making an arrest, the police officer or other person making the same shall actually touch or

confine the body of the person to be arrested, unless there be a submission to the custody by word or action. Apprehending a person necessarily involves touching or confining the body of that person or submission of the person to the control of the police officer. Therefore, apprehending a person involves arrest of the person. Apprehending a person curtails his personal freedom and liberty. In my view, merely for the reason that Section 10 of the Act provides for apprehending a child in conflict with law and not for arresting him, it cannot be held that an application under Section 438 of the Code by him/her is not maintainable.

18. As per Section 12 of the Act, when any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before the Juvenile Justice Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail unless the Board is satisfied that there are reasonable grounds for believing that granting bail to him is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or his release would defeat the ends of justice. Section 12(1) of the Act, to a large extent, obliterates the distinction between a bailable offence and a non-bailable offence as far as a child in conflict with law is concerned because whatever be the nature of the offence, bailable or non-bailable, he is entitled to be released on bail unless the proviso to that provision applies. The question is whether Section 12(1) of the Act, for that reason, creates a bar for the application of Section 438 of the Code.

19. Section 12(1) of the Act deals with a situation where a child in conflict with law is apprehended or detained by the police or appears or brought before the Board. It deals with the procedure to be followed after apprehending a child in conflict with law. When a child in conflict with law is apprehended or detained or appears or brought before the Board, the provision contained in Section 12(1) of the Act comes into play. The expression "notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)" in Section 12(1) of the Act is applicable to granting of bail to a child who is alleged to be in conflict with law after his apprehension or detention by the police or appearance or production before the Board. It does not deal with a situation before apprehending a child in conflict with law. In other words, this provision does not deal with a situation before the apprehension or detention of a child in conflict with law by the police or his appearance or production before the Board. Therefore, the provision contained in Section 12(1) of the Act does not take away the jurisdiction of the High Court or the Court of Session under Section 438 of the Code even by implication.

20. Section 4(1) of the Code provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions contained in the Code. Section 4(2) of the Code states that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Section 5 of the Code states that nothing contained in the case shall, in the absence of a specific provision to the

contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. It is apparent from Section 4 of the Code that the provisions of the Criminal Procedure Code are applicable where an offence under the Indian Penal Code or under any other law is being investigated, inquired into, tried or otherwise dealt with. Section 5 of the Code is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction and it does not nullify the effect of Section 4(2) of the Code. The provisions of the Code would be applicable in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the Code.

21. In **Vishwa Mitter v. O. P. Poddar : AIR 1984 SC 5**, the Supreme Court has held as follows:

"Generally speaking, anyone can put the criminal law in motion unless there is a specific provision to the contrary. This is specifically indicated by the provision of sub-section (2) of S.4 which provides that all offences under any other law meaning thereby law other than the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions in the Code of Criminal Procedure, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. It would follow as a necessary corollary that unless in any statute other than the Code of Criminal Procedure which prescribes an offence and simultaneously specifies the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences, the provisions of the Code of Criminal Procedure shall apply in respect of such offences and they shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure."

22. There is no provision in the Act which either expressly or by necessary implication excludes the applicability of Section 438 of the Code which provides for granting anticipatory bail. The Act does not contain any special provision dealing with granting of anticipatory bail to a child in conflict with law. Where no special provision is made under the Act with regard to any particular matter, the provision contained in the Code in that regard shall be applicable. The Act does not contain any provision which excludes the general application of the provisions of the Code as such. Wherever the legislature intended to give overriding effect to the statutory scheme of the Act over the provisions of general application contained in the Code, it has been specifically provided so.

24. I am in respectful agreement with the aforesaid view. At this juncture, it is to be noticed that in **Gopakumar v. State of Kerala** (2012 (4) KHC 841: 2012 (4) KLT 755), while considering the provisions contained in the Act of 2000, this Court has held that a juvenile in conflict with law apprehending arrest in a non - bailable offence, no doubt, will be entitled to seek the discretionary relief of pre-arrest bail envisaged under Section 438 of the Code because that Section takes within its ambit 'any person' to seek such relief when he has reason to believe that he may be arrested on an accusation of having committed a non - bailable offence.

25. The upshot of the discussion above is that an application for anticipatory bail under Section 438 of the Code at the

instance of a child in conflict with law is maintainable before the High Court or the Court of Session."

25. As is evident from the conclusions recorded in **Mr. X**, the learned Judge took the view that the expression "apprehend" would include and necessarily involve the arrest of a person and consequently it cannot be held that an application for anticipatory bail could not be maintained by the child. Proceeding to deal with the non obstante clause as used in Section 12, the learned Judge held that the same can have no application to a situation where a child in conflict with law is yet to be apprehended. In view thereof the learned Judge opined that the provisions contained in Section 12 do not take away the jurisdiction of either the High Court or the Court of Sessions to entertain a petition under Section 438. The learned Judge then proceeded to hold that no provision of the 2015 Act either expressly or by necessary implication excluded the applicability of Section 438 of the Criminal Procedure Code. It was further noted that since the 2015 Act did not contain any special provision dealing with the grant of anticipatory bail to a child, the provisions made in that respect in the Criminal Procedure Code would apply.

26. The learned Judge also rested his decision on the decision rendered by a Division Bench of the Chhattisgarh High Court in **Sudhir Sharma v. State of Chhattisgarh**10 where dealing with an identical question, the Division Bench held as follows: -

32. As has already been dealt with hereinabove, sub section (2) of Section 4 of the Code of Criminal Procedure, 1973 clearly provides that all offences under any other law shall be investigated, enquired into, tried and other wise dealt with according to the provisions contained in the Code of Criminal Procedure, 1973, but subject to any other enactment for the time being in force, regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. Therefore, where no special provisions have been made with regard to any particular procedure under the Act of 2015 of general application contained in the Code of Criminal Procedure, 1973, to the extent they are not inconsistent or derogative with the provisions and statutory scheme of the Act of 2015, shall be applicable.

33. The Act of 2015 does not contain any provision which excludes the general application of the provisions of the Code of Criminal Procedure, 1973 as such. As has been examined hereinabove, overriding effect has been given to certain provisions of the Act of 2015 by providing *non obstante* clause in respect of certain matters. Wherever legislature intended to give overriding effect to the statutory scheme of Act of 2015 over the provisions of general application contained in the Code of Criminal Procedure, 1973, it has been specifically provided in given provision, which have been referred to hereinabove.

34. Word "notwithstanding anything" is used in contra-distinction to the phrase 'subject to', the later conveying idea of provision yielding place to another provision or other provision to which, it is made subject to. Please see *Punjab Sikh Regular Motor Service, Moudahapara, Raipur v. Regional Transport Authority, AIR 1966 SC 1318 and South India Corporation (P) Limited v. Secretary, Board of Revenue, Trivandrum*, AIR 1964

SC 207. Therefore, phrase "subject to" which occurs in Section 4(2) of the Code of Criminal Procedure, 1973 and the phrase "notwithstanding anything contained in the Code of Criminal Procedure, 1973" mentioned in various provisions of the Act of 2015, read together in juxtaposition pave wave for approach to be adopted while examining the issue whereby application of Act of 2015 in general and provisions of Section 12 of the Act of 2015 in particular, legislature intended to exclude the juvenile (child as defined under the Act of 2015) from the category of persons having statutory remedy of applying for grant of anticipatory bail.

…

38. Applying the aforesaid principles applicable in the matter of interpretation of non obstante clause, if the scheme of Act of 2015 in general and the provisions relating to grant of post arrest bail as contained in Section 12 of the Act of 2015 in particular, having non obstante clause to override the provisions of the Code of Criminal Procedure, 1973, generally with the provisions of general applications of Section 4 of the Code of Criminal Procedure, 1973, the legislative intention does not appear to altogether exclude provisions of the Code of Criminal Procedure, 1973 in relation to provisions contained in Chapter XXXIII relating to bails and bonds. Provisions relating to bails and bonds contained in the Code of Criminal Procedure, 1973 would be rendered inapplicable only to the extent that they are inconsistent with the provisions of grant of bail contained in the Act of 2015. There is no warrant for conclusion that *non obstante* clause contained in Section 12 of the Act of 2015 completely excludes the availability of remedy of applying for grant of anticipatory bail by CICL, who is apprehending his arrest on the accusation of commission of any offence. The only provision for grant of bail as contained under Section 12 of the Act of 2015, which deals with application for grant of bail by a CICL applies, when he is apprehended or detained by the police or appears or brought before the Board on the allegation of having committed a bailable or non-bailable offences. The statutory scheme of Section 12 mandates grant of bail to a CICL by use of word "shall" unless there appears reasonable grounds for believing that the release is likely to bring the CICL in association with known criminal or to expose such person to mental, physical or psychological danger or his release would defeat the ends of justice. The provision, in fact, deals with a case of child differently from any other person who is not a child. Unless the aforesaid three exceptional grounds are made out for rejection of application for grant of bail, CICL has to be granted bail irrespective of nature and gravity of allegations against him. We fail to see how the beneficial provision for grant of bail to CICL could be interpreted to the utter prejudice of a CICL to say that he would not be entitled to say that important statutory scheme of seeking anticipatory bail provided under Section 438 of the Code of Criminal Procedure, 1973 is not available to him. On rational construction of the *non obstante* clause in Section 12, it only seeks to put a ClCL in a better position as compared to any other person who is not a CICL by providing that ordinarily a CICL has to be granted bail and it could be rejected upon existence of three specified grounds exhaustively enumerated in the provision itself. There is no justification for giving *non obstante* of such a wide amplitude as to exclude the statutory remedy of applying for anticipatory bail by a CICL. The Act of

2015 is completely silent with regard to anticipatory bail. Therefore, in view of the provision contained in Section 4 of the Code of Criminal Procedure, 1973, the provision relating to grant of anticipatory bail contained in Section 438 of the Code of Criminal Procedure, 1973 will continue to have application and will be available to CICL, who is apprehending arrest."

27. Significantly the decisions rendered in **Mr. X** and **Sudhir Sharma** fail to notice the provisions made in Section 1(4) of the 2015 Act. Commencing with a non obstante clause, the provision as noted above, clearly appears to indicate the legislative intent to create an independent and special procedure to deal with the issue of arrest and detention of a child in conflict with law.

28. The view taken in **Mr. X** has been followed by a learned Judge of the High Court of Jharkhand in **Birbal Munda and Others v. State of Jharkhand**11 where it was held: -

"13. After going through the Judgments and orders of various High Courts referred to above it is crystal clear that some of the High Courts are of the view that the anticipatory bail filed on behalf of a child in conflict with law under Section 438 of the Code of Criminal Procedure is not maintainable basically for the following two reasons:-

(a) Since there is non obstante clause in Section 12 of Juvenile Justice (Care and Protection of Children) Act, 2015 regarding the applicability of the provisions of the Code of Criminal Procedure and Juvenile Justice (Care and Protection of Children) Act, 2015 is a special act hence the application for grant of anticipatory bail preferred by a child in conflict with law cannot be entertained by the High Court or a Court of Session in exercise of the power under section 438 of the Code of Criminal Procedure, as there is no provision either in the Juvenile Justice (Care and Protection of Children) Act, 2015 or in the Code of Criminal Procedure to enable a child in conflict with law to move an application for anticipatory bail either before the Court of Session or the High Court.

(b) The second ground is that as the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015 do not envisages arrest of the child in conflict with law and deliberately the legislature has used the word 'apprehend' instead of the word 'arrest' so the pre requisites for exercising power under Section 438 of Code of Criminal Procedure that there has to be an apprehension of the applicant of being arrested in connection with non-bailable offence does not exist hence, the power under Section 438 of the Code of Criminal Procedure cannot be exercised by a High Court or a Court of Session in granting anticipatory bail to a child in conflict with law in exercise of power under Section 438 of the Code of Criminal Procedure.

14. So far as the first ground for non-availability of the relief of anticipatory bail to a child in conflict with law on the ground of non obstante clause as appearing in Section 12 of Juvenile Justice (Care and Protection of Children) Act, 2015 is concerned, I am of the considered view that non obstante clause does not take away various provisions of bail or anticipatory bail envisaged in the Code of Criminal Procedure but only removes various barriers for grant of bail under the provisions of the Code of Criminal Procedure and authorizes the Juvenile Justice Board that in-spite of such barriers

for granting of bail as envisaged in Section 436 and 437 of the Code of Criminal Procedure for releasing the person arrested or detained.

15. Further the Hon'ble Supreme court of India in the case of Nikesh Tarachand Shah v. Union of India[(2018) 11 SCC 1: AIR 2017 SC 5500] while considering the provision of bail in cases involving the offences punishable under The Prevention of Money-Laundering Act, 2002, Section 45(1) of which starts with the non obstante clause imposing restrictions for grant of anticipatory bail, which reads as under when the said judgment was passed (Subsequently the said section has been amended):-

45. Offences to be cognizable and non-bailable.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless-

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

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail: Provided that a person who is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the special court so directs: Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by-

(i) the Director; or

(ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government.

16. Inter alia observed as under in paragraph- 35 of the said judgement:-

35. Another conundrum that arises is that, unlike the Terrorist and Disruptive Activities (Prevention) Act, 1987, there is no provision in the 2002 Act which excludes grant of anticipatory bail. Anticipatory bail can be granted in circumstances set out in Siddharam Satlingappa Mhetre v. State of Maharashtra,[(2011) 1 SCC 694 (See paragraphs 109, 112 and 117) : (AIR 2011 SC 312, Paras 118-119, 122 and 128)]. *Thus, anticipatory bail may be granted to a person who is prosecuted for the offence of money laundering together with an offence under Part A of the Schedule, which may last throughout the trial. Obviously for grant of such bail, Section 45 does not need to be satisfied, as only a person arrested under Section 19 of the Act can only be released on bail after satisfying the conditions of Section 45. But insofar as pre-arrest bail is concerned, Section 45 does not apply on its own terms. ... …*

(Emphasis Supplied)

17. Thus, certainly the said non obstante clause does not exclude the availability of remedy of applying for grant of anticipatory bail on behalf of a child in conflict with law, who is apprehending his arrest on accusation of having committed a non bailable offence therefore beneficial provision to grant of bail to a child in conflict with law, like the instant case where a child as young as 5 years has been accused of murdering the deceased in furtherance of common intention, as envisaged under section 438 of the Code of Criminal Procedure and certainly keeping in view the objects and reasons of the enactments in view Section 12 of Juvenile Justice (Care and Protection of Children) Act, 2015 cannot be interpreted to the detriment of a child in conflict with law

and the interpretation that the said provision disentitles a child in conflict with law to the statutory scheme of seeking anticipatory bail provided under Section 438 of the Code of Criminal Procedure will not be a rational construction of non obstante clause appearing in Section 12 of Juvenile Justice (Care and Protection of Children) Act, 2015 as the said non obstante clause only seeks to put the child in conflict with law in a better position as compared to any other person who is not a child in conflict with law by providing that in absence of existence of three specified grounds exhaustively enumerated in the said section the child in conflict with law has to be granted bail and interpreting the said non obstante clause by giving it a wide amplitude as to exclude the statutory remedy of applying for anticipatory bail by a child in conflict with law will be an illogical interpretation.

18. Further as Section 438 of the Code of Criminal Procedure envisages that any person who has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence may apply to the High Court or the Court of Session under Section 438 of the Code of Criminal Procedure that in the event of such arrest he shall be released on bail and though the word 'person' has not been defined in the Code of Criminal Procedure but the same has been defined in Section 11 of the Indian Penal Code which reads as under:-

11. "Person"-The word "person" includes any company or association or body of persons, whether incorporated or not.

19. Hence, applying the definition of person mentioned in the Indian Penal Code to the word "person' as mentioned in section 438 of the Code of Criminal Procedure in terms of Section 2 (y) of the Code of Criminal Procedure which reads as under:-

"2. Definitions:- In this Code, unless the context otherwise requires,-

(y) words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code."

20. It cannot be said that the Code of Criminal Procedure does not provide a child in conflict with law which certainly comes within the ambit of the words "person of any age" is entitled to approach the High Court to seek the relief of anticipatory bail in terms of Section 438 of the Code of Criminal Procedure or the Court of Session.

21. So far as the second ground that a child in conflict with law does not has the remedy to the anticipatory bail as the word 'apprehend' has been used instead of the word 'arrest' in Section 10 of Juvenile Justice (Care and Protection of Children) Act, 2015 is concerned, in P. Ramanatha Aiyar's Law Lexicon, published by Wadhwa and Company(*Reprint 2002 of Second Edition 1997*) the meaning of the word 'Apprehend' has been mentioned as under:

Apprehend- To seize under process of law; to take into custody; make prisoner; arrest by legal warrant or authority.

22. As mentioned in the said Law Lexicon the distinction between the words 'apprehension' and 'arrest' was considered by Court in England in the case of Montgomery County v. Robinson (85 III 176, Black) and the said two words have been distinguished as under:

"The term 'apprehension' seems to be more peculiarly appropriate to seizure on criminal process; while "arrest" may apply to either a civil or criminal

action but it perhaps be confined to the former."

23. It is pertinent to refer to section 46(1) of the Code of Criminal Procedure which reads as under:

46. Arrest how made - (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by words or action.

[Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest]

24. The said section provides that in making an arrest the police officer or the person making arrest shall actually touch or confine the body of the person to be arrested and unless there be a submission to the custody by word or action, thus apprehending a person necessarily involves touching or confining the body of that person to or submission of the person to the control of the police officer or the person making arrest. Therefore "apprehending" in my humble opinion also involves the arrest of a person as apprehending a person certainly curtails his personal freedom and liberty as has been held by the Hon'ble Supreme Court in the case of *Gubaksh Singh Sibbia vs. State of Punjab* reported in (1980) 2 SCC 565: AIR 1980 SC 16632 wherein bail has been interpreted as under:-

".... .... Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally an order of bail gives back to the accused that freedom on condition that he will appear to take his trail. ....…"

25. Thus, I am of the considered view that the provision contained in Section 12 (1) of Juvenile Justice (Care and Protection of Children) Act, 2015 does not extinguish the jurisdiction of a High Court or the Court of Session under Section 438 of the Code of Criminal Procedure in any manner."

29. In **Birbal Munda** the learned Judge, placing reliance upon the definition of the word "person" as appearing in Section 11 of the Indian Penal Code, proceeded to hold that a child in conflict with law would clearly fall within the ambit of the words "person of any age". The learned Judge further held that there was no significant distinction between the words "apprehension" and "arrest" and therefore held that Section 12 of the 2015 Act does not extinguish the jurisdiction of a High Court of the Court of Sessions as conferred by Section 438 of the Criminal Procedure Code.

30. A contrary view has been taken by the Division Bench of the Madras High Court in **K. Vignesh v. State represented by the Inspector of Police**12 where it was held: -

"11. While enacting the Juvenile Justice (Care and Protection of Children) Act, 2015, the Legislature was well aware of Chapter V of the Code of Criminal Procedure more particularly Section 46 of the Code of Criminal Procedure as to how a person could be arrested. Had it been the intention of the Legislature, that a police officer should be empowered to arrest a child in conflict with law, the Legislature would have very well used the expression

'arrest' instead of using the expression 'apprehend' in Section 10 of the Juvenile Justice (Care and Protection of Children) Act, 2015. In our considered view, the Legislature has, thus, consciously omitted to use the expression 'arrest' in Section 10 of the Act, which means that the Legislature did not want to empower the police to arrest a child in conflict with law. The Legislature, being aware of the consequences that ensue the arrest, has avoided to empower the police to arrest a child in conflict with law. At the same time, the child in conflict with law cannot be let free as it would not be in the interest of the child in conflict with law as well as the society. Therefore, the Legislature had obviously thought it fit to give only a limited power to the police. In other words, the Legislature has empowered the police simply to apprehend a child in conflict with law and immediately, without any delay, cause his production before the Juvenile Justice Board. The Juvenile Justice Board has also not been empowered to pass any order of remand of the child in conflict with law either with the police or in jail. The proviso to Section 10 of the Act makes it very clear that in no case a child alleged to be in conflict with law shall be placed in a police lock-up or lodged in a jail. The Board has been obligated to send the child either to an observation home or a place of safety. There are lot of other safeguards in the Act as well as in the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 to ensure that the child so apprehended by a police or any other authority shall not in any manner be disturbed emotionally, psychological or physically. Thus, a reading of the entire scheme of the Act would inform that no authority, including the police, has been empowered to arrest a child in conflict with law but instead the child in conflict with law could only be apprehended and produced before the Juvenile Justice Board.

.... ..…

15. From the above narration of various provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, one can understand, without any doubt whatsoever, that a child in conflict with law cannot be arrested and thus there can not be apprehension of arrest and so an application at the instance of a child in conflict with law either before the High Court or before the Court of Sessions under Section 438 Cr.P.C. is not maintainable. The Juvenile Justice (Care and Protection of Children) Act, 2015 is a self-contained Code which is both substantive as well as procedural. The Act takes care of the interest of the child in conflict with law on the child being apprehended. When a question arises before the Board as to whether to grant bail to the child or not, the Board shall not grant bail if it finds that it is likely to bring the child into association with any known criminal or expose the said person to moral, physical or psychological danger or when the Board finds that the person's release would defeat the ends of justice. Even after bail is refused to the child, the child cannot be remanded to either judicial custody or police custody. The Board shall ensure the welfare of the child by keeping the Child in an Observation Home or a place of safety.

16. Thus, there are lot of safeguards provided to the child in conflict with law in the event the child is apprehended by the police. In the light of these safeguards, and in the light of the legal position that the child in conflict with law cannot be arrested, the child in conflict with law need not apply for anticipatory bail. The legislature has consciously did not empower the police to arrest a child in conflict with law. Thus, it is manifestly

clear that an application seeking anticipatory bail under Section 438 Cr.P.C. at the instance of a child in conflict with law is not at all maintainable. Similarly, a direction to the Juvenile Justice Board to release the child in conflict with law cannot be issued by the High Court in exercise of its inherent power saved under Section 482 Cr.P.C. Thus, we approve the view of the Hon'ble Mr. Justice P.N. Prakash in *Ajith Kumar Vs. State,* reported in 2016 (2) CTC 63 and we are impelled to overrule all the other orders wherein conflicting views have been expressed. Accordingly, we answer the reference."

31. The Division Bench as is evident from the extracts quoted above proceeded to draw a distinction between the expression "arrest" and "apprehend" and came to conclude that since no arrest was contemplated under the provisions of the 2015 Act, the provisions of Section 438 would not apply. More significantly **K. Vignesh** noted that the 2015 Act was a self-contained code in both a substantive as well as a procedural sense. In that view it held that an application for anticipatory bail would not be maintainable.

32. The view taken by the Madras High Court is also shared consistently by the Madhya Pradesh High Court, which too has taken the view that a petition for anticipatory bail at the behest of a child is not maintainable. Noticing the various decisions rendered by that High Court on the subject, a learned Judge while deciding **Miscellaneous Criminal Case No. 10345 of 201913** held as follows: -

"11. The Act, 2015 further makes it clear that bail plea of a juvenile can only be entertained when he is arrested or detained or appears or is brought before the Board, and not otherwise. In fact, no provision in the Act or in the Code of Criminal Procedure enables the juvenile to move an application for anticipatory bail either before the Court of Sessions or High Court or even before the Board, which has been exclusively constituted for the purpose of dealing with the proceedings pertaining to a juvenile. Reason appears behind this is that the Act makes the bail a rule and jail an exception.

12. The issue regarding anticipatory bail of a Juvenile has been dealt with by this Court in para 16, 21 to 23 of ***Satendra Sharma v. State of Madhya Pradesh MCRC No. 4183 of 2014, dated 8.7.2014***, which are as under:

16. On bare perusal of this provision, it is clear that the bail application of a juvenile can be entertained by the Board only when he is arrested or detained or appears or is brought before the Board otherwise application cannot be entertained. If the juvenile is arrested or detained or appears or is brought before the Board then certainly bail application will be filed under Section 12 and the same be decided by the Board only but not by the High Court or Court of Session as discussed above.

21. The anticipatory bail can be granted in anticipation of arrest but such proceedings are not inserted in the Act. The only provision for bail of Juvenile is given under Section 12 of the Act which has been discussed as above.

22. In view of the aforesaid discussion, this Court is of the view that application for grant of anticipatory bail preferred by the juvenile cannot be entertained by the High Court or the Court of Session by applying the provision contained under Section 6(2) of the Act. The powers conferred on the Board can be used by High Court and the Court of

Session only when proceedings come before them in appeal, revision or otherwise except under Section 438 and 439 of Cr.P.C. Therefore, I respectfully disagree with the interpretation made by the learned Single Judge of the Hon. Rajasthan High Court and Hon. Chhattisgarh High Court.

23. Accordingly, application for grant of anticipatory bail by the applicant is hereby dismissed. ….

13. In ***Kapil Durgawani v. State of Madhya Pradesh reported in 2010 (IV) MPJR 155***, the High Court of Madhya Pradesh has held that even the Juvenile Board has no jurisdiction to entertain anticipatory bail application. Relevant portion of the decision is extracted as under:

"Provisions of Section 12 of the Act, 2000 do not provide such powers to the Board which is equivalent to Section 438 of Cr.P.C. The Board has no jurisdiction to entertain application under Section 438 of Cr.P.C."

14. Similar view is taken by the **High Court of Chattisgarh** in ***Preetam Pathak v. State of Chattisgar in MCRC (A) No. 1104 of 2014*** and it has held as under:

7. A close and careful perusal of Section 12 of the Act, 2000 would show that an application for bail of juvenile would be entertainable by the Board only if he is arrested and brought before the Board where he is accused of bailable or non bailable offences and the condition precedent to the juvenile would be, he is arrested or detained or appears or is brought before a Board, then only his application filed under Section 12 of the Act, 2000 shall be decided by the Board. Apart from Section 12 of the Act, 2000, there is no other provisions in the Act, 2000 like Section 438 of Cr.P.C. giving powers to the Board to grant anticipatory bail to the juvenile and thus, power and jurisdiction to grant anticipatory bail has not been conferred to the juvenile Justice Board, and therefore, the provisions contained in Section 438 of Cr.P.C. cannot be exercised by this court or court of session to grant anticipatory bail to the juvenile by virtue of provisions contained in Section 6(2) of the Act, 2000.

8. The aforesaid question came to be considered before the High Court of Madhya Pradesh in case of Kapil Durgawani v. State of Madhya Pradesh, in which, after consideration it has been held that provisions of Section 12 of the Act, 2000 do not provide such power to the Board which is equivalent to Section 438 of Cr.P.C. and the Board has no jurisdiction to entertain application under Section 438 of Cr.P.C. by holding as under:

"Provisions of Section 12 of the Act, 2000, do not provide such powers to the Board which is equivalent to Section 438 of Cr.P.C. The Board has no jurisdiction to entertain application under Section 438 of Cr.P.C."

15. Again similar view was reiterated by MP High Court in case of ***Sandeep Singh Tomar V. State of M.P. Passed in M.Cr.C. No.9816 of 2013, decided on 10th March, 2014.***

16. Therefore, in my considered opinion, in absence of specific provisions in the Act, 2015, juvenile is not entitled to move application under Section 438 of Cr.P.C. "

33. On a careful consideration of the various judgments rendered by different High Courts it is relevant to note that those which hold that a petition for anticipatory bail is not maintainable at the behest of a child have proceeded principally on the basis of the absence of a specific conferral

of power to grant anticipatory bail under the 2015 Act. This Court however is respectfully of the opinion that mere absence of a specific provision enabling the Board to grant anticipatory bail is clearly not an answer to the question posed. Suffice it to note that Section 4 of the 2015 Act while provides for the constitution of the Board confers on that entity all powers as invested in a Metropolitan Magistrate or a Judicial Magistrate of the First Class by the Criminal Procedure Code. It also cannot be disputed that the provisions of the Criminal Procedure Code would generally apply except where a departure in respect of a particular matter is made in the 2015 Act or a special provision to the contrary engrafted therein. This would also appear to be the correct position when one bears the provisions of Section 4 (2) of the Criminal Procedure Code in mind. Similarly this Court fails to find any significance liable to be accorded to the non-obstante clause as appearing in Section 12 of the 2015 Act. The non-obstante clause as employed in Section 12 merely regulates the power of bail as conferred and invested in the Board. It simply enables the Board to release a child in conflict with law on bail irrespective of any procedural or substantive restraint or fetter as contained in the Criminal Procedure Code to the contrary. Consequently the only impact which the concerned non obstante clause has is to confer on the Board a power to release a child on bail irrespective of any condition or restriction that may be found in the Criminal Procedure Code with respect to the grant of bail. The *non-obstante clause* as appearing in Section 12 consequently is neither indicative nor determinative of the right of a child to seek anticipatory bail.

34. This Court is also of the considered view that it would be clearly hazardous to base the answer to the question posed on the quagmire of semantics and the perceived distinction as sought to be drawn by certain High Courts while interpreting the words "arrest" and "apprehend". **P. Ramanatha Aiyar** in the **Advanced Law Lexicon** defines the expressions "apprehension" and "arrest" to mean *"the seizing or taking hold of a man; the act of arresting or seizing under process of law; the apprehension of criminals"*. The word "apprehend" has been defined to mean *"to take into custody; make prisoner; arrest by legal warrant or authority"*. In **Words And Phrases Permanent Edition**, the expression "apprehension" has been defined to mean:-

"The word "apprehension" means the seizure, taking, or arresting of a person on a criminal charge, the term "apprehension" being applied exclusively to criminal cases as distinguished from the word "arrest," which is applied to both civil and criminal cases. Hogan v. Stophlet, 53 N.E. 604, 606, 179 Ill. 150, 44, L.R.A. 809. See, also, Montgomery County v. Robinson, 85 Ill. 174, 176."

"Apprehend" is defined as "to take or seize (a person) by legal process; to arrest; as to apprehend a criminal." "Arrest" is defined as "the taking or apprehending of a person by authority of law; legal restraint; custody." The words "apprehension" and "arrest," as used in Rev.St.1899, [] 2474, V.A.M.S. [] 544.150, providing that any two judges of the county court may offer, for the county, a reward for the apprehension and arrest of a person committing a felony, are synonyms, and a reward offered for the apprehension of a felon is within the authority of the judges of the county court. Cummings v. Clinton County, 79 S.W. 1127, 1129, 181 Mo. 162, quoting Webster's Dict."

35. In the Oxford English Dictionary the word "apprehension" has been defined as the *"seizure of a person, a ship etc. in the name of justice or authority; arrest"*.

The word "arrest" has been defined to mean *"apprehend or restraining of one's person in order to be forthcoming to answer an alleged or suspected crime"*. It has further been defined to include *"a person being placed under legal restraint, in the hands of law, arrest"*. It is thus manifest that the expressions "apprehend" and "arrest" are possible to be used interchangeably and do not appear to have a generic or significant distinction. Both those words would appear to include the detention or a person by virtue of a power conferred by law. The answer to the question, therefore, cannot be made to rest merely on the use of the expression "apprehend" in Section 10 of the 2015 Act.

36. A clearer and a more sustainable answer clearly flows from the recognition of the 2015 Act as being a complete code in itself. As has been noticed in the earlier parts of this decision, the enactment lays in place an all encompassing and comprehensive statutory regime dealing with a child in conflict with law and issues arising from and pertaining to the apprehension, detention, prosecution, penalty and imprisonment of such a child. This is clearly evident from a reading of Section 1(4). This singular provision is clearly indicative of the legislative intent to confer upon the 2015 Act exclusivity and an overriding effect insofar as these subjects in relation to a child in conflict with law are concerned. It is the provisions of Section 1(4) and the special and distinct procedure as laid in place which appears to indicate and imply that Section 438 Criminal Procedure Code would have no application. The Court also bears in mind that both Sections 10 and 12 lay down a detailed procedure and statutory mechanism which must be mandatorily followed consequent to the apprehension of a child in conflict with law. These provisions neither entail nor envisage the detention or placement of the child in a jail or police lock-up. As is manifest from the procedure as laid down in Section 10 the child upon being apprehended by the police has to be immediately placed in the custody and care of the SJPU or the CWPO to be produced before the concerned Board without any loss of time and in any case within 24 hours of apprehension. During the period before his production before the Board the child is to be placed in an observation home. The provision also does not empower the authorities to question or interrogate. As is evident from the provisions made in the Model Rules he is to be interviewed by the SJPU or the CWPO bearing in mind the salutary safeguards that have been put in place. In terms of Section 12 the Board is obliged to forthwith release the child unless it forms the opinion that hid release would fall within the ambit of the Proviso to Section 12 and be not conducive to the over all interest of the child. This Court is consequently of the view that the principal trigger which confers the right of an individual to invoke the provisions of Section 438, namely, of arrest and detention by the police is absent. It consequently must be held that the need to invoke the jurisdiction of either the High Court or the Court of Sessions as conferred by Section 438 of the Criminal Procedure Code is clearly obviated.

37. More importantly, the special provisions laid in place clearly indicate that the provision of pre-arrest bail as made in Section 438 of the Criminal Procedure Code would clearly impede, hinder and may even disrupt or retard the mandatory statutory procedure which is liable to be adhered to in view of the provisions made

in the 2015 Act and the Model Rules. The 2015 Act lays in place a complete machinery to deal with issues that may arise on account of the apprehension of a child in conflict with law. An order of anticipatory bail would clearly disrupt and interfere with the salutary process statutorily constructed.

38. That only leaves the Court to deal with a situation where a child apprehends his arrest or detention prior to the registration of a first information report or prior to the recordal of a cognizable offence not falling in the genre of a heinous offence by the SJPU or the CWPO. It becomes relevant to note that in terms of the provisions made in Rule 8 of the Model Rules, the process is initiated either upon the registration of a first information report in the case of a heinous offence or where any other cognizable offence not entailing imprisonment of more than seven years comes to be recorded. The procedures as contemplated in Sections 10 and 12 read with Rules 8 and 9 would stand initiated only upon the recordal of information. However as has been consistently held the powers conferred by Section 438 Cr.P.C. can be invoked even before a report in respect of a cognizable offence is made or recorded. During this period and in such a situation the child has no remedy or avenue of protection under the 2015 Act. Prior to the registration or recordal of information in respect of a cognizable offense, the child would consequently be left with no remedy against an apprehended deprivation of liberty. The Court cannot possibly leave a child in such a situation with no avenue of redress or protection against a potential deprivation of liberty. It is only within this limited window that perhaps the right of a child in conflict with law to invoke Section 438 can possibly be recognised. The Court is of the considered view that the right conferred by Section 438 of the Criminal Procedure Code would be entitled to be invoked by a child apprehending arrest prior to the registration of a first information report in the case of a heinous offense or recordal of information in respect of other offenses and prior to Section 10 and other provisions of the 2015 Act coming into play.

SUMMATION

39. The Court is of the considered opinion that the mere use of the expression "apprehended" in Section 10 does not really furnish an answer to the question framed. As noticed hereinabove the words arrest and apprehend can possibly be used as substitutes of each other and convey an identical meaning. The absence of a specific conferment of power to grant anticipatory bail upon the Board and by extension to the Court of Sessions or the High Court is not determinative of the question raised since the provisions of the Criminal Procedure Code may otherwise apply and operate in areas where the 2015 Act is either silent or constructs no special or distinct measure. The non obstante clause as used in Section 12 is only indicative of the Board being conferred the power to grant bail notwithstanding any restraint or fetter that may be found in that regard in the Criminal Procedure Code.

40. The implied exclusion of Section 438 essentially flows from Section 1(4) of the 2015 Act that confers on the provisions made therein in respect of arrest and detention the character of preeminence. The section is a clear manifestation of the legislative intent that the provisions of the 2015 Act dealing with arrest and detention must necessarily prevail over any other law

for the time being in force. The 2015 Act represents an all encompassing and self contained code laying in place a separate and distinct procedure liable to be followed in case of arrest or detention of a child in conflict with law. It places significant and special safeguards in respect of the apprehension of a child in conflict with law. It is in that sense not an incarceration or detention by the police as normally understood. The extension of the provisions of Section 438 of the Criminal Procedure Code would clearly interfere with and disrupt the statutory process that is otherwise liable to be followed upon apprehension of a child. It must consequently be held that once a first information is registered or information otherwise recorded by the SJPU or the CWPO with regard to a child in conflict with law, the provisions of Section 438 stand impliedly excluded. In such a situation it is the provisions made in Sections 10 and 12 of the 2015 Act which alone must be permitted to operate and recognised in law to be applicable.

41. The only limited window in which Section 438 can be held to apply is the pre recordal of information stage with regard to an offense allegedly committed by a child. As noticed above, Section 10 comes into play only once information in respect of an offense comes to be recorded. Prior to that a child apprehending detention or deprivation of liberty is accorded no protection or avenue of redress under the 2015 Act. It is within this narrow confine alone that his right to invoke the jurisdiction of the Court of Sessions or the High Court must be recognised to exist and preserved.

CONCLUSION

42. In the present case, a first information report has already come to be lodged against the two applicants. The learned AGA has rightly submitted that the police cannot apprehend the applicants and that it is the procedure prescribed by Sections 10 and 12 that will have to be necessarily followed. In that view of the matter the Court is of the opinion that the apprehension of arrest is clearly misplaced.

43. Taking on board the statement of the learned AGA, the instant application is **dismissed as not maintainable**.

(2020)03-05ILR A1281
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2020

BEFORE

THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE YASHWANT VARMA, J.
THE HON'BLE RAHUL CHATURVEDI, J.

Crl. Misc. Anticipatory Bail Application No. 1094 of 2020 and other connected cases

Ankit Bharti ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Gaurav Kacker, Sri Bharat Singh

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

A. Criminal Law-Code of Criminal Procedure,1973-section 438-application-concurrent jurisdiction of anticipatory bail-special circumstances must be convincingly established and not on vague allegations before the jurisdiction of the High Court is invoked-a strong foundation in respect of both the apprehension of arrest as well as in justification of the concurrent jurisdiction of the High Court being invoked directly-it is for the concerned judge to assess whether special circumstances do exist warranting the jurisdiction of the High Court being

invoked directly-Hence reference is answered.(Para 3 to 22)

Whenever an application for relief u/s 438 is moved, discretion has to be always exercised judiciously, and with caution, having regard to the facts of every case.while the power of granting anticipatory bail is not ordinary, at the same time, its use is not confined to exceptional cases.application should be based on concrete facts and not vague or general allegations relatable to one or other specific offence.(Para 8, 9, 10)

The reference is answered. (E-6)

List of Cases Cited:-

1. Onkar Nath Agarwal & ors. Vs. St. (1976) All LJ 223

2. Vinod Kumar Vs. St. Of U.P. & anr. (2019) 12 ADJ 495

3. Ankit Bharti Vs. St. Of U.P. & anr. CR. Misc. Bail application no. 1094 of 2020

4. Gurbaksh Singh Sibbia Vs. St. Of Punj. (1980) 2 SCC 565

5. Sushila Aggaarwal Vs. St.a(NCT of Delhi) & Ors.(2020) SCC Online SC 98

6. Mohan Lal & Ors. Etc. Vs. Prem Chand & ors. Etc.,AIR (1980) HP 36

7. Mubarik & Anr. Vs. St. Of U.K. & Ors.,CMWP No. 2059 of 2018

8. Diptendu Nayek Vs. St. Of W.B. (1998) 2 Cal LJ 447

9. Suresh Jaiswal Vs. St. Of U.P. (2020) 1 ADJ 52 FB

10. Rashmi Rekha Thatoi Vs. St. Of Orissa (2012) 5 SCC 690

(Delivered by Hon'ble Govind Mathur, C.J.
Hon'ble Ramesh Sinha, J.
Hon'ble Mrs. Sunita Agarwal, J.
Hon'ble Yashwant Varma, J.
Hon'ble Rahul Chaturvedi, J.)

1. We have heard Sri Gaurav Kacker, learned Advocate and other counsels appearing for the various applicants and the learned AGA.

2. A learned Judge of the Court while considering a petition for anticipatory bail has deemed it appropriate to refer the following questions for the consideration of this Full Bench: -

"(i) Whether the Court would have no jurisdiction to reject the anticipatory bail after considering the grounds of compelling reasons mentioned in the affidavit being found not appealing, which would amount nothing but to approach this Court directly;

(ii) Whether amongst the grounds which have been enumerated in the judgment in the case of Vinod Kumar (supra), the ground at Serial (A) requires any reconsideration so as to preclude the co-accused approaching this Court directly in case the other co-accused's regular bail/anticipatory bail is rejected by the Court of Sessions and whether he be also subjected to filing such an affidavit, showing therein the circumstances in which he had to feel compelled to approach this Court directly;

(iii) Whether amongst the grounds which have been enumerated in the judgment in the case of Vinod Kumar (supra), the ground at Serial (B) requires any reconsideration as to whether an accused, who is not residing within the jurisdiction of the Sessions Court concerned, faces a threat of arrest, should be allowed to approach the High Court directly, to move an anticipatory bail application by the logic given above in Para 6 of this judgment; and

(iv) Whether such anticipatory bail applications which do not contain any compelling reason to approach this Court directly, should be entertained.

3. While passing the referral order, the learned Judge also suggested the formation of a Bench larger than the one which had rendered judgment in **Onkar Nath Agarwal and others Vs. State**1, a decision rendered by three learned Judges of this Court. The Reference came to be made in the backdrop of the decision rendered in **Vinod Kumar Vs. State of U.P. and another**2 in which a learned Judge framed the following questions for consideration:-

"A. The nature of the concurrent jurisdiction conferred by Section 438 Cr.P.C.

B. Whether parties should be commanded to necessarily approach the Sessions Court first before invoking the jurisdiction of this Court under Section 438 Cr.PC

C. In what circumstances can the High Court be approached directly under Section 438 Cr.P.C.

D. Exceptional or Special circumstances.

E. The perceived conflict between the decisions rendered in Harendra Singh @ Harendra Bahadur Vs. The State of U.P.1 and Neeraj Yadav And Another Vs. State of U.P.2

F. Impact of the Explanation to Section 438(2) Cr.P.C.

G. The period for which anticipatory bail should operate."

4. Upon due consideration of the decisions rendered on the subject by the Court as well as those rendered by different High Courts of the country, the following conclusions came to be recorded:

"A. Section 438 Cr.P.C. on its plain terms does not mandate or require a party to first approach the Sessions Court before applying to the High Court for grant of anticipatory bail. The provision as it stands does not require an individual first being relegated to the Court of Sessions before being granted the right of audience before this Court.

B. Notwithstanding concurrent jurisdiction being conferred on the High Court and the Court of Session for grant of anticipatory bail under Section 438 Cr.P.C., strong, cogent, compelling and special circumstances must necessarily be found to exist in justification of the High Court being approached first without the avenue as available before the Court of Sessions being exhausted. Whether those factors are established or found to exist in the facts of a particular case must necessarily be left for the Court to consider in each individual matter.

C. The words "exceptional" or "extraordinary" are understood to mean atypical, rare, out of the ordinary, unusual or uncommon. If the jurisdiction of the Court as conferred by Section 438 Cr.P.C. be circumscribed or be recognised to be moved only in exceptional situations it would again amount to fettering and constricting the discretion otherwise conferred by Section 438 Cr.P.C. Such a construction would be in clear conflict of the statutory mandate. The ratio of Harendra Singh must be recognised to be the requirement of establishing the existence of special, weighty and compelling reasons and circumstances justifying the invocation of the jurisdiction of this Court even though a wholesome

avenue of redress was available before the Court of Sessions.

D. What would constitute "special circumstances" in light of the nature of the power conferred must be left to be gathered by the Judge on a due evaluation of the facts and circumstances of a particular case. It would be imprudent to exhaustively chronicle what would be special circumstances. It is impossible to either identify or compendiously postulate what would constitute special circumstances. Sibbia spoke of the "imperfect awareness of the needs of new situations". It is this constraint which necessitates the Court leaving it to the wisdom of the Judge and the discretion vested in him by statute.

E. While the Explanation may have created an avenue for an aggrieved person to challenge an order passed under Section 438(1), it cannot be construed or viewed as barring the jurisdiction of the High Court from entertaining an application for grant of anticipatory bail notwithstanding that prayer having been refused by the Court of Sessions.

F. Till such time as the question with respect to the period for which an order under Section 438 Cr.P.C. should operate is answered by the Larger Bench, the Court granting anticipatory bail would have to specify that it would continue only till the Court summons the accused based on the report that may be submitted under Section 173(2) Cr.P.C. whereafter it would be open for the applicant on appearance to seek regular bail in accordance with the provisions made in Section 439 Cr.P.C."

5. In **Ankit Bharti Vs. State of U.P. and another**3 the learned Judge while referring the matter to this Full Bench expressed certain reservations with respect to the answers rendered in **Vinod Kumar** while dealing with the question of what would constitute *"special circumstances"* enabling an applicant to approach the High Court directly by way of a petition under Section 438 of the Criminal Procedure Code. The doubt itself was expressed in respect of contingencies "A' and "B' as set forth in **Vinod Kumar** while answering Question 'D'. In **Vinod Kumar**, the learned Judge while dealing with Question 'D' held thus: -

"Harendra Singh leaves a window open with the learned Judge observing that requiring the party to invoke the jurisdiction conferred on a Court of Sessions must be recognized as the normal course and the High Court entitled to be moved only in extraordinary circumstances and special reasons. The learned Judge further went on to observe in the ultimate conclusion drawn that for "extraneous" (sic) or special reasons the High Court could also exercise the powers conferred by Section 438 Cr.P.C. notwithstanding the Court of Sessions having not been moved. What appears upon a holistic reading of that decision is the intent of the learned Judge to convey the duty of the applicant approaching the High Court to establish the existence of exceptional and special circumstances. The only clarification which, therefore, would merit being entered is with regard to the requirement of proving the existence of extraordinary or exceptional circumstances. The words "exceptional" or "extraordinary" are understood to mean atypical, rare, out of the ordinary, unusual or uncommon. If the jurisdiction of the Court as conferred by Section 438 Cr.P.C. be circumscribed or be recognised to be moved only in exceptional situations it would again amount to fettering and constricting the discretion otherwise conferred by Section 438 Cr.P.C.

Such a construction would perhaps run the risk of being again viewed as being in conflict of the statutory mandate and the discretion conferred. In the considered view of the Court what the learned Judge did seek to convey and hold in Harendra Singh was the requirement of establishing the existence of special, weighty, compelling reasons and circumstances justifying the invocation of the jurisdiction of this Court even though a wholesome avenue of redress was available before the Court of Sessions.

Regard must be had to the fact that the Constitution Bench in Sibbia had an occasion to deal with the correctness of the restrictions as formulated by the Full Bench of the Punjab and Haryana High Court on the exercise of power under Section 438 Cr.P.C. Dealing with that aspect the Constitution Bench clearly held that the exercise of discretion as statutorily conferred cannot be confined in a straitjacket. This simply since it would be impossible to either prophesize or foresee the myriad situations in which the jurisdiction of the Court may be invoked. It was for the aforesaid reasons that the Constitution Bench held that this aspect must be left to the judgment and wisdom of the Court to evaluate and consider whether special circumstances exist or are evidenced by the facts of a particular case. The Court deems it apposite to extract the following paragraphs from the decision rendered by the Constitution Bench: -

"13. This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though sub-section (1) of that section says that the Court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the Court thepower to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section. The controversy therefore is not whether the Court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute condition which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.

14. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting

anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application, Earl Loreburn, L. C. said in Hyman v. Rose :

"I desire in the first instance to point out that the discretion given by the section is very wide..... Now it seems to me that when the Act is so express to provide a wide discretion,... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law.

.....…

26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to

deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An overgenerous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficient provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not be found therein"

On an overall consideration of the above the Court is of the considered view that **Harendra Singh** when interpreted and understood in the manner indicated above, rightly balances the issues that arise. While it was urged that the aforesaid decision would be per incuriam the views expressed by our Full Bench in **Onkar Nath Agarwal** and the decision of the Constitution Bench in **Sibbia**, this Court finds no merit in that submission since as noted above, even **Onkar Nath Agarwal** had envisaged situations where the High Court may relegate parties to the Court of Sessions and refuse to invoke its jurisdiction. Insofar as **Sibbia** is concerned, it becomes relevant to bear in mind that the Constitution Bench was not dealing with the issue that arises for our consideration directly. The observations with regard to the exercise of discretion as appearing therein were entered in the context of the principles formulated by the Full Bench of the Punjab and Haryana High Court relating to the exercise of power under Section 438 itself. The issue of a self imposed restraint exercised by the High Court in light of the contemporaneous jurisdiction conferred on the Court of Session was not a question directly in issue. The argument of per incuriam is thus liable to be and is consequently rejected.

The legal position which consequently emerges is that notwithstanding the concurrent jurisdiction being conferred on the High Court and the Court of Session for grant of anticipatory bail under Section 438 Cr.P.C., strong, cogent, compelling reasons and special circumstances must necessarily be found to exist in justification of the High Court being approached first and without the avenue as available before the Court of Sessions being exhausted. Whether those factors are established or found to exist in the facts of a particular case must necessarily be left for the Court to consider in each case.

What would constitute "special circumstances" in light of the nature of the power conferred, must also be left to be gathered by the Judge on a due evaluation of the facts and circumstances of a particular case. It would perhaps be imprudent to exhaustively chronicle what would be special circumstances. As noticed

above, it would be impossible to either identify or compendiously propound what would constitute special circumstances. **Sibbia** spoke of the *"imperfect awareness of the needs of new situations"*. It is this constraint which necessitates the Court leaving it to the wisdom of the Judge and the discretion vested in him by statute. Without committing the folly of attempting to exhaustively enunciate what would constitute special circumstances or being understood to have done so, the High Court would be justified in entertaining a petition directly in the following, amongst other, circumstances:-

(A) Where bail, regular or anticipatory, of a coaccused has already been rejected by the Court of Sessions;

(B) Where an accused not residing within the jurisdiction of the concerned Sessions Court faces a threat of arrest;

(C) Where circumstances warrant immediate protection and where relegation to the Sessions Court would not subserve justice;

(D) Where time or situational constraints warrant immediate intervention.

These and other relevant factors would clearly constitute special circumstances entitling a party to directly approach the High Court for grant of anticipatory bail."

6. As is manifest and evident from the above extract, the learned Judge chose, and in our opinion correctly, to observe that it would be imprudent to exhaustively chronicle what would constitute special circumstances. A further caveat was placed with the learned Judge observing that the aforesaid exposition on the question should not be viewed as an attempt to exhaustively enunciate what would constitute special circumstances. The learned Judge thus left it entirely at the discretion of the Judge considering a petition for anticipatory bail to ascertain whether such special circumstances did in fact exist entitling the applicant to approach the High Court directly. In our considered view the answer as framed to Question 'D' in **Vinod Kumar** clearly needs no further explanation or elaboration.

7. There can never be an encyclopedic exposition as to what would constitute special circumstances. The grounds on which a petition for anticipatory bail may be instituted before the High Court can neither be placed in a straightjacket nor can be comprehensively enumerated. Decades ago the Constitution Bench in **Gurbaksh Singh Sibbia Vs. The State of Punjab**4 had cautioned against any attempt to compendiously enumerate the myriad situations in which a petition for anticipatory bail may come to be moved. It had in that backdrop set aside the directions framed by the Full Bench of the Punjab and Haryana High Court seeking to guide the power conferred by Section 438 of the Criminal Procedure Code only in exceptional cases. The Constitution Bench held that where the statutory provision itself did not employ or place any words of limitation on the discretion conferred, it would not only be incorrect but also inappropriate to read into that provision fetters which the Legislature had chosen not to place. It also denounced attempts to subject the discretion statutorily conferred to controls by way of judicial interpretation. In fact **Sibbia** held that the Legislature had wisely left it to the discretion of the Court. The note of prudence was entered bearing in the

mind the impossibility of predicting the infinite and imponderable situations in which petitions for anticipatory bail may come to be presented.

8. More recently, a Constitution Bench in **Sushila Aggarwal Vs. State [NCT of Delhi] and others** 5 was called upon to consider whether protection accorded under Section 438 should be limited for a fixed period and whether the life of such an order should end at the time when the accused is summoned by the Court. While dealing with those questions, the Constitution Bench reiterated the conclusions entered in **Sibbia**, which clearly has come to be regarded as the *locus classicus* on the subject. Delivering his concurring opinion in **Sushila Aggrawal**, Ravindra Bhat J. observed thus: -

84. The accused is not obliged to make out a special case for grant of anticipatory bail; reading an otherwise wide power would fetter the court's discretion. Whenever an application (for relief under Section 438) is moved, discretion has to be always exercised judiciously, and with caution, having regard to the facts of every case. (Para 21,*Sibbia*).

85. While the power of granting anticipatory bail is not ordinary, at the same time, its use is not confined to exceptional cases (Para 22, *Sibbia*).

86. It is not justified to require courts to only grant anticipatory bail in special cases made out by accused, since the power is extraordinary, or that several considerations - spelt out in Section 437-or other considerations, are to be kept in mind. (Para 24-25, *Sibbia*).

87. Overgenerous introduction (or reading into) of constraints on the power to grant anticipatory bail would render it Constitutionally vulnerable. Since fair procedure is part of Article 21, the court should not throw the provision (i.e. Section 438) open to challenge *"by reading words in it which are not to be found therein."* (Para 26).

9. Dealing then with the nature of the foundation that must be laid in an application for anticipatory bail, the learned Judge held: -

"133. Having regard to the above discussion, it is clarified that the court should keep the following points as guiding principles, in dealing with applications under Section 438, Cr. PC:

(a) As held in *Sibbia*, when a person apprehends arrest and approaches a court for anticipatory bail, his apprehension (of arrest), has to be based on concrete facts (and not vague or general allegations) relatable a specific offence or particular of offences. Applications for anticipatory bail should contain clear and essential facts relating to the offence, and why the applicant reasonably apprehends his or her arrest, as well as his version of the facts. These are important for the court which considering the application, to extent and reasonableness of the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not a necessary condition that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest."

10. While framing **"FINAL CONCLUSIONS"** and on the aspect noted above, the Constitution Bench observed: -

"140. This court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438, Cr. PC:

(1) Consistent with the judgment in *Shri Gurbaksh Singh Sibbia v. State of Punjab*, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest."

11. We have noted these conclusions recorded by the Constitution Bench in **Sushila Aggarwal** for they shall be of some import for reasons, which follow.

12. Reverting however to the principal issue, we are of the considered view that **Vinod Kumar** rightly desisted from either postulating or particularizing the various circumstances in which an individual may be recognized as entitled to move the High Court directly and left it to the judicious discretion of the Court to be exercised bearing in mind the facts and exigencies of each particular case. The words of caution and circumspection as entered in **Sibbia** and **Sushila Agarwal** in the context of the power conferred by Section 438 apply with equal force while understanding the nature and extent of the concurrent jurisdiction of the High Court. Regard must be had to the fact that it is well nigh impossible to predict upon imponderables such as the immanency of the threat, issues of access to justice and redress and the exigencies of a particular situation. It would not only be unwise but injudicious to frame what was dubbed in **Sibbia** to be *"formulae of universal application"*. The Court would be well advised to leave it to a judicious exercise of discretion in the facts of each cause brought before it.

13. It may also be noted that undisputedly the jurisdiction as conferred on the High Court and the Court of Sessions by Section 438 is concurrent. As was held by the earlier Full Bench of the Court in **Onkar Nath Agrawal** that discretion and the power of the High Court to entertain an application directly is one which is liable to be exercised according to the facts and circumstances of the each case. The Full Bench there had observed in paragraph 8 as follows:-

"8. It may, however, be mentioned that inasmuch as Section 438 of the Code of Criminal Procedure, 1973 gives a discretionary power to grant bail, this discretion is to be exercised according to the facts and circumstances of each case. There may be cases in which it may be considered by the High Court to be proper to entertain an application without the applicant having moved the Court of Sessions initially. Similarly there may be cases in which the Court may feel justified in asking the applicant to move the Sessions Court or to refer the matter to that Court. In any case all depends upon the discretion of the Judge hearing the case."

14. As a minor digression from the main issue, it becomes relevant to state that significantly the learned Judge while

making the present Reference and requesting the Chief Justice to constitute a Bench larger than that which had decided **Onkar Nath Agrawal** does not rest this recommendation on any decision or precedent to the contrary. In fact as was noted in **Vinod Kumar** the view so expressed by the Full Bench in **Onkar Nath Agrawal** has not only held the field for decades but has also been followed by the Full Bench of the Himachal Pradesh in **Mohan Lal and others etc. Vs. Prem Chand and others etc**6, by the High Court of Uttarakhand in **Mubarik & another v. State of Uttarakhand & others**7, as well as the Full Bench of the Calcutta High Court in **Diptendu Nayek Vs. State of West Bengal**8. Viewed in that light we are of the considered view that there was neither a conflict between precedents that required resolution nor was there any question which merited an authoritative exposition by a Bench larger than which had decided **Onkar Nath Agarwal**. It would be worthwhile to recollect the following pertinent observations made by a Full Bench of the Court in **Suresh Jaiswal Vs. State of U.P.**9 and another in this context: -

"56.In the instant matter, as expressed above, we could not find any conflict between two decisions which warranted a reference before the Larger Bench.

57. The questions, in the reference order, framed by the Division Bench, assuming conflict of opinion in the election matters, with due respect, are sweeping. On a plain reading of the order of reference, it appears that their Lordships have referred the questions to the Larger Bench with a view to create a precedent assuming that those questions of law of importance may arise in election matters and an authoritative pronouncement of a Larger Bench is needed on the subject

58. The pronouncement by a Full Bench, with due regard to the learned Judges referring the matter, on a hypothetical conflict, would not be a proper judicial exercise."

15. The Reference, in that sense, was clearly not merited. However and since we have heard parties not only on the question of maintainability of the Reference but also on the questions formulated for our consideration, we deem it apposite to render our opinion in order to lend a quietus to the doubts which appear to exist.

16. We, therefore, hold that the conclusions as recorded in **Vinod Kumar** on the meaning to be ascribed to exceptional or special circumstances needs no reconsideration. It must, as was noted there, be left to the concerned Judge to exercise the discretion as vested in him by the statute dependent upon the facts obtaining in a particular case.

17. The second aspect which needs to be emphasized and reiterated is that **Vinod Kumar** itself while articulating some of the situations in which the High Court may be moved directly had underlined the necessity of those assertions being evidenced and substantiated in fact. A bald assertion without requisite particulars was neither suggested as being sufficient to petition the High Court nor does such an assumption flow from that decision. **Vinod Kumar** has explained that an application of grant of anticipatory bail cannot rest on vague and unsubstantiated allegations or lack of material particulars in support of the threat of imminent arrest. The learned Judge has while dealing with this aspect also referred to the pertinent observations

as made by the Supreme Court in **Rashmi Rekha Thatoi Vs. State of Orissa**10. Consequently it must be held that some of the circumstances which have been noted by the learned Judge in **Vinod Kumar** by way of an exemplar of what may constitute special circumstances is not to be read or understood as empty incantations but must necessarily be supported and established from the material on record. The petition must rest on a strong foundation in support of the imminent threat of arrest as alleged. This aspect has also been duly emphasised by the Constitution Bench in **Sushila Agarwal** as is evident from the parts extracted above with it being observed that the application must be based *"...on concrete facts (and not vague or general allegations)..."*

18. Viewed in that backdrop it is manifest that it was open for the learned Judge to assess the facts of each case to form an opinion whether special circumstances existed or not entitling the applicant there to approach the High Court directly. Considered from the aforesaid perspective, it is manifest that Question (i) as framed by the learned Judge is really unwarranted. If the learned Judge was of the opinion that the averments made in support of the existence of special circumstances were *"not appealing"* [as he chooses to describe it] or unconvincing, nothing hindered the Court from holding so.

19. We would consequently answer the Reference by holding that the decision in **Vinod Kumar** does not merit any reconsideration or explanation. As rightly held in that decision, there can be no exhaustive or general exposition of circumstances in which an applicant may be held entitled to approach the High Court directly. The Court would clearly err in attempting to draw a uniform code or dictum that may guide the exercise of discretion vested in the Court under Section 438 of the Criminal Procedure Code. The discretion wisely left unfettered by the Legislature must be recognised as being available to be exercised dependent upon the facts and circumstances of each particular case. The contingencies spelled out in **Vinod Kumar** as illustrative of special circumstances may, where duly established, constitute a ground to petition the High Court directly.

20. The special circumstances the existence of which have been held to be a sine qua non to the entertainment of an application for anticipatory bail directly by the High Court must be left for the consideration of the Hon'ble Judge before whom the petition is placed and a decision thereon taken bearing in mind the facts and circumstances of that particular cause. However special circumstances must necessarily exist and be established as such before the jurisdiction of the High Court is invoked. The application must rest on a strong foundation in respect of both the apprehension of arrest as well as in justification of the concurrent jurisdiction of the High Court being invoked directly. The factors enumerated in Vinod Kumar including (A) and (B) as constituting special circumstances do not merit any review except to observe that the existence of any particular circumstance must be convincingly established and not rest on vague allegations.

21. In light of the aforesaid, we answer the Reference as follows: -

Question (i) and (iv) clearly do not merit any elucidation for it is for the

concerned Judge to assess whether special circumstances do exist in a particular case warranting the jurisdiction of the High Court being invoked directly. We answer Questions (ii) and (iii) in the negative and hold that **Vinod Kumar** does not merit any reconsideration or further explanation. It would be for the concerned Judge to form an opinion in the facts of each particular case whether special circumstances do exist and stand duly established.

22. Reference stands answered accordingly. The individual applications may now be placed for disposal before the appropriate Bench for disposal in light of the above.

(2020)03-05ILR A1293
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.05.2020

BEFORE

THE HON'BLE JASPREET SINGH, J.

Bail No. 2738 of 2020

Austin Paul ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
K.K. Sharma, Ajay Kumar Shukla

Counsel for the Opposite Party:

A. Criminal Law- The Narcotic Drugs and Psychotropic Substances Act, 1985-Sections 8/21-Code of Criminal Procedure,1973-Section 439 -application-allowed-applicant prayed that he has been falsely implicated by the police officer during lockdown alleging that the applicant possessed 6 grams of smack.(Para 5,18, 25, 26)

At the stage of considering bail application, detailed examination of the merits or demerits of the materials relied upon by the prosecution, should be avoided. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case such as nature and severity of punishment, character, behaviour, reasonable apprehension of tampering with the witnesses.(Para 18,21,22)

The application is allowed. (E-6)

List of Cases Cited:-

Sundeep Kumar Bafna Vs. St. Of Mah. (2014) 16 SCC 623

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

1. In compliance of the order passed by this Court dated 05.05.2020, the learned counsel for the applicant has provided all the necessary documents along with an e-mail and a supplementary affidavit which are taken on record.

2. The Court has heard the learned counsel for the applicant as well as Sri J.S. Tomar, learned A.G.A. for the State-respondent.

3. The submissions of the learned counsel for the applicant is that the applicant has been falsely implicated. The averments made in the First Information Report do not constitute any offence and it is motivated on account of the prevailing circumstances of COVID-19 pandemic. It has been submitted by learned counsel for the applicant that as per the First Information Report version, on 09.04.2020 at around 04:30 PM both the applicant and one Sunny Masih were riding on a motorcycle which was being driven by Austin paul, the applicant.

4. At the Polytechnic crossing, the police party which was headed by Sri Anil Kumar Singh had intecepted the motorcycle and had asked the applicant as why he was moving on the motorcycle during the COVID-19 pandemic lockdown. It was also questioned to the applicant that he had got written the "Civil Court" on the front of his motorcycle. The applicant explained that his father is a working as a Reader in the Civil Court at Lucknow and that the applicant is working as a Nursing Staff in the Medical College on contractual basis and had been issued a duty pass by the Medical College and under these circumstances, the applicant who is exempted from the lockdown is entitled to move.

5. The applicant had also suggested that since the police inspector had got written the word "Police" on his motorcycle, similarly, the applicant's father had also got the word Civil Court written and this rebuke perhaps irked the police officer and under these circumstances the applicant has been implicated and as per the First Information Report, it has been alleged that 6 grams of smack was found in possession of the applicant no. 1 and 5 grams of smack was recovered from Sunny Masih.

6. It is under these circumstances that the First Information Report was lodged and the applicant who brought before the Remand Magistrate. It has been submitted by learned counsel for the applicant that the applicant does not have any criminal history and he has been falsely implicated and under these circumstances the applicant is entitled to be enlarged on bail.

7. The learned A.G.A. had raised an objection and submitted that on the own showing of the applicant, it would indicate that he had made an application for bail before the Remand Magistrate and since the said application remained un-disposed as per their own averments, hence the present bail application is not maintainable.

8. The learned counsel for the applicant while responding to the aforesaid objection and in respect of his submissions has filed a supplementary affidavit which has been taken on record. It has been submitted that since the application for alleged bail was produced before the Remand Magistrate, the same is not going to come in the way of the applicant, inasmuch as, that the application was before the Court which did not possess the jurisdiction, hence it does not make this application before the High Court, as not maintainable.

9. The Court has considered the rival submissions and also perused the material available on record including the supplementary affidavit filed by the learned counsel for the applicant.

10. First and foremost, it would be necessary to ascertain whether the bail application is maintainable in light of the objections raised by the learned A.G.A.

11. The matter of this bail is governed by The Narcotic Drugs and Psychotropic Substances Act, 1985. Section 36 of the Act of 1985 envisages the establishment of Special Courts for trial of offences under the said Act.

12. Section 36 of The Narcotic Drugs and Psychotropic Substances Act, 1985 reads as under:-

13. Section 36 in The Narcotic Drugs and Psychotropic Substances Act, 1985:-

"36. Constitution of Special Courts.

1) The Government may, for the purpose of providing speedy trial of the offences under this Act, by notification in the Official Gazette, constitute as many Special Courts as may be necessary for such area or areas as may be specified in the notification.

(2) A Special Court shall consist of a single Judge who shall be appointed by the Government with the concurrence of the Chief Justice of the High Court.

Explanation. In this sub-section, High Court means the High Court of the State in which the Sessions Judge or the Additional Sessions Judge of a Special Court was working immediately before his appointment as such Judge.

(3) A person shall not be qualified for appointment as a Judge of a Special Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Sessions Judge.]

Section 36 Sub Section (2) of the said Act provides that the Special Court consisting of a single Judge shall be appointed by the Government with the concurrence of the Chief Justice of the High Court and Sub Section 3 clearly indicates a person shall not be qualified for appointment as a Judge of the Special Court, unless he is immediately before such appointment as an Additional Sessions Judge."

14. From the perusal of the aforesaid Section, it is clear that the Special Court envisaged under Section 36 of The Narcotic Drugs and Psychotropic Substances Act, 1985 is to be headed by a Judge whose minimum qualification for appointment ought to be a Sessions Judge or an Additional Sessions Judge. In the aforesaid view of the matter, the application for bail also ought to have been produced before the Special Court headed by the Special Court.

15. From the perusal of the material available on record, it indicates that the application for bail was placed before the Remand Magistrate who needless to say was neither the Sessions Judge nor an Additional Sessions Judge nor was he a Judge of the Special Court as envisaged under Section 36 of the Act of 1985.

16. In view of the aforesaid, the alleged application before the Remand Magistrate was wholly immaterial, inasmuch as, neither the Magistrate was competent to entertain or had the jurisdiction to deal with the said application. Thus, even if at all, any such application was filed before the Remand Magistrate it was filed before a Court having no jurisdiction, therefore, this Court is of the opinion that merely because the said application remained pending or undisposed of before a Court of no jurisdiction is not going to affect the rights of the applicant to approach this Court under Section 439 Cr.P.C.

17. Section 439 Cr.P.C., would indicate that it relates to special powers of the High Court as well as of the Sessions Court in respect of bail which reads as under:-

439.Special powers of High Court or Court of Session regarding

bail.?(1) A High Court or Court of Session may direct?

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

18. At this stage, it will be gainful to refer to certain observations made by the Apex Court in the case of ***Sundeep Kumar Bafna Vs. State of Maharashtra 2014 (16) SCC 623*** which are being reproduced hereinafter for convenient perusal:-

"7. Article 21 *of the Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law. We are immediately reminded of three sentences from the Constitution Bench decision in P.S.R. Sadhanantham v. Arunachalam [P.S.R. Sadhanantham v. Arunachalam, (1980) 3 SCC 141 : 1980 SCC (Cri) 649] , which we appreciate as poetry in prose: (SCC p. 144, para 3)*

"3. Article 21, in its sublime brevity, guardians human liberty by insisting on the prescription of procedure established by law, not fiat as sine qua non for deprivation of personal freedom. And those procedures so established must be fair, not fanciful, nor formal nor flimsy, as laid down in Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] . So, it is axiomatic that our constitutional jurisprudence mandates the State not to deprive a person of his personal liberty without adherence to fair procedure laid down by law."

Therefore, it seems to us that constriction or curtailment of personal liberty cannot be justified by a conjectural dialectic. The only restriction allowed as a general principle of law common to all legal systems is the period of 24 hours post arrest on the expiry of which an accused must mandatorily be produced in a court so that his remand or bail can be judicially considered".

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"As observed in Gurcharan Singh v. State (Delhi Admn.) [Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118 : 1978 SCC (Cri) 41] , there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these courts. The legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Court of Session and High Court are bereft of this

jurisdiction or if they were so empowered under the old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh [Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118 : 1978 SCC (Cri) 41] , as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody".

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"Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher courts have only the procedural requirement of giving notice of the bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of "committal of cases to the Court of Session" because of a possible hiatus created by CrPC."

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"What is to happen to the accused in this interregnum; can his liberty be jeopardised! The only permissible restriction to personal freedom, as a universal legal norm, is the arrest or detention of an accused for a reasonable period of 24 hours. Thereafter, the accused would be entitled to seek before a court his enlargement on bail. In connection with serious offences, Section 167 CrPC contemplates that an accused may be incarcerated, either in police or judicial custody, for a maximum of 90 days if the charge-sheet has not been filed. An accused can and very often does remain bereft of his personal liberty for as long as three months and the law must enable him to seek enlargement on bail in this period. Since severe restrictions have been placed on the powers of a Magistrate to grant bail, in the case of an offence punishable by death or for imprisonment for life, an accused should be in a position to move the courts meaningfully empowered to grant him succour. It is inevitable that the personal freedom of an individual would be curtailed even before he can invoke the appellate jurisdiction of the Sessions Judge. The Constitution therefore requires that a pragmatic, positive and facilitative

interpretation be given to CrPC especially with regard to the exercise of its original jurisdiction by the Sessions Court. We are unable to locate any provision in CrPC which prohibits an accused from moving the Court of Session for such a relief except, theoretically, Section 193 which also only prohibits it from taking cognizance of an offence as a court of original jurisdiction. This embargo does not prohibit the Court of Session from adjudicating upon a plea for bail. It appears to us that till the committal of case to the Court of Session, Section 439 can be invoked for the purpose of pleading for bail. If administrative difficulties are encountered, such as, where there are several Additional Sessions Judges, they can be overcome by enabling the accused to move the Sessions Judge, or by further empowering the Additional Sessions Judge hearing other bail applications whether post-committal or as the appellate court, to also entertain bail applications at the pre-committal stage. Since the Magistrate is completely barred from granting bail to a person accused even of an offence punishable by death or imprisonment for life, a superior court such as Court of Session, should not be incapacitated from considering a bail application especially keeping in perspective that its powers are comparatively unfettered under Section 439 CrPC."

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"There are no restrictions on the High Court to entertain an application for bail provided always the accused is in custody, and this position obtains as soon as the accused actually surrenders himself to the Court."

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"The Sessions Court as well as the High Court, both of which exercise concurrent powers under Section 439, would then have to venture to the merits of the matter so as to decide whether the applicant-appellant had shown sufficient reason or grounds for being enlarged on bail."

19. Thus, from the proposition as noticed above, it is clear that both the High Court and the Sessions Court exercise concurrent powers under Section 439 Cr.P.C.. In the present case it is not disputed that the applicant is in custody as envisaged and explained in the case of Sundeep Kumar Bafna (Supra) hence there is no impediment for this Court to consider the bail application and the bail application filed before the Remand Magistrate was before a Court having no jurisdiction to entertain it, thus it will not create an embargo on this Court to entertain and consider the bail application on its merits and in any case an application filed before the Remand Magistrate is liable to be ignored and it has been rendered otiose.

20. In the aforesaid circumstances, this Court is of the opinion that this Court can consider the bail application despite an application having been moved before a Court lacking jurisdiction. In view of the aforesaid, the objection raised by the learned A.G.A. is over ruled.

21. The Court has considered the bail application on its own merits which has been opposed by the learned A.G.A., however, looking into the facts and circumstances, the material available on record as well as the fact that the accusation against the applicants are yet to be tested in trial and only if the evidence and material produced before the Court is proved beyond reasonable doubt, can the applicant be convicted.

22. In the aforesaid facts and circumstances and taking a holistic view, this Court without expressing any opinion on the merits of the case is of the view that the applicant is entitled to be released on bail.

23. The Registry of this Court has reported certain defects and in this regard the High Court has laid down a guideline vide circular dated 14.04.2020. The relevant portion thereof is being reproduced hereinafter:-

"2. However, during the lock down period, the requirement of an affidavit/e-affidavit/scanned Notary Affidavit shall not be mandatory in the case of BAIL APPLICATIONS and ANTICIPATORY BAIL APPLICATIONS. In lieu thereof, Counsel shall have to submit, in the e-filed petitions, the Adhar Card Number, full details of the card holder like name, parentage, age and address, as also the mobile number linked to the adhar card, of the person wanting to act as the deponent in the matter along with a declaration of that applicant/petitioner/pairokar affirming the correctness of the disclosures and averments made in the application/petition. In case of civil matters, a prayer for dispensing with the requirement of filing an affidavit may be made along with the urgency application which shall also be considered simultaneous with the issue of urgency.

3. This waiver or relaxation is subject to a proper affidavit being filed, in hard copy, within a period of 15 days from the date the lock down is lifted. No further time shall be granted for the purpose. In case a proper affidavit is not filed as specified above, the said case shall stand dismissed automatically and any order passed therein, shall stand recalled, without any reference to the Court. A communication, in this regard shall be sent by the Registry to the Court(s) below/authorities concerned, forthwith for consequential action."

24. Hence this order passed by the Court shall be subject to the compliance of the conditions as prescribed in the circular dated 14.04.2020.

25. Let the applicant Austin Paul involved in Case Crime No. 207 of 2020, under Sections 8/21 of The Narcotic Drugs and Psychotropic Substances Act, 1985, Police Station Vibhut Khand, District Lucknow be released on bail on his furnishing a personal bond to the satisfaction of the Jail Authorities where said accused is imprisoned, provided the accused applicant/s shall also undertake to furnish two reliable sureties required by the court concerned, within a period of 6 weeks from the date of his/her actual release.

26. At the time of executing required sureties the following conditions shall be imposed in the interest of justice.

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court, absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(v) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

(vi) The computer generated copy of such order shall be self attested by the counsel or the party concerned.

(vii) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

27. And in case any application be filed before the Remand Magistrate, the same should be ignored and has been rendered ocious.

(2020)03-05ILR A1300
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.05.2020

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Bail No. 2778 of 2020

Siddharth Varadarajan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Applicant:
Amrendra Nath Tripathi, Surangama Sharma

Counsel for the Opposite Party:

A. Criminal law- Code of Criminal Procedure,1973-Section 438 & Indian Penal Code, 1860-Sections 188, 505(2)-application-allowed-FIR lodged by the Police upon the applicant tweet relating to religious sentiment on Covid-19 Cases Spike which was also published by "The Wire" on the large fair planned for Ayodhya by Chief Minister on the occasion of Ram Navami-notice was served upon the applicant's wife directing the applicant to appear in Ayodhya from Delhi in the lockdown-reasonable apprehension of being arrested when another notice was was served and even chargesheet also submitted.

While granting bail, the court has to keep in mind the nature of accusations, evidence, the severity of the punishment,character and circumastances, reasonable possibility of securing the presence fo accused at trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/state and other similar considerations

The application is allowed. (E-6)

List of Cases Cited:-

1. Siddharam Satlingappa Mhetre Vs. St. Of Mah. (2011) 1 SCC 694

2. Gurbaksh Singh Sibbia Vs. St. Of Punj. (1980) 2 SCC 656

3. Ashok Sagar Vs. St.(NCT of Delhi) (2018) SCC Online Del 9548

4. Bhadresh Bipinbhai Sheth Vs. St.of Guj. (2016) 1 SCC 152

5. Sushila Aggarwal Vs. St. (NCT of Delhi) (2020) SCC Online SC 98

6. Savitri Agarwal & Ors. Vs. St. Of Mah. & ors.(2009) 8 SCC 325

7. Deepak Mahajan Vs. ED (1994) SCC (Crl) 785

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Objection filed by the State is taken on record.

2. This bail application has been taken up today through Video Conferencing.

3. The instant application under Section 438 Cr.P.C. has been filed with a prayer for anticipatory bail of the accused-applicant who is involved in FIR No.268 of 2020, under Sections 188 & 505(2) IPC, Police Station Kotwali Nagar, District Ayodhya.

4. Brief facts of the case are that the applicant is editor of online news portal "The Wire". As per the prosecution story, the complainant had lodged the FIR on 01.04.2020 in the aforementioned sections alleging therein that the applicant had made a tweet on website Twitter.com which was allegedly defamatory towards the Chief Minister of Uttar Pradesh. The said FIR was lodged on the report published by "The Wire" on 31.03.2020 titled as "Covid-19 Cases Spike in Nizzamuddin Nehru Stadium in Delhi to Become Quarantine Centre", which was also tweeted by the applicant on 31.03.2020 and 01.04.2020. Relevant portion of the tweet is reproduced hereinbelow:-

"On the day the Tablighi Jamaat event was held. Yogi Adityanath insisted that a large fair planned for Ayodhya on the occasion of Ram Navami from March 25 to April 2 would proceed as usual while Acharya Paramhans said that Lord Ram would protect devotees from the coronavirus'.

One day after Modi announced the "curfew like" national lockdown on March 24, Adityanath violated the official guidelines to take part in a religious ceremony in Ayodhya along with dozens of people."

5. The error in the said report was corrected as soon it became known of the applicant and the incorrect version was deleted. FIR was registered on 01.04.2020. The instant application has been filed seeking anticipatory bail of the applicant as an apprehension of arrest in connection of the said FIR.

6. Shri I.B. Singh, learned Senior Advocate has submitted that the said FIR is nothing but an attempt to muzzle free speech and it is also submitted that the report in the said Magzine and Tweeter handle by the applicant is based on statements of facts which was also covered by various other news publications such as Deccan Herald, The Print, NDTV and Economic Times. The said report has never been denied by the Government of U.P. In such circumstances, the learned Senior Advocate has submitted that the applicant has not committed any offence as alleged in the FIR. The FIR is frivolous, malicious and motivated in nature. Furthermore, one small error in the report wherein the statement was wrongly attributed to the Chief Minister of U.P. was corrected as soon it became known and even before the registration of the FIR. It is submitted that

any factual inaccuracies are not subject to any criminal action in law, even more so the offences with which the applicant has been charged.

7. Learned Senior Advocate has further submitted that the FIR purportedly relates to the said article and tweets in relation thereto, which are matters of record, so there is no possibility of tampering of evidence and there is no requirement of custodial interrogation. Learned Senior Advocate has further submitted that the applicant is a permanent resident and working in Delhi. He has deep roots in Delhi and his immediate family is also resident of Delhi.

8. Learned Senior Advocate has also submitted that only one offence cited is non-bailable and that too carries the maximum imprisonment of three years, in which arrest is deprecated by Courts and the law. It is further submitted that the news portal i.e. "The Wire" and the applicant were being targeted and harassed by Government of U.P. through U.P. Police in connection with the said article even though the small factual inaccuracy therein has been promptly corrected presumably because the said article shows the U.P. Government's handling Covid-19 crisis in critical light.

9. Learned Senior Advocate has submitted that on 10.04.2020 pursuant to FIR No.246 of 2020, some policemen of U.P. came to the applicant's residence and served upon his wife a written notice under Section 41(A) of Cr.P.C. directing the applicant to appear at Police Station Ayodhya at 10 AM on 14.04.2020 knowing fully well that given the current lockdown, where no trains or planes are operating and people are being prosecuted for stepping out of their houses, and further, the border between the NCT of Delhi and the State of Uttar Pradesh is closed for ordinary traffic, it would be impossible for the applicant to comply with the said notice. The applicant gave reply to the said notice through Email dated 13.04.2020 to the relevant officials of Uttar Pradesh police. In his response, the applicant clearly expressed his willingness to cooperate with the respondents in the investigation and highlighted his inability to comply with the direction to appear at P.S. Ayodhya on 14.04.2020 in view of lockdown.

10. It is further submitted that the police has sent a second notice under Section 41(A) of Cr.P.C., on 26.04.2020 relating to FIR No.246 of 2020. The applicant replied to the said second notice on 28.04.2020 providing a response to all questions and requesting the police to provide copy of FIR and relevant underlying documents as required.

11. Learned Senior Advocate has submitted that the applicant has very reasonable apprehension of being arrested in pursuance of registration of FIR No.246 of 2020 in which the applicant has been charged with non-bailable offence. Learned Senior Advocate has further submitted that while exercising its discretion under Section 438 Cr.P.C., a Court may, *inter alia*, take into consideration the nature and gravity of the accusation and the role of the accused. He has relied on a judgment rendered by Hon'ble Supreme Court of India in the case of ***Siddharam Satlingappa Mhetre v. State of Maharashtra - (2011) 1 SCC 694*** to support his argument.

12. Learned Senior Advocate has further submitted that the liberty of an

individual cannot be in the thrall of such frivolous invocation of non-bailable provisions. To strengthen his contention/submission, learned Senior Advocate has relied on Para - 112(x) of *Siddharam Satlingappa's case (supra).*

13. Learned Senior Advocate has submitted that in the instant case filing of an FIR with cognizable and non-bailable offences is only with the sole aim of using the threat of arrest to browbeat the applicant and "The Wire" into deleting the said article which shows the U.P. Government's handling of the Covid-19 crisis in a critical light. He has further submitted that the liberty of an individual is important in the liberty of society as a whole. He has relied on a judgment rendered by the Hon'ble Supreme Court in the case of ***Gurbaksh Singh Sibbia v. State of Punjb - (1980) 2 SCC 656.***

14. Learned Senior Advocate has further submitted that in the case of ***Ashok Sagar v. State (NCT of Delhi) - 2018 SCC Online Del 9548***, the Hon'ble Supreme Court has held that imprisonment of an accused during the course of investigation and trial is not meant to be punitive and the requirement of arrest at this stage is only to secure the cooperation of the accused and to prevent any potential prejudice being caused to the investigation if it is shown that such prejudice is likely to be caused. If no such apprehension exists, there can be no reasonable ground to arrest the accused, as incarceration would then assume a punitive avatar.

15. In the instant case, the FIR purportedly relates to an online news report and a tweet in relation thereto, which are matters of record, so there is no possibility of tampering of evidence and no requirement of custodial interrogation. Moreover, there is no chance of the applicant fleeing, as he is permanent resident and working in Delhi. The applicant has deep roots in Delhi.

16. Learned Senior Advocate has lastly submitted that the investigation has already been completed and after the investigation, the police has filed charge-sheet. The Court below has taken cognizance on the charge-sheet filed by the investigating officer, but inspite of filing the charge-sheet and the cognizance being taken, the present applicant has a strong apprehension of arrest by the investigating agency.

17. During the argument, learned counsel has referred a judgment of the Hon'ble Supreme Court in the case of ***Bhadresh Bipinbhai Sheth v. State of Gujarat - (2016) 1 SCC 152*** and submitted that the Hon'ble Supreme Court has held that there is no requirement that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail and a person seeking anticipatory bail is a free person entitled to presumption of innocence.

18. It is also submitted that a Constitution Bench of Hon'ble Supreme Court in the case of ***Sushila Aggarwal v. State (NCT of Delhi) - 2020 SCC Online SC 98***, has held that while holding that protection under Section 438 of Cr.P.C., should ordinarily be without any restriction as to time and that it should continue till the end of trial, reiterated the importance of the protection of individual liberty against arbitrary, frivolous and malicious arrests by recalling that it is such arrests which lead to the enactment of the protection under Section 438 of Cr.P.C.

19. Learned Senior Advocate has further submitted that, therefore, filing the charge-sheet by the police as well as the cognizance being taken by the Court does not bar for grant of anticipatory bail to the accused-applicant in the instant case.

20. *Per contra*, Shri V.K. Shahi, learned Additional Advocate General and Shri Jayant Singh Tomar, learned Additional Government Advocate have vehemently opposed the submissions made by learned Senior Advocate appearing for the accused-applicant and submitted that no case is made for granting the relief as sought for in the instant application under Section 438 of Cr.P.C. He has submitted that the said article and the tweet were nothing but to create a confusion amongst the public at large in order to disturb the communal harmony by tweeting else on the day Tabligi Jamat event was held by Muslim Community and various statements linked with Chief Minister were purposely made with intention to create disharmony amongst the two communities. It is submitted that because of this article and tweet, there were several unfortunate communal incidents which destroyed the public peace, and cases were registered upon which actions were taken immediately by the vigilant activities and activeness of the district police.

21. It has further been vehemently submitted on behalf of the State that if the police had not taken appropriate prompt measures, the communal harmony would have been disturbed not only in the city but even would have widely spread outside the state.

22. Learned Additional Advocate General has submitted that investigation of the case has been conducted and during the course of investigation notices under Section 41(A) of Cr.P.C. have been served upon the accused/applicant upon which he has given reply through Email and the same has been included in the case diary as well. After completion of the investigation, a charge-sheet against the accused/applicant has been filed in the Court concerned on 08.05.2020. Learned Chief Judicial Magistrate, Faizabad, District Ayodhya has taken cognizance on the said charge-sheet and after *prima-facie* satisfaction, summon has been issued against the accused-applicant and the next date is fixed as 08.06.2020.

23. Learned Additional Advocate General has taken a serious objection that there is every likelihood that the accused-applicant will abscond and intimidate the witnesses and he may evade trial too. The accused-applicant is holding passport of U.S.A., and is an American citizen, and is residing in India since 1995. Therefore, the applicant can flee away from the country.

24. Learned Additional Advocate General has submitted that since the police has already completed the investigation and charge-sheet has been filed and the Court concerned has already taken congnizance, under law, there is no apprehension of arrest to the applicant-accused by the investigating agency.

25. Learned Additional Advocate General has submitted that in view of the facts and circumstances, the accused-applicant is not entitled for any relief by this Court. The anticipatory bail application of the applicant is devoid of merits and is based on misconceived facts and liable to be rejected.

26. I have heard Shri I.B. Singh, learned Senior Advocate assisted by Ms. Surangama Sharma, learned counsel appearing for the applicant; Shri V.K.

Shahi, learned Additional Advocate General and Shri Jayant Singh Tomar, learned Additional Government Advocate appearing for respondent-State.

27. The concept of anticipatory bail was introduced in Cr.P.C. by 1973 amendment. The said provision can be invoked by a person who has a "reasonable apprehension" that he may be arrested for committing a non-bailable offence. The main purpose for incorporating Section 438 in Cr.P.C. was that the liberty of an individual should not be unnecessarily jeopardised. Right to life and personal liberty are one of the important fundamental rights guaranteed by the constitution and therefore, no person should be confined or detained in any manner unless he has been held guilty. The provision of 438 Cr.P.C., (U.P. Amendment) is reproduced hereinbelow:-

"438. (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

(i) the nature and gravity of the accusation;

(i) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iil) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, consider it expedient to issue an interim order to grant anticipatory bail under sub section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:-

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

Explanation:- The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application.

(6) Provisions of this section shall not be applicable -

(a) to the offences arising out of -

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

28. From the collection and scheme of Chapter XXXIII and Section 438 Cr.P.C., it becomes explicitly clear that the legislature intended to bring anticipatory bail within the category of bail and not to treat it as something different from bail.

29. Therefore, I can straightway trace out the meaning of the word "bail' as found in the various judgments of the Hon'ble Supreme Court and the Law Dictionaries.

30. The 'bail' means as per Wharton's Law Lexicon, to "set at liberty a person arrested on security being taken for his appearance'.

31. As per the Encyclopaedia Britanhica, the bail is a procedure by which a Judge: or Magistrate sets at liberty one who has been arrested, upon receipt of security to ensure the release prisoner's latter appearance in Court for further proceedings.

32. In Nagendra v. King Emperor AIR 1924 Cal 476, it is held that the object of the bail is to secure the attendance of the accused at the time of the trial and that the proper test to be applied for the solution of the question whether bail should be granted or not is whether it is probable that the party will appear to take his trial.

33. Thus, it is clear that the object of the bail is to secure the attendance of the accused at the trial. The accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself in, the trial than if he is in custody. In other words, as the Apex court holds, a presumed innocent person must have his freedom in the form of bail to enable him to establish his innocence at the trial.

34. In ***Savitri Agarwal and Ors. vs. State of Maharashtra & Ors. - (2009) 8***

SCC 325, the Hon'ble Supreme Court has held that while exercising the power under sub-section 1 of Section 438 Cr.P.C., the Court must be satisfied that the applicant invoking the provision has reasons to believe that he is likely to be arrested for committing non-bailable offence and such believe must be founded for reasonable grounds.

35. Section 438 Cr.P.C. contemplates an application to be made by person apprehending arrest of an accusation of having committed a non-bailable offence. It is indicative of the fact that the application for anticipatory bail is pivoted on an apprehension of arrest which invites exercise of power under Section 438 of Cr.P.C. The expression "reason to believe" or reasonable apprehension of arrest, a term substitute for each other is the governing factor to let off a person on anticipatory bail where submission of charge-sheet, is an idle parade. It is settled law now that the submission of the charge-sheet is not a lock gate for the applicant to be enlarged on anticipatory bail but it ensures generation of apprehension of arrest. "Reason to believe" or apprehension of arrest for having committed a non-bailable offence does not grant any licence to any wrong-doer to be enlarged on anticipatory bail.

36. According to the rule of construction, the expression "reason to believe" should be construed with the aim, object and scheme of Section 438 Cr.P.C. The inflammatory allegations having their pedestal on falsity, malafide, and motive afford considerable grounds to be enlarged on anticipatory bail as the object of it is to protect an individual from humiliation and harassment. Thus, the expression "reason to believe" must be the belief of reasonable mind where the petitioner or the individual is immune. The "reason to belief" never contemplates nor it accords any licence to any individual to commit the offence and to seek protection within the realm of Section 438. The expression "reasonable belief" fosters a belief of genuine belief apprehension of arrest of an allegation which *prima facie* is insubstantial and made with a sinister motive, the object being to malign a person where his arrest by prosecuting agency is immediate than remote. But when a non-bailable offence has been committed by an accused, such "reason to believe" or apprehension of arrest can never be equated with the genuine belief of apprehension of arrest proceeding from *prima facie* substantial material entitling him to pre-arrest bail. The section can never be used by any individual to cultivate his rights when he is *prima facie* liable for an accusation and does not commensurate with his innonce. Reasonable belief is not colourable belief.

37. Section 438(1) Cr.P.C. provides that when any person has reason to believe that he may be arrested, he may approach the High Court or Sessions Court. It does not refer to a particular time or stage to have such an apprehension of arrest. However, the words and the language under Section 438(1) and (3) are so clear, so as to lead to the conclusion that whenever any person apprehends that he may be arrested for a non-bailable offence, he may seek for anticipatory bail, irrespective of the stages.

38. Therefore, the apprehension that he may be arrested on an accusation of a non-bailable offence has alone to be given due consideration and weight, irrespective of the state of the case.

39. When apprehension of arrest arises? The apprehension of arrest for a non-bailable offence, one can have at different stages, namely :-

(a) during the period of investigation by the police after registration of F.I.R. and before filing of the final report under Section 173 Cr.P.C.;

(b) during further investigation under Section 173(8), Cr.P.C. even after filing of the charge sheet under Section 173 Cr.P.C.;

(c) after taking cognizance by the Magistrate, summoning the accused under Section 204 Cr.P.C. through warrant;

(d) while the Magistrate committing the Sessions case to the Court of Session under Section 209 Cr.P.C. and remanding the accused to custody;

(e) during the enquiry or trial, if the Court, on the basis of the evidence let in, impleads a person as an accused under Section 319 Cr.P.C. for the purpose of summoning and detaining him under Section 319 (2) and (3) Cr.P.C.

40 The above five contingencies involve different stages. Once the person accused of is released on anticipatory bail or on bail at one stage, the operation of the bail continues till the conclusion of trial.

41. The grounds on which apprehension of arrest is based must be capable of being examined by the Court objectively. Then alone the Court can determine whether the applicant has reason to believe that he would be arrested. Therefore, Section 438 Cr.P.C. cannot be invoked, unless there is some material on the basis of which the Court can come to the conclusion that the apprehension of the petitioner for the arrest is genuine.

42. In the case of Gurbaksh Singh Sibbia (supra), the Hon'ble Supreme Court went to the extent of observing that in some circumstances even without registration of the F.I.R., the Court can grant the relief of anticipatory bail, if the reasonable belief of the apprehension is established before the Court by giving the details of the events and facts.

43. This would show that even during the investigation, there are two stages at which there may be apprehension of arrest. One is, before the F.I.R. and another is subsequent to the F.I.R. But, in the light of the observation of the Supreme Court, it can be concluded that if the applicant entertains the apprehension of arrest at the hands of the police at the petition enquiry before registering F.I.R., the High Court or the Court of Session could invoke Section 438 Cr.P.C., provided the imminence of a likely arrest is shown to exist to the Court. Since registration of F.I.R. itself would be a strong material to show that he has got reason to believe that he may be arrested by the police.

44. The second stage is during the course of further investigation under Section 173(8) Cr.P.C. If a person is not arrested in the first investigation and in the event of taking up for further investigation by the police either on the direction of the superior officer or on the direction of the Court or on the basis of fresh materials, which have come to light, the person against whom the materials have been collected in the further investigation could

approach for anticipatory bail, since apprehension of arrest could be shown to the Court exists.

45. The next stage for apprehension of arrest is at the time of taking cognizance by the Magistrate on entertaining the police report or the complaint and issuing warrant of arrest.

46. Under Chapter XVI, the proceedings before the Magistrate commences. Under Section 204 Cr.P.C., the Magistrate after taking cognizance of an offence, can issue summons for the attendance of the accused. In a warrant case, he may issue warrant directing the police to arrest the accused to produce before him at a certain time. Though the Magistrate invariably issues summons even in a warrant case under Section 204, Cr.P.C. after taking cognizance, in a police case, when the police intimated to the Court that the accused person was not arrested, since he was absconding, the Magistrate issues warrant directing the police to apprehend the absconding accused. .

47. In fact, only when the charge sheet is filed and the cognizance is taken by the Magistrate and the process is issued, the apprehension of arrest will become more stronger. At least, during the course of investigation it could be said that the apprehension of arrest is not reasonable, since under Section 41(A) Cr.P.C. the arrest is not mandatory. The reading of Section 41 Cr.P.C. would make clear that the arrest need not be resorted to in all cases automatically. The police has got a large discretion to arrest or not to arrest a person.

48. Therefore, it can be said that during the investigation, when the police officer has decided not to arrest, there is no apprehension of arrest. But, after filing of the charge sheet and that too once the warrant/summon is issued to appear the accused, then there would certainly be an apprehension of arrest.

49. In the case of ***Directorate of Enforcement v. Deepak Mahajan -1994 SCC (Crl) 785***, the Hon'ble Supreme Court has held as follows:-

"Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is entitled to take that accused persons into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender……

In the backdrop of the above legal position, the conclusion that can be derived is that a Magistrate can himself arrest or order any person to arrest any offender if that offender has committed an offence in his presence and within his local jurisdiction or on his appearance or surrender or is produced before him and take that person (offender), into his custody subject to the bail provisions."

50. Therefore, this would make it clear that a person can apprehend arrest at the hands of the Magistrate for the purpose of remanding him to custody, while

committing the sessions case to the Court of Session for trial with an accusation of non-bailable offence and this would certainly make that person to be entitled for approaching the Court under Section 438 Cr.P.C..

51. In view of the above principle as laid down in several judgments of the Hon'ble Supreme Court, I have to test the instant case on the aforesaid principle.

52. The applicant tweeted an article on the website Twitter.com on 31.03.2020 (supra) and the same was also published in the news portal "The Wire" titled as "Covid-19 Cases Spike in Nizzamuddin Nehru Stadium in Delhi to Become Quarantine Centre". Thereafter, the present applicant realised his mistake in the tweet dated 31.06.2020 and the same was corrected later on and a clarificatory tweet was also tweeted on the website Twitter.com on 01.04.2020 prior to lodging of the FIR in the instant case. It is contended in the affidavit accompanying the bail application that *"on 10.04.2020, pursuant to FIR No.246 of 2020, some policemen of U.P. came to the applicant's residence and served upon his wife a written notice under Section 41(A) of Cr.P.C. directing the applicant to appear at Police Station Ayodhya at 10 AM on 14.04.2020 knowing fully well that given the current lockdown....."*. It is also contended in Para - 38 of the affidavit accompanying the bail application that the applicant has expressed his willingness to cooperate with the investigating agency in the investigation via Email dated 13.04.2020 to the relevant police officer, however also shown his inability to comply with the direction to appear at Police Station Ayodhya on 14.04.2020 in view of lockdown due to Covid-19.

53. The applicant has stated on the affidavit that there are very reasonable and sufficient apprehension of being arrested for non-bailable offence. In Para-45 of the affidavit accompanying accompanying the bail application, it has been contended that the apprehension of the applicant is further fortified by the conduct of Uttar Pradesh Police, which has already sent two notices under Section 41(A) of Cr.P.C. in relation to FIR No.246 of 2020.

54. Learned Senior Advocate appearing for the accused-applicant has submitted that the applicant is willing to cooperate with the investigation as well as the entire proceeding of the trial in the instant case. It is also submitted that there is no possibility of fleeing away as he has deep route in the society, is a permanent resident of Delhi and is a reputed journalist. It is also submitted that the applicant undertakes that he shall not misuse any condition imposed by this Court while granting bail.

55. Learned Additional Advocate General has taken objection that the applicant is having an American passport and therefore, there is a chance of him fleeing away from India. It has further been submitted that since the charge-sheet has been filed by the police after completion of investigation and the cognizance has been taken on the said charge-sheet by the concerned Court, therefore, there is no reasonable apprehension of arrest of the applicant in the instant case by the police.

56. I do not find any merit in the argument advanced by learned Additional Advocate General, as the law discussed above in several judgments clarify the situation.

57. In view of the observations made, the instant anticipatory bail application under Section 438 Cr.P.C. is ***allowed.***

58. It is directed that, in the event of his arrest in connection with FIR No.268 of

2020, under Sections 188 & 505(2) IPC, Police Station Kotwali Nagar, District Ayodhya, the applicant **Siddharth Varadarajan**, be released on bail on his executing a personal bond to the tune of Rs.2,00,000/- (Rupees Two Lakh) with two sureties each in the like amount to the satisfaction of the learned trial Court concerned.

59. The applicant shall abide by the following conditions:

1. The applicant shall not leave India during the currency of trial without prior permission from the concerned trial Court.

2. The applicant shall surrender his passport to the concerned trial Court or before this Court forthwith. His passport will remain in custody of the concerned trial Court/with the registry of this Court.

3. The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence and the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law to ensure presence of the applicant.

4. In case, the applicant misuses the liberty of bail, the trial Court concerned may take appropriate action in accordance with law.

5. The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

6. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

7. The computer generated copy of such order shall be self attested by the counsel or the party concerned.

8. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

60. It is clarified that all the observations contained in this order are only for disposal of this anticipatory bail application and shall not affect the trial proceedings in any manner.

(2020)03-05ILR A1311
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Crl. Misc. Ist Bail Application No. 3515 of 2020

Shailendra Kumar Gupta @ Shailu
...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Rajiv Lochan Shukla, Sri Pramod Kumar Dwivedi

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

A. Criminal law- The Narcotic Drugs and Psychotropic Substance Act,1985-Sections 8/21-Code of Criminal Procedure,1973-Section 439 -application-rejection-recovery of 1 kg. 17 gram of charas from the possession of applicant which is above commercial quantity-applicant prayed he has been falsely implicated due to enmity as a civil suit is pending between the parties- a case of public gambling also got

registered against the applicant-lower court didnot consider the applicant bail due to applicant's past antecedents.
(Para 3 to 26)

Perusal of the FIR and statements recorded of the informant and other policemen, site plan of the place of occurrence reveals that an amount of 1 kilogram 17 gram charas was recovered form the applicant in his right hand in broad daylight at 4 pm in crowded area.(Para 20)

The application is rejected. (E-6)

List of Cases Cited:-

1. St. Of Ker. Vs. Rajesh ,Crl. Appeal no. 154-157 of 2020

2. Sujit Tiwari Vs. St. Of Guj. & anr., Crl. Appeal No. 1897 of 2019

3. Sanjay Chandra Vs. CBI (2012) 1 SCC 40

4. Shiv Shanker Kesari Vs. UOI (2007) 7 SCC 798

5. St. Of M.P. Vs. Kajad (2001) 7 SCC 673

6. Ram Samujh & anr. Vs. UOI (1999) 9 SCC 429

7. Thamisharasi Vs. UOI (1995) 4 SCC 190

8. Dataram Singh Vs. St. Of U.P. & Anr. (2018) 3 SCC 22

9. Arif Khan @ Agha Khan Vs. St. Of UK AIR (2018) SC 2123

10. Narcotics Control Bureau Vs. Kishan Lal (1991) 1 SCC 705

11. Dr. Bipin Shantilal Panchal Vs. St. Of Guj. (1996) 1 SCC 718

12. Manoj Vs. St. Of M.P. (1999) 3 SCC 715

13. Babua Vs. St. Of Oris. (2001) 2 SCC 566

14. Rattan Mallik Vs. UOI (2009) 2 SCC 624

15. Baldev Singh Vs. St. Of Punj.(1999) 6 SCC 172

16. VijaySingh Chandubha Jadeja Vs. St. Of Guj. (2011) 1 SCC 609

17. Harjit Singh Vs. St. Of Punj.(2011) 4 SCC 441

18. E. Micheal Raj (2008) 5 SCC 161

19. Satpal Singh Vs. St. Of Punj.(2018) 104 ACC 307

(Delivered by Hon'ble Jayant Banerji, J.)

1. This application has been filed to release the applicant on bail in case crime no. 574 of 2019, under Section 8/21 of the Narcotic Drugs and Psychotropic Substance Act, 19851, P.S. Shahpur, District Gorakhpur. An amount of 1 Kg 17 gm of charas is alleged to have been recovered from the possession of the applicant which is above the commercial quantity.

2. Notice of the present bail application was served on the Government Advocate on 8.1.2020. However, no counter affidavit has been filed.

3. When the matter was being heard on 4.2.2020, learned Additional Government Advocate (AGA) placed before the court a recent judgement of the Supreme Court dated 24.01.2020 passed in **Criminal Appeal No. 154-157 of 2020 (State of Kerala Vs. Rajesh)**2 to contend that in view of the provisions of Section 37(1)(b)(ii) of the NDPS Act, since the offence involves recovery of the narcotic drug in excess of the commercial quantity, the Court is required to record its satisfaction that there are reasonable grounds for believing that the applicant is not guilty of such offence and that the applicant is not likely to commit any offence while on bail.

4. Apart from the learned counsel for the parties, the Court also requested Shri Imran Ullah and Dr. Arun Srivastava, learned counsel to assist the Court as amicus curie on the legal issues involved in the matter. On the date fixed, the case was heard at length.

5. Learned counsel for the applicant, Shri Rajeev Lochan Shukla, has relied upon a judgement of the Supreme Court in the case of **Sujit Tiwari Vs. State of Gujarat and Another** in Criminal Appeal No. 1897 of 2019, whereby the bail application filed by one of the accused who was charged under the NDPS Act in respect of the recovery of 1445 Kg of heroin was allowed after imposing stringent conditions. It is contended that by the learned counsel that the Apex Court took note of the prosecution case at the highest and observed that the appellant was aware that his brother was indulging in some illegal activity because obviously such huge amount of money of Rs. 50 crores cannot be made otherwise. It is stated by Shri Shukla that in that case before the Supreme Court the provisions of Section 37 of the N.D.P.S. Act were specifically considered. While referring the judgement of the Supreme Court in **State of Kerala**, Shri Shukla has contended that the Apex Court has dealt with the expression "reasonable grounds" appearing in Section 37 of the Act as meaning something more than prima facie grounds. He contends that the expression "reasonable grounds" contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. It is contended that "reasonable grounds" appearing in Section 37 of the Act would not entail a finding to be recorded by the Court regarding its satisfaction beyond reasonable doubt but to an extent more than prima facie. It is contended that the Court while exercising its jurisdiction for grant of bail or otherwise has to take into account the overall facts of the case and the compliance of the mandatory provisions of the N.D.P.S. Act before coming to a finding. The contention is that this Court may, accordingly, grant bail in view of the facts of the present case.

6. Shri Imran Ullah, learned counsel (amicus curie) while referring to paragraph nos. 7 and 22 of the judgement of the Apex Court in the case of **State of Kerala** has contended that the Court is required to record a finding mandated under Section 37 of the N.D.P.S. Act which is a *sine qua non* for grant of bail to the accused under the N.D.P.S. Act. With regard to bail, learned counsel has referred to the judgements of the Apex Court in the matters of **Sanjay Chandra Vs. Central Bureau of Investigation**3**, Union of India Vs. Shiv Shanker Kesari**4**, State of M.P. Vs. Kajad**5**, Union of India Vs. Ram Samujh and another**6**, Union of India Vs. Thamisharasi**7 and **Dataram Singh Vs. State of Uttar Pradesh and another**8 . It is contended by the learned counsel that refusal of bail is the rule and its grant an exception in view of Section 37(1)(b)(ii). Liberal approach in the matter of bail under the NDPS Act is uncalled for. He contends that Section 37 of the NDPS Act starts with a non-obstante clause and therefore, the provisions of Section 437/439 of the Code of Criminal Procedure would not be applicable with regard to a person accused of an offence punishable under Section 19 or Section 24 or Section 27A and also for offences involving commercial quantity of contraband. The words "reasonable grounds" also appear in clause (i) of Section 437 of Cr.P.C. but the authority given to a High Court or a Court of Session under clause (a) of Section 439 permitting

release on bail of any person accused of an offence would be curtailed in view of the stringent provision of Section 37(1)(b)(ii) of the NDPS Act. The limitations prescribed under the NDPS Act on granting of bail are in addition to the limitations under Cr.P.C. or any other law for the time being in force. It is further contended that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of not guilty. With reference to the phrase "reasonable grounds for believing", the learned counsel has referred to paragraph no. 37 of the judgement of the Supreme Court in the case of **Sanjay Chandra** (supra) to contend that the legislature has used the the words 'reasonable grounds for believing' instead of 'the evidence' which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge.

7. Dr. Arun Srivastava, learned counsel has referred to the judgement of the Supreme Court in the case of **Arif Khan @ Agha Khan Vs. State of Uttarakhand**9. In that case the Supreme Court has held that compliance of the requirements of Section 50 of the NDPS Act are mandatory and therefore the provisions of Section 50 have to be strictly complied with. It is contended that where, in case the applicant is not informed of his right under Section 50 of the NDPS Act, conviction of the accused would be vitiated.

8. Section 37 of the NDPS Act, as substituted by Act 2 of 1989 and as further amended by Act 9 of 2001, is as follows:

"37. **Offences to be cognizable and non-bailable.**- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

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

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

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

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

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

SUMMARY OF THE PRINCIPLES WITH REGARD TO BAIL UNDER THE NDPS ACT WITH REFERENCE TO A PERSON ACCUSED under Section 19 or Section 24 or Section 27A and also for OFFENCES INVOLVING 'COMMERCIAL QUANTITY'

9. It is no longer res nova that in view of Section 37(1)(b) of the NDPS Act, refusal of bail is the rule and its grant an exception and, that too after, inter alia, providing the Public Prosecutor an opportunity to oppose the application for such release. The law with regard to grant of bail in matters under the NDPS Act is

quite well settled. However, some of the principles may be summarized as follows:-

i) **Powers of the High Court to grant bail under section 439 Cr.P.C are subject the limitations contained in Section 37 of the NDPS Act.**

While considering the scope of Section 439 of the Cr. P.C. with respect to Section 37 of the NDPS Act, the Supreme Court, in the case of **Narcotics Control Bureau v. Kishan Lal**10, looked into the provision of S.37 of the NDPS Act as amended in the year 1989 and held:

"For all the aforesaid reasons we hold that the powers of the High Court to grant bail under Section 439 are subject to the limitations contained in the amended Section 37 of the NDPS Act and the restrictions placed on the powers of the court under the said section are applicable to the High Court also in the matter of granting bail".

ii) **The total period of custody under the NDPS Act of the accused permissible during investigation is to be found in Section 167 CrPC read with Section 36A of the NDPS Act.**

In the case of **Union of India Vs. Thamisharasi**7, the Supreme Court held that Section 37 of the NDPS Act does not exclude the application of the proviso to sub-section (2) of Section 167 of the Code, even in respect of persons who are accused of offences under the NDPS Act, and observed as follows:

"13. Accordingly, provision in Section 37 to the extent it is inconsistent with Section 437 of the Code of Criminal Procedure supersedes the corresponding provisions in the Code and imposes limitations on granting of bail in addition to the limitations under the Code of Criminal Procedure as expressly provided in sub-section (2) of Section 37. These limitations on granting of bail specified in sub-section (1) of Section 37 are in addition to the limitations under Section 437 of the Code of Criminal Procedure and were enacted only for this purpose; and they do not have the effect of excluding the applicability of the proviso to sub-section (2) of Section 167 CrPC which operates in a different field relating to the total period of custody of the accused permissible during investigation.

14. In our opinion, in order to exclude the application of the proviso to sub-section (2) of Section 167 CrPC in such cases an express provision indicating the contrary intention was required or at least some provision from which such a conclusion emerged by necessary implication. As shown by us, there is no such provision in the NDPS Act and the scheme of the Act indicates that the total period of custody of the accused permissible during investigation is to be found in Section 167 CrPC which is expressly applied. The absence of any provision inconsistent therewith in this Act is significant."

However, after insertion of S. 36A by the Act 2 of 1989 and its substitution by Act 9 of 2001, sub-section (4) of Section 36A reads as under:

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the

Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

iii) **After the charge-sheet is filed, an accused under the NDPS Act cannot exercise the right to be released on bail on failure of the prosecution to file the charge-sheet within the time prescribed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet.**

In the case of **Dr. Bipin Shantilal Panchal Vs. State of Gujarat**11, the Supreme Court while considering an appeal against rejection of bail of the appellant who was accused of offences under the NDPS Act, observed as follows:

"4. .....Therefore, if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet.....…"

iv) **Detention made as a sequel to the arrest would become unlawful beyond the period of 24 hours without the order of a Magistrate.**

In the case of **Manoj Vs. State of Madhya Pradesh**12 the appellant was arrested in connection with a case involving NDPS Act registered by police in Rajasthan. Later, in another case under the NDPS Act in Madhya Pradesh involved the appellant who was recorded as arrested. Though an order granting bail was passed by the Rajasthan High Court, the appellant did not execute the bond since his arrest in Madhya Pradesh case became a stonewall for his release from custody. His application for bail before the Madhya Pradesh High Court, after the Sessions Judge rejected his bail application, was rejected. After 90 days of his arrest in the Madhya Pradesh case, he moved an application before the Special Judge, Kota (Rajasthan) for bail under the proviso to S. 167 (2) of the Cr. P.C as no charge-sheet was filed in the Madhya Pradesh case. But the Special Judge rejected the application saying that he was never produced before the court after formal arrest and no order as regards the first remand was ever passed and therefore, the question of completion of investigation within a period of 90 days does not arise. The High Court also did not enlarge the applicant on bail. The Supreme Court observed as follows:

"12. If the police officer is forbidden from keeping an arrested person beyond twenty-four hours without order of a Magistrate, what should happen to the arrested person after the said period? It is a constitutional mandate that no person shall be deprived of his liberty except in accordance with the procedure established in law. Close to its heels the Constitution directs that the person arrested and detained in custody shall be produced before the nearest magistrate within 24 hours of such arrest. The only time permitted by Article 22 of of the Constitution to be excluded from the said period of 24 hours is "the time necessary for going from the place of arrest to the court of the Magistrate". Only under two contingencies can the said direction be obviated. One is when the person arrested is an "enemy alien". Second is when the arrest is under any law for

preventive detention. In all other cases the Constitution has prohibited peremptorily that "no such person shall be detained in custody beyond the said period without the authority of a Magistrate".

13. When the State of Madhya Pradesh, whose police made the arrest of the appellant in connection with the M.P. case on 7-8-1998, admitted that after arrest he was not produced before the nearest Magistrate within 24 hours, its inevitable corollary is that detention made as a sequel to the arrest would become unlawful beyond the said period of 24 hours."

v) **Liberal approach in the matter of bail under the NDPS Act is uncalled for.**

Then, in the case of **State of M.P. Vs. Kajad**5, the Supreme Court was considering an appeal against an order of the High Court allowing the second bail application of the respondent who was accused under the NDPS Act (as it stood prior to its amendment in the year 2001). The Supreme Court held:

"5. ..... Negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1). For granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for.

6. .. . . . .

7. In the instant case, the learned Single Judge of the High Court has granted the bail on his own sense of observation regarding the course of conduct adopted by the accused at the time of his interception and arrest. Merely because the accused was found to be continuing to hold bag containing opium during the period, the raiding party searched him in accordance with the provisions of the Act, the learned Judge was not justified to conclude "it is by itself unnatural". How the learned Judge concluded that the conduct of the accused or raiding party were unnatural is not discernible from the impugned order. A person, apprehended by a raiding party, who is sought to be searched is supposed to hold the goods in his possession unless he opts to flee from the place of occurrence or is advised to throw the container in which the offending substance is contained. Section 37 of the Act has been referred to in the impugned order not for the purposes of showing of its compliance but to justify the passing of an apparently wrong order. If, besides referring to Section 37 of the Act, the learned Judge would have referred to its provisions, he would not have fallen a prey to the ulterior designs of the respondent-accused."

vi) **On merits, no person shall be granted bail unless the two conditions are satisfied, that is, the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail.**

The Supreme Court in the case of **Union of India Vs. Shiv Shanker Kesari**4, while considering an appeal against bail which was granted to the respondent by this Court on the ground that the recovery was not from the exclusive possession of the accused-respondent and other members of the family are involved in the case and that the respondent had no criminal history, observed as follows:

"6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that

there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37 (1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

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11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion."

Earlier, in the case of **Babua v. State of Orissa**13, the Apex Court held:

"3. In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In the present case, the petitioner attempted to secure bail on various grounds but failed. But those reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view."

(emphasis by Court)

vii) **Even in a criminal appeal against the order of conviction under the NDPS Act, the mandatory provisions of Section 37 of the Act cannot be ignored while suspending the sentence.**

The Supreme Court in the case of **Union of India v. Rattan Mallik**14 observed as follows:

"10. As already noted, in the present case, the respondent has been convicted and sentenced for the offences under the NDPS Act and therefore, while

dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for the offences under the Penal Code, 1860 the relevant provision in the said special statute in this regard had to be kept in view.

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15. ..... It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to conclude that it was a fit case for grant of bail are: (i) that nothing has been found from the possession of the respondent; (ii) he is in jail for the last three years, and (iii) that there is no chance of his appeal being heard within a period of seven years. In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Penal Code, 1860, etc. but are not sufficient to satisfy the mandatory requirements as stipulated in clause (b) of sub-section (1) of Section 37 of the NDPS Act.

16. Merely because, according to the learned Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned counsel for the respondent that the observation of the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the learned Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge."

viii) **The seriousness of cases under the NDPS Act have to be viewed like this that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable: it causes deleterious effects and deadly impact on the society.**

The Supreme Court in the case of **Union of India Vs. Ram Samujh and another**6 has observed as follows:

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable: it causes deleterious effects and deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. Chief Secy., Union Territory of Goa*. as under: (SCC p. 104, para 24)

"24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and

alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine."

8. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail

are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended."

ix) **Compliance or otherwise of Section 50 of the NDPS Act is a factual issue that can only be considered during trial.**

The Supreme Court in the Constitution Bench judgments in the matters of **State of Punjab v. Baldev Singh**15 and **Vijaysinh Chandubha Jadeja v. State of Gujarat**16 has observed that compliance of Section 50 of the NDPS Act can be looked into during trial. Therefore, this aspect may not be looked into at the stage of grant of bail.

x) **Compliance or otherwise of Section 42 of the NDPS Act is also a factual issue which can be considered during trial.**

A Constitution Bench of the Supreme Court, in the matter of Karnail Singh v. State of Haryana, while looking into the mandate of Section 42 has observed:

"35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

It, therefore, is reflected in this judgement that compliance of Section 42 is a question of fact. Thus, it is to be looked into by the Courts during trial and may not be looked into for consideration of a bail application.

xi) **Whether possession of the drug or substance is below or above the commercial quantity, has to be viewed in light of Note-4 appended to the Notification of the Central Government specifying small quantity and commercial quantity.**

Note 4 was inserted at the foot of the Notification of the Central Government specifying small and commercial quantity by means of S.O. 2941(E) dated 18th November, 2009 which reads as follows:-

"The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

In the case of **Harjit Singh v. State of Punjab**17, while distinguishing the case of **E. Micheal Raj**18, and considering the aforesaid Note 4, the Supreme Court held:

"13. Notification dated 18-11-2009 has replaced the part of the Notification dated 19-10-2001 and reads as under:

"In the Table at the end after Note 3, the following Note shall be inserted, namely:

(4) The quantities shown in Column 5 and Column 6 of the Table

relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

14. Thus, it is evident that under the aforesaid notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18-11-2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned.

...…

21. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 18(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry 92 becomes totally redundant.

22. Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry 93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry 92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity.

23. The judgment in E. Micheal Raj [(2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558] has dealt with heroin i.e. diacetylmorphine which is an "opium derivative" within the meaning of the term as defined in Section 2(xvi) of the NDPS Act and therefore, a "manufactured drug" within the meaning of Section 2(xi)(a) of the NDPS Act. As such the ratio of the said judgment is not relevant to the adjudication of the present case.

.....…

25. The notification applicable herein specifies small and commercial quantities of various narcotic drugs and psychotropic substances for each contraband material. Entry 56 deals with heroin, Entry 77 deals with morphine, Entry 92 deals with opium, Entry 93 deals with opium derivatives and so on and so forth. Therefore, the notification also makes a distinction not only between opium and morphine but also between opium and opium derivatives. Undoubtedly, morphine is one of the derivatives of the opium. Thus, the requirement under the law is first to

identify and classify the recovered substance and then to find out under what entry it is required to be dealt with. If it is opium as defined in clause (a) of Section 2(xv) then the percentage of morphine contents would be totally irrelevant. It is only if the offending substance is found in the form of a mixture as specified in clause (b) of Section 2(xv) of the NDPS Act, that the quantity of morphine contents becomes relevant.

26. Thus, the aforesaid judgment in E. Micheal Raj [(2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558] has no application in the instant case as it does not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances. The material so recovered from the appellant is opium in terms of Section 2(xv) of the NDPS Act. In such a fact situation, determination of the contents of morphine in the opium becomes totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity. The entire substance has to be considered to be opium as the material recovered was not a mixture and the case falls squarely under Entry 92. Undoubtedly, the FSL report provided for potency of the opium giving particulars of morphine contents. It goes without saying that opium would contain some morphine which should not be less than the prescribed quantity, however, the percentage of morphine is not a decisive factor for determination of the quantum of punishment, as the opium is to be dealt with under a distinct and separate entry from that of morphine."

(emphasis by Court)

xii) **Possession of narcotic drugs, controlled substances or psychotropic substances can be either 'physical' or 'constructive'. Courts require circumspection while considering issues of possession in a bail application in view of the presumption to be drawn under Section 54 during trials.**

Under Section 54 of the NDPS Act it is provided as follows:

54. **Presumption from possession of illicit articles.**- In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured,

for the possession of which he fails to account satisfactorily.

Therefore, for purpose of bail, where such grounds are raised, the courts would be circumspect, as this aspect of the matter is a factual dispute which needs to be gone into during trial.

REFERENCES OF OTHER CASES

10. **Dataram Singh Vs. State of Uttar Pradesh and another**8

This case before the Supreme Court was not under the provisions of the

NDPS Act. The Court observed that a humane attitude is required to be adopted by a Judge while dealing with an application for remanding a suspect or accused person to police custody or judicial custody. The Court observed that there are several reasons for this, including maintaining the dignity of the accused person howsoever poor that person might be, the requirements of Article 21 of the Constitution, and the fact that there is enormous overcrowding in prisons leading to social and other problems. However, the Supreme Court, in the opening paragraph of the judgement observed as follows:-

"1. Leave granted. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. "

Thus the Supreme Court, in **Dataram Singh**, has clearly excluded those offences under statutes (like the NDPS Act) which place a reverse onus on an accused.

11. **State of Kerala**

The discretion exercised by the High Court in granting post arrest bail to the accused-respondent without noticing the mandate of Section 37(1)(b)(ii) of the NDPS Act and thereafter rejecting the application filed by the appellant under Section 482 Cr.P.C. for recalling the order of the post arrest bail was considered. The Learned Judge of the High Court without noticing Section 37 of the NDPS and taking notice of the fact that the other accused-persons in Crime No. 14 of 2018 had since been released on bail, granted him post arrest bail. The prosecution case was that the respondents and others were found to be in possession of 1.800 Kg of hashish oil. They were arrested and after investigation a chargesheet was filed. Their post arrest bail application was dismissed by the Sessions Judge whereafter they preferred the bail application before the High Court. The High Court by its order dated 10.5.2019 granted bail to the respondents and others in crime no. 19 of 2018 and observed that both the accused have completed 195 days in judicial custody and their further detention is not necessary as nothing remains to be investigated against them. The Supreme Court observed that Section 37 of the NDPS Act has been referred to by the learned Single Judge in the impugned order not for the purpose of showing its compliance, but to justify due application of mind in taking decision to grant post arrest bail under the order dated 10.5.2019. When a recall application was filed under Section 482 Cr.P.C by the appellant for recalling the order of the post arrest bail, the Single Judge observed that even if it was an erroneous order and it did not involve application of mind, still it was not open for the Court to reconsider the facts invoking Section 482 Cr.P.C. and expressed its view that the remedy of the State lies in assailing the orders of the Court before the superior forum, if so advised, and dismissed the application by the order dated 12.6.2019.

12. Among the contentions advanced on behalf of the respondents before the Supreme Court in **State of Kerala** the following points were raised:

(i) Accused nos. 1 to 4 were granted post arrest bail by the high Court in

Crime No. 14 of 2018 but the prosecution has not taken any steps to challenge the grant of bail to all other accused persons.

(ii) Chargesheet was filed in both the cases, that is, in Crime No. 14/2018 and Crime No. 19/2018 and the matter is fixed for framing of charge. No further investigation is required from the accused respondents and the learned Judge under the impugned judgement has put stringent conditions while granting post arrest bail to the respondents, which was neither been misused nor violated and after affording due opportunity of hearing and noticing Section 37 of the NDPS Act, satisfaction was recorded that the accused-persons deserved post arrest bail.

(iii) The High Court was cognizant of the fact that it could be a case of false implication on account of animosity of the office-colleagues of a person convicted under the Prevention of Corruption Act on the complaint of the respondent.

(iv) There being no prior case against the respondent under the NDPS Act except two aforesaid cases, and the judicial discretion having been exercised, no interference is called for by this Court.

13. The Supreme Court observed that the contraband recovered is more than the commercial quantity and held as follows:

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

22. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a *sine qua non* for granting bail to the accused under the NDPS Act.

23. The submission made by learned counsel for the respondents that in Crime No. 14/2018, the bail has been granted to the other accused persons(A-1 to A-4), and no steps have been taken by the prosecution to challenge the grant of post-arrest bail to the other accused persons, is of no consequence for the reason that the consideration prevailed upon the Court to grant bail to the other accused persons will not absolve the act of the accused

respondent(A-5) from the rigour of Section 37 of the NDPS Act.

24. The further submission of the learned counsel for the respondents that they have been falsely implicated in Crime No. 19/2018 for the reason that the batchmates of the excise official, Babu Varghese was convicted in the corruption case on the trap being laid down by the respondent-Shajimon (A-1) is only a conjecture of self-defence, and no inference could be drawn of false implication, more so when in Crime No. 19/2018 and 14/2018, charge-sheets have been filed after investigation and the matter is listed before the learned trial Judge for framing of the charge where the accused respondents certainly have an opportunity to make their submissions."

(emphasis by Court)

14. Accordingly, the Supreme Court allowed the appeals of the State of Kerala and the order passed by the High Court releasing the respondents on bail was set aside.

15. **Sujit Tiwari Vs. State of Gujarat and Another**19

This case of the Supreme Court has been relied upon by the learned counsel for the applicant. The facts of the case were that the brother of the appellant, one Suprit Tiwari, who was the master of a ship (MV Hennry) and the crew members of that ship, when intercepted by the Indian Coast Guard, could not produce any documents pertaining to departure from last port of call i.e. Abu Dhabi in UAE or for the next port of call i.e. Bhavnagar in Gujarat. Suprit Tiwari when questioned, admitted that they were carrying contraband substance in the nature of narcotics substance and he identified the locations and 1445 Kg of narcotics substances (heroin) in 1526 packets were recovered from the ship which was intercepted on 29.7.2017. The Narcotic Control Bureau carried out its investigation and after completion filed a complaint before the Special Judge, NDPS Court at Porbandar in Gujarat on 22.12.2017 against the Master and the 7 crew members and against five other persons including the appellant Sujit Tiwari who is the brother of Suprit Tiwari. Suprit Tiwari revealed that he had informed his brother Sujit Tiwari about some illegal activity in which he was to make huge amount of money and he also told Sujit that he would get Rs. 50 crores through hawala. The appellant was arrested on 4.8.2017 with the allegation that he was party of the conspiracy to smuggle the huge quantity of contraband into India. On behalf of the appellant two arguments were advanced, firstly, that there is no material to connect the appellant with the crime and, secondly that the appellant is entitled to a default bail since the investigation has not been completed within the period prescribed under Section 167 of the Code of Criminal Procedure, 1973, read with Section 36A of the NDPS Act. The Supreme Court went through the statement made by the appellant under Section 67 of the NDPS Act. While noticing that the question whether the statement so made is admissible or not having been referred to a larger Bench, for the purpose of the case, the Supreme Court took the statement into consideration even though the appellant had resiled from the same.

16. The Supreme Court observed as follows:

"10. The prosecution story is that the appellant was aware of what his brother was doing and was actively helping his

brother. At this stage we would not like to comment on the merits of the allegations levelled against the present appellant. But other than the few *WhatsApp* messages and his own statement which he has resiled from, there is very little other evidence. At this stage it appears that the appellant may not have even been aware of the entire conspiracy because even the prosecution story is that the brother himself did not know what was loaded on the ship till he was informed by the owner of the vessel. Even when the heroin was loaded in the ship it was supposed to go towards Egypt and that would not have been a crime under the NDPS Act. It seems that Suprit Tiwari and other 7 crew members then decided to make much more money by bringing the ship to India with the intention of disposing of the drugs in India. During this period the Master Suprit Tiwari took the help of Vishal Kumar Yadav and Irfan Sheikh who had to deliver the consignment to Suleman who had to arrange the money after delivery. The main allegation made against the appellant is that he sent the list of the crew members after deleting the names of 4 Iranians and Esthekhar Alam to Vishal Kumar Yadav and Irfan Sheikh through *WhatsApp* with a view to make their disembarkation process easier. Even if we take the prosecution case at the highest, the appellant was aware that his brother was indulging in some illegal activity because obviously such huge amount of money could not be made otherwise. However, at this stage it cannot be said with certainty whether he was aware that drugs were being smuggled on the ship or not, though the allegation is that he made such a statement to the NCB under Section 67 of the NDPS Act.

11. At this stage, without going into the merits, we feel that the case of the appellant herein is totally different from the other accused. Reasonable possibility is there that he may be acquitted. He has been behind bars since his arrest on 04.08.2017 i.e. for more than 2 years and he is a young man aged about 25 years. He is a B.Tech Graduate. Therefore, under facts and circumstances of this case we feel that this is a fit case where the appellant is entitled to bail because there is a possibility that he was unaware of the illegal activities of his brother and the other crew members. The case of the appellant is different from that of all the other accused, whether it be the Master of the ship, the crew members or the persons who introduced the Master to the prospective buyers and the prospective buyers."

Therefore the Supreme Court directed bail to the appellant, Sujit Tiwari, after imposing some stringent conditions.

CONSIDERATION OF THE PRESENT CASE

17. Coming to the facts of the instant case, the FIR dated 24.11.2019 was lodged by the Station Officer stating that on 24.11.2019 the informant and other police personnel, for purpose of inspecting the area and for maintaining law and order were busy in Basharatpur area when an special informant informed them that one person who engages in purchase and sale of narcotic substance is standing in the wait for someone near H.N. Singh Crossing of Basharatpur area. If hurried, the person can be nabbed along with the substance. Believing that information, the informant and others after taking physical search of each other to ensure that nobody had any unauthorized substance with them, they reached H.N. Singh Crossing. The special informant indicated a person standing near the graveyard near Metro Hospital that he is that person. Then the police personnel

surrounded that person and apprehended him. When that person was asked his name and address, he started stammering out of fear and said that his name was Shailendra Kumar Gupta @ Shailu s/o Ramashray Prasad Gupta, in whose hand there was a solid substance in a plastic bag. When that person was subjected to rigorous interrogation, he said that he purchases and sells charas and other narcotic substance for profit and that he was standing there holding charas in his hand to sell it. After informing the applicant about his right and then taking a consent letter from him for taking his search, his search was taken and thereafter two solid rectangular pieces wrapped in brown plastic were found in a plastic bag which he was holding in right hand. The bag was opened. On opening it was smelt and found that it was a substance like charas. Thereafter, one constable was asked to get an electronic weighing scale for taking the weight of the solid substance. When the recovered rectangular pieces were weighed on the electronic weighing scale then 1 Kg 17 grams of the substance was recovered. When the documents pertaining to the recovered charas were asked for, the apprehended person did not show them. Thereafter, the offence under Section 8/21 of the NDPS Act was explained to that person and he was arrested by the police and the recovered charas was seized. From the recovered substance, in the presence of the accused, 9 grams were taken out and were sealed in a white cloth. An arrest memo was prepared at the site on which the applicant signed. A recovery memo was also prepared, a copy of which was given to the applicant.

18. The contention of the learned counsel for the applicant is that the applicant has been falsely implicated in the case and the recovered contraband was planted on him. It is contended that the applicant has serious enmity with one Smt. Guddi Devi who is the mother of a leader of the ruling political party at Gorakhpur. That leader professes to be close to the Chief Minister of the State. A suit between the aforesaid Smt. Guddi Devi and the father of the applicant being O.S. No. 882 of 1992 is pending in the court of Additional Civil Judge (Junior Division) F.T.C., Gorakhpur. In view of this enmity another police case being case crime no. 123 of 2019 was got registered on fake and trumped up charges against the applicant as well as others for allegedly indulging in public gambling and the applicant is on bail in that case. It is alleged that in case crime no. 123 of 2019, the applicant has been falsely implicated at the behest of one Sandeep Kumar who is the son of Smt. Guddi Devi. It is contended that the wife of the applicant, Smt. Sunita Gupta had lodged a complaint against Sandeep and his associates on 23.10.2019 for "Jan Sunwai" before the Senior Superintendent of Police, Gorakhpur. It is contended that in the present case the applicant is absolutely innocent and has not committed any crime nor has he indulged in trafficking of any narcotic drug. No independent witness of the alleged recovery is there even though the alleged incident occurred in a heavily populated area.

19. Learned counsel for the applicant has referred to the statement of the first informant and the statement of the Sub-Inspector and the constable which have been enclosed as Annexure No. 2 and 3 to the affidavit to contend that the arrest of the applicant was admittedly done at 4:10 PM in the afternoon in broad daylight. The statements of the police personnel themselves reveal that at the time of recovery and arrest of the applicant several

members of the public were standing around. Learned counsel has referred to the site plan prepared by the police which is enclosed as Annexure No. 4 to the affidavit in an attempt to demonstrate that in a crowded area in broad day light, the applicant has been shown standing on the roadside holding 1 Kg 17 grams of charas in his right hand in a plastic bag. It is contended that the presence of the applicant at that point of time holding onto 1Kg 17 grams of charas is highly improbable and unbelievable. The consent for taking the physical search of the applicant which is not in the hand writing of the applicant, was taken by forcing him to sign on a blank sheet of paper. However, learned counsel has fairly conceded that he is not pressing this application on the ground of non-compliance of Section 50 of the NDPS Act as the applicant was alleged to have been holding on to a packet of charas in his right hand and not concealed in his clothes. It is contended that since, in the case of **Sujit Tiwari**, the Supreme Court granted bail, imposing stringent conditions, where a massive quantity of heroin was recovered, this Court may also grant bail in this case with stringent conditions. It is finally contended that if the applicant is enlarged on bail, he will not abscond or tamper with the evidence nor intimidate the witnesses and is ready to furnish reliable sureties to the satisfaction of the court concerned.

20. Shri Nagendra Kumar Srivastava, learned A.G.A. on the other hand while opposing the bail application, he has referred to the judgements of the Supreme Court in **Satpal Singh Vs. State of Punjab20, Union of India Vs. Ram Samujh and others6** and **Union of India Vs. Shri Shiv Shanker Kesari**4. It is his contention that the amount recovered from the possession of the applicant is above the commercial quantity and as such the rigour of Section 37(1)(b)(ii) would be applicable in the present case. He states that a perusal of the FIR reveals that the applicant is guilty of the offence and, given his criminal history, is likely to commit offence while on bail. The charge-sheet has been filed on 12.01.2020.

21. The case of **Satpal Singh**20, referred to by the learned A.G.A. is essentially a case arising out of proceedings under Section 438 of the Cr.P.C having its own set of facts that would not apply in the present case. The other cases referred to by the learned A.G.A. have already been discussed above.

22. Perusal of the FIR and statements recorded of the informant and other policemen, site plan of the place of occurrence as well as the order dated 4.1.2020 passed by the Incharge Additional Sessions Judge, reveal that an amount of 1 Kilogram and 17 grams of charas was allegedly recovered from the applicant who is stated to have been carrying in his right hand in a bag. The commercial quantity of charas is 1 Kg. The contention of the learned counsel for the applicant that the presence of the applicant at that point of time holding on to the narcotic substance being highly improbable and unbelievable, is wholly a factual issue and thus is a matter to be considered during trial. No finding can be recorded by the Court with regard to allegations of motivated action by the police in framing the applicant at the stage of bail given the facts and material on record of the present case. While considering the broad probabilities, given the documents on record, it is not possible for this Court to record its satisfaction that there are reasonable grounds for believing that the applicant is not guilty of the

offence and that he is not likely to commit any offence while on bail.

23. The judgement of the Supreme Court in the matter of **Sujit Tiwari**19, that has been relied upon by the learned counsel for the applicant, cannot be of any assistance to the applicant as that case is based on its own unique facts, with the Supreme Court observing that the case of the appellant therein was totally different from the other accused. There is no dilution of the principles for grant of bail in such cases.

24. In view of the aforesaid facts and circumstances, this bail application is rejected at this stage.

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

26. Given the fact that the applicant is in jail since 25.11.2019 the trial of the case is expedited.

(2020)03-05ILR A1330
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.05.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.

Crl. Misc. Bail Application No. 12047 of 2020

Sujay Desai & Anr. ...Applicants
Versus
Union of India & Anr. ...Opposite Parties

Counsel for the Applicants:
Ms. Gunjan Jadwani, Sri Anurag Khanna

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

A. Criminal Law- Companies Act,2013-Sections 447,448-Code of Criminal Procedure,1973-Section 439 & - application-rejection-applicantapproached the Apex Court for interim bail due to pandemic-applicant directed to approach the High Court for seeking relief-applicant prayed that they are diabetic patient suffering from ill health for a long time-offences committed by the applicants are of grave nature and punishable upto 10 years-in pursuance of the order of the Apex Court in Sou Motu Petition, the applicant cannot claim any relief.(Para 10 to 18)

The Apex court ordered each State/Union Territories to constitute a High Powered Committee for the release of only convicted persons on parole for 8 weeks and undertrial prisoners who are facing maximum 7 years sentence.The applicant involved in grave offences having deep rooted conspiracies and huge loss of public funds affecting the economy of country and posing serious threat to the company's financial health.(Para 10)

The application is rejected. (E-6)

List of Cases Cited:-

1. S.F.I.O. Vs. Nittin Johari & anr.(Crl Appeal No. 1381 of 2019)

2. P. Chidambaram Vs. ED (2019) 9 SCC 24

3. Y.S. Jagan Mohan Reddy Vs. CBI (2013) 7 SCC 439

4. Rohit Tandon Vs. ED (2018) 11 SCC 46

5. St. Of Guj. Vs. Mohanlal Jitamalji Porwal (1987) 2 SCC 364

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

1. The present application under section 439 Cr.P.C. has been filed by the applicants for interim bail. The prayer made in the present application is reproduced here under:-

"This Hon'ble Court may graciously be pleased to consider this matter as imminently urgent and allow this application. It is to be noted here that the WHO has declared Coronavirus as a Public Health Emergency and has categorically stated that individuals suffering from diabetes of any kind, are at increased risk of severe illness from Coronavirus and they should be particularly stringent in following social distancing measures, including significantly limiting face to face interaction. Therefore, it is imperative that this Hon'ble Court may hear the matter and pass some interim order/grant interim bail to the applicants in Arrest Order dated 19.3.2020 issued by respondent no. 2 in furtherance of Order No. 03/117/2018-CL-II (NR) dated 21.02.2018 and Order No. 7/117/2108/CL-II dated 22.08.2019 under sections 447 and 448 of the Companies Act, 2013 or else the applicants shall suffer irreparable loss and injury which could not be compensated, as this matter rquired urgent hearing by this Hon'ble Court"

2. The present matter has been nominated to this Bench by Hon'ble The Chief Justice vide order dated 30.4.2020 and the same was heard ***through video conferencing*** and judgment/order was reserved by this Court on 1.5.2020.

3. Heard Sri Anurag Khanna, learned Senior Advocate assisted by Ms. Gunjan Jadwani, learned counsel for the applicants and Sri Gyan Prakash, learned Assistant Solicitor General of India for the respondents.

4. Pleadings between the parties have been exchanged through e-mail which are on record.

5. The brief facts of the case are that the applicants have been arrested in pursuance of the arrest order dated 19.3.2020 by the Arresting Officer, who is Assistant Director of Ministry of Corporate Affairs for the offence under sections 447 and 448 of the Companies Act, 2013 from Delhi and Mumbai respectively. Copies of grounds of arrest were also served on the applicants on 19.3.2020. In pursuance of Order No. 03/117/2018-CL-II (NR) dated 21.02.2018 and Order No. 7/117/2108/CL-II dated 22.08.2019 under sections 447 and 448 of the Companies Act, 2013 issued by the Ministry of Corporate Affairs, Government of India (hereinafter referred to as the MCA) which in exercise of power under sections 212 (1) (c) of the Companies Act, 2013 had ordered for investigation into affairs of Rotomac Global Pvt. Ltd. (hereinafter referred to as the 'RGPL') and 10 others and Frost International Ltd. (hereinafter referred to as 'F.I.L.') by the Serious Fraud Investigation Office-respondent no. 2 (hereinafter referred to as 'the SFIO') in the **public interest.** Pursuant to the order of MCA, Director SFIO vide Order No. SFIO/Inv./AOI/2018-19 dated 20.06.2018 had appointed a team of officers for carrying out investigation into the affairs of the Company. The applicant no. 1 is the Director and CEO of M/s F.I.L. and applicant no. 2 is the Managing Director of F.I.L.

6. The applicants before approaching this Court for interim bail have approached the Apex Court due to present pandemic and spread of Covid-19 (Corona Virus) due to which working of all the Courts were suspended in the State and filed Writ Petition (Crl.) No. 126 of 2020 for seeking following relief:-

"Pass a writ, order or direction in the nature of mandamus or any other appropriate writ for seeking of immediate release of the petitioners in light of the threat posed to the life and personal liberty of the petitioners in light of the Covid-19."

7. The Apex Court on 1.4.2020 was pleased to dispose of the said writ petition and directed the applicants to approach High Court by filing bail applications thus, the applicants have filed the present bail application before this Court seeking interim bail.

8. Learned counsel for the applicants submits that applicant no. 1 is suffering from Type-II diabetes and is also asthmatic patient and suffered from frequent asthmatic attack and he is required to take insulin injection as well as other medicines for asthma to maintain his health. So far as applicant no. 2 is concerned, he is Senior citizen aged about 63 years and is also Type-II diabetic patient suffering from ill health for a long time. Further he is overweight and has a diminished lung capacity and he is also required to take insulin injection as well as other medicine in order to maintain his health. It has been vehemently argued by learned counsel for the applicants that due to Covid-19, the life of the applicants is under great threat and particularly when they are also suffering from the disease of diabetes and asthma and there are increased risk of severe suffering from Corona Virus and they should be particularly stringent in following social distancing measures including significantly limiting face to face interaction. He submitted that the applicants are presently confined in District Jail, Kanpur Nagar which is over crowded and due to large number of persons in the said jail, the inmates are highly suspected to come into contact of Covid-19 (Novel Corona Virus). He submitted that the Apex Court taking suo motu cognizance of the threat to prisoners of various prisons in India, into the light of Corona Virus, on 16.3.2020 passed an order in Suo Motu Writ Petition (Civil) No. 1 of 2020 and thereafter passed an order in the said petition on 23.3.2020 for releasing the inmates of jail directing the respective States/Union Territories to constitute a high power committee and consider the release of prisoners, who have been convicted or under trial for the offence for which prescribed punishment are about 7 years or less, with or without fine and the prisoners has been convicted for lesser number of years than the maximum. Learned counsel for the applicants has placed reliance on the order of the Delhi High Court in the case of Arvind Yadav vs. N.C.T. Delhi being numbered as Bail Application No. 778 of 2020 where the Delhi High Court vide order dated 22.4.2020 was pleased to grant interim bail to the accused, who was involved under the N.D.P.S. Act, 1985 considering the lock down due to Covid-19. He also placed reliance on another judgment of the Delhi High Court in the case of Babulal vs. N.C.T. Delhi in Crl. Appeal No. 291 of 2020 by which the Delhi High Court vide order dated 20.4.2020 was pleased to grant interim suspension of sentence to the appellant, who was sentenced for heinous crimes under the POCSO Act, considering the

"unprecedented circumstances of a public health emergency that prevail today and the consequent need to decongest prisons for overall medical safety of all the prisoners...".

9. Learned counsel for the applicants further placed reliance on an order passed by Lucknow Bench of this Court in Crl. Misc. Bail Application No. 2013 of 2020 Subhash Chandra Agarwal vs. State of U.P. passed on 30.4.2020 in which interim bail has been granted to the accused in the said case for the offence under sections 419, 420, 467, 468, 471 I.P.C. He also submitted that the investigation of the present case is pending since June, 2018 and the applicants have been co-operating in the investigation being conducted by the SIFO. He submitted that applicant no. 1, who had gone to New Delhi for the purpose of interrogation in the present case on 19.3.2020, was detained and arrested by the Arresting Officer whereas applicant no. 2 was arrested from Mumbai in the present case. He further pointed out that since the date when the applicants were arrested and were lodged in Kanpur District Jail, the Investigating Officer has not visited in jail for the purpose of investigation and the allegation against the applicants is that they committed fraud in the affairs of 11 Companies and have further not furnished documents to the Investigating Officer, is not correct as the applicants have supplied voluminous documents to the respondent no. 2. There would not be any fruitful purpose to detain them in jail as till date no complaint has been filed by respondent no. 2 against them for offences under sections 447, 448 the Companies Act, 2013. They have no flight risk. They are ready to abide by the conditions which may be imposed by this Court.

10. Per contra, Sri Gyan Prakash, learned Assistant Solicitor General of India appearing for the respondents has submitted that the applicants were arrested on 19.3.2020 and they being the Directors/Controllers, used the corporate identities of the respective Companies of Rotomac Group, i.e., Rotomac Global Pvt. Ltd., Rotomac Exports Pvt. Ltd., Crown Alba Writing Instruments Pvt. Ltd, Kothari Foods & Fragrances Pvt. Limited, Mohan Steels Ltd. and Frost International Ltd. to deceive the Public Financial Institutions/Banks in obtaining credit facilities in the form of Letter of Credits and otherwise against which they defaulted to the tune of Rs. 4,000/- crores approximately in the case of RGPL and Rs. 3500/- crores approximately in the case of FIL which amounts continue as outstanding liabilities in the respective Companies. The applicant no. 1 is the Director & CEO, the signatory of the financial statements of FIL for the financial year 2013-14 to 2017-18. Applicant no. 1 along with his father applicant no. 2, who is the Managing Director were ultimate decision makers of the business of F.I.L. which have been also accepted by all the others Directors and employees of the F.I.L. whose statements were recorded under oath. They under the garb of Merchantile Trade have fraudulently induced the Banks & Public Financial Institutions to obtain credit facilities. He had knowingly falsified the books of account and the financial statements of F.I.L. deliberately concealing material facts thereby inducing BFIs to fraudulently extending credit facilities to F.I.L. which ultimately remained outstanding as account of F.I.L. became

N.P.A. The falsified financial statements signed by the applicant no. 1 for the financial year 2013-14 to 2017-18 that was filed with ROC and that submitted to BFIs depicted false MT trade receivables to the tune of approx. Rs. 3500 crore in F.I.L. as per financial statements for financial year 2017-18. He submitted that the offence committed by the applicants being the Director and the Managing Director of F.I.L., has come into light during the investigation, is of grave nature. The plea which has been taken by the applicants for granting them interim bail in view of spread of Covid-19 (Corona Virus) is only an attempt to claim a relief indirectly which they cannot seek directly in such a offence of high magnitude amounting to thousands of crores. As this stage, their release would definitely hamper the investigation and further there are strong chances of tempering with the investigation of the present case. He further argued that so far as the judgment the Apex Court passed in Suo Motu Writ Petition (Civil) No. 1 of 2020 is concerned that relates to the offence which are punishable maximum upto 7 years and the Apex Court has categorically made it clear in its order that while considering the case of the said accused persons, the nature and gravity of the offence should be also taken into account by the High Powered Committee constituted in the light of the order of the Apex Court dated 23.3.2020. In the present case the offences under Sections 447 and 448 of the Companies Act, 2103 for which the applicants have been charged is punishable maximum upto 10 years and is of grave nature, hence the applicants cannot claim any relief in pursuance of the order of the Apex Court passed in Suo Motu writ petition. Therefore, their case is distinguishable from category/class of those prisoners. He next pointed that the applicants have made an application before the Additional Session Judge/Special Judge, Court no. 9 Kanpur Nagar which is the designated Court under section 436 of the Companies Act, 2013 that they may be permitted to have home cooked food, clothes, bedding and medicine etc. which was not opposed by the respondent no. 2 S.F.I.O. and in pursuance thereof they are being given the said facilities. He further submitted that the applicants are also being given their regular medicines for their ailment in jail. So far as the case which have been relied upon by the learned counsel for the applicants with respect to release on interim bail by the Delhi High Court with respect to accused involved in serious offences are concerned, it was a short period for operating Bank account and taking care of mentally retarded child of the said accused. He submitted that looking into the gravity and nature of offence committed by the applicants where they have deceived the Public Financial Institutions/Banks worth thousands of crores, this Court should not exercise its discretion in grant of interim bail to the applicants and the same be rejected. Learned Assistant Solicitor General in support of his argument has relied upon the judgment of the Apex Court in the case of Serious Fraud Investigation Office vs. Nittin Johari and another (Criminal Appeal No. 1381 of 2019, P Chidrambaram vs. Directorate of Enforcement (2019) 9 SCC 24, Y.S. Jagan Moham Reddy vs. Central Bureau of Investigation, reported in 2013 (7) SCC 439, and in Rohit Tandon vs. Directorate of Enforcement, (2018) 11 SCC 46 and State of Gujarat vs. Mohanlal Jitamalji Porwal, (1987) 2 SCC 364 in which the Court has observed that ***economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The***

economic offence having deep rooted conspiracies and involving huge loss of Public funds, needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the Companies. The court thus observed that while granting bail, the court has to keep in mind the nature of accusations, nature of evidence in support thereof, the severity of punishment which conviction will ential, the larger interest of the public/State and other similar considerations.

11. Considered the rival submissions made by learned counsel for the parties and perused the record.

12. It transpires from the record that the applicants before approaching this Court has filed Writ Petition (Crl.) No. 126 of 2020 before the Apex Court and on 1st April, 2020, the Apex Court passed the following order:-

"The above writ petitions are filed for grant of bail in favour of the petitioners in veiw of the threat posed to their lives in the light of COVID-19. Notice was issued on 27.03.2020.

Today, we are informed that the High Court of Allahabad is taking up matters which are of urgent nature. As the Writ Petitions pertain to grant of bail, we are of the opinion that the petitioners should withdraw these writ petitions to approach the High Court by filing bail applications. The High Court of Allahabad is requested to take up the bail applications at the earliest. We make it clear that we have ot heard the matters on merit.

The writ petitions are, accordingly, disposed of as withdrawn."

13. From a perusal of the aforesaid order passed by the Apex Court, it is apparent that the applicants were given liberty to approach this Court by filing bail application and the applicants in pursuance of the said order, had filed the present application under section 439 Cr.P.C. for ***interim bail*** taking into account serious threat to their lives because of the severe illness, from Corona Virus. Thus it is clear that no regular bail application has been filed by the applicants nor the same is pending before this Court or before the Special Judge, (Companies Act, 2013) at Kanpur Nagar. The applicants without moving regular bail application before this Court in the present case, have come up with a prayer only for grant of ***interim bail*** due to Covid-19 (Corona Virus) which speaks of lot of their conduct and the contention of counsel for the respondent appears to be justified to a great extent that the applicants want to seek relief indirectly which they cannot seek directly being a difficult task, realizing the nature and gravity of the offence as nothing had stopped them to file a regular bail applications before this Court on merits which this Court is also hearing showing urgency in the matters.

14. Be that as it may. The applicants have chosen to file the present bail application under sections 439 Cr.P.C. for ***interim bail***, the Court in the interest of justice proceeds to decide the same with the prayer made therein.

15. The main thrust which has been canvassed by learned counsel for the applicants is that due to Covid-19 (Corona Virus) infection, the applicants being diabetic patients have great risk to their lives if they are kept in jail where there are much chances of they being infected by Corona Virus. The applicant no. 1 is the son of applicant no. 2 and further claims that he is also a patient of Asthma. Due to over crowding in District Jail where they are confined they cannot follow the guideline of social distancing measures,

including significantly limiting face to face interaction and due to lack of medical care regarding their lives in the prevalent environment in jail, they may be released on interim bail by this Court. In this regard, the applicant's counsel have also drawn the attention of Court towards the order dated 23.3.2020 passed by the Apex Court Suo Motu in the aforesaid writ petition and also circular dated 18.3.2020 of this Court whereby the working of court below has been suspended. So far as the order dated 23.3.2020, it is evident that the Apex Court has directed each State/Union Territories to constitute a High Powered Committee to determine which class of prisoners can be released on parole or on interim bail for said period as may be thought appropriate. The Court has directed that the State/Union Territories could consider the release of the prisoners, who have been convicted or under trial for the offence which prescribed punishment upto 7 years or less, with or without fine and the prisoners, who have been convicted for lesser number of years than the maximum. The Apex Court further left it open for the High Powered Committee to determine the category of prisoners, who should be release as aforesaid, depending upon gravity and the nature of offence and other relevant factor thereto. In pursuance of the same, High Powered Committee had been constituted in the State of U.P. as has been informed by the Secretary U.P. Legal Services Authorities Lucknow vide order dated 27th March, 2020 and as per the resolution of the High Powered Committee in its meeting dated 27.3.2020 had issued certain directions regarding convicted and under trial prisoners and has resolved as follows:-

*"**The Committee has resolved that the following category of convicted prisoners (excepts who are Foreign Nationals) to be released on parole on furnishing personal bond with the undertaking written on the personal bond itself that he/she shall surrender before the prison authority after expiry of the parole period.:-***

a) Convicts already on parole would get extended special parole of 08 additional weeks.

b) Convicts who have already availed 01 parole peacefully and surrendered on time will be granted afresh one-time special parole for 08 weeks.

c) Convicts who are not facing a sentence of more than 7 years shall be released on special parole for 08 weeks.

The Committee further resolved that following category of under trial prisoners (except prisoners who are Foreign Nationals) may be released on Interim Bail.

a) Under trial prisoners facing criminal cases in which maximum sentence is 07 years and presently confined in jails may be released on interim bail for 08 weeks by the Sessions Court, Additional Sessions Court or the Chief Judicial Magistrate including other Judicial Magistrates, as the case may be, on furnishing personal bond with the under taking written on the personal bond itself that he/she shall surrender before the Court after expiry of the interim bail period. Other conditions may be imposed by the Court if it thinks fit, considering the circumstances of the case.

b) The grant of interim bail may be done by visiting the jails, on alternate days, by the Sessions Judge/Additional Sessions Judge/the Chief Judicial Magistrate/other Judicial Magistrates, as the case may be, on the bail applications at the jails itself and it shall be done forthwith. For drafting bail applications, to be moved by under trial prisoners

assistance and services of prison officers, jail staff, jail Para Legal Volunteers (PLVs) and Panel Lawyers empanelled with the District Legal Services Authority (DLSA) may be utilized under intimation to the Secretary, DLSA of the concerned district. For this purpose passes shall be issued to the Judges/Magistrate & Panel Lawyers during lock down period by the District Administration.

c) The Undertrial Review Committee contemplated by the Hon'ble Supreme Court in Re Inhuman Conditions in 1382 prisons, (2016) 3 SCC 700, shall meet every week and take such decisions in consultation with the concerned district authority as per the said judgment.

d) Jail Superintendent shall be in continuous touch with concerned Secretary, District Legal Services Authority regarding disposal of interim bail applications moved by the under trial prisoners so that proper arrangements may be made."

16. From a perusal of the resolution of the said Committee, it is apparent that the Committee has resolved to release the under trial prisoners on interim bail, who are facing criminal cases in which the maximum sentence is of 7 years and presently confined in jails, for a period of eight weeks by the competent courts. Thus, the contention of Assistant Solicitor General Sri Gyan Prakash appearing on behalf of the respondents, who vehemently argued that the applicants are not entitled for interim bail as per the order passed by the Apex Court Suo Motu in the aforesaid writ petition by which a High Powered Committee has been constituted as their case is distinguishable from under trial prisoners as the offence in which the applicants have been confined in jail is punishable with a maximum sentence upto 10 years, appears to have substance. Moreover, so far as the risk of applicants being infected due to Corona Virus because of their severe illness in the lack of following strict norms of social distancing measures including face to face interaction is concerned, it has been pointed by learned Assistant Solicitor General that the applicants had moved an application before the Special Judge (Companies Act) Kanpur Nagar for providing them home cooked food, clothes, bedding and medicines etc. was not opposed by the S.F.I.O. on account of which the same are being provided to them and the said fact has not been denied by learned counsel for the applicants but he has submitted that the said facilities is not adequate for the applicants to run the risk of their lives as the present interim bail application has been filed only on the ground of risk to life of the applicants because of their illness and coming in contact with Covid-19 (Corona Virus) infected persons. The main thrust of the argument of learned counsel for the applicants was only on the said issue though he tried to argue on the merits of the case in short stating that the Central Government has ordered for investigation by Serious Fraud Investigation Officer through its Director-respondent no. 2 by its order dated 21.2.2018 and 22.8.2019 respectively as is apparent from the grounds of arrest which has been enclosed along with the present application but the same has yet not been concluded by the Investigating Officer nor report has been submitted to the Central Government by it, hence no fruitful purpose would be served if the applicants are being detained in jail as no investigation is taking place and no Inspector of respondent no. 2 has visited the jail for the purpose of investigation since the date, i.e., 19.3.2020 they have been detained in jail. He stated that the applicants have been co-operating in the

investigation and the applicant no. 1 was arrested by the respondent no. 2 when he went for the purpose of interrogation on 19.3.2020 at Delhi and no complaint has been filed till date under the Companies Act, 2013 in pursuance of the said investigation. With respect to the argument of learned counsel for the applicants, the Court only wants to observe that from a perusal of the ground of arrest, it is apparent that applicant no. 1 Sujay Desai was the Director/CEO of F.I.L. and along with said Company, the investigation has been ordered and is underway into the affairs of Rotomac Global Pvt. Ltd. and 10 other Companies and Frost International Limited by S.F.I.O. in public interest under the order dated 21.2.2018 and 22.8.2019 respectively of Ministry of Corporate Affairs, Government of India and applicant no. 2 Uday J. Desai was functioning as Director of Frost International Limited from 31.5.1995 onward and as Managing Director of the said Company from 29.12.2008 onward and under their direction they used Merchantile Trade for rotation of funds continuously manipulating and falsified books of account and financial statements of the Company to fraudulently inducing the Banks and Public Financial Institutions for obtaining credit facilities. As a result of fraudulent activities, the Company has defaulted against outstanding liabilities of ***Rs. 3578/- crores*** approximately to Banks and Public Financial Institutions thereby causing wrongful loss to them and their acts and omission are punishable under section 447 and 448 of the Companies Act, 2013. Learned Assistant Solicitor General appearing on behalf of the respondents through his objection filed has drawn the attention of the Court that the applicants have been arrested for the commission of offence of fraud with Public Sector Banks and Financial Institutions involving total amount of Rs. **7500/- crores** approximately (Rs. 4000/- crores approximately in RGPL and Rs. 3500/- crores in F.I.L.) and the Ministry of Corporate Affairs vide order dated 21.2.2018 ordered investigation into the affairs of 11 Companies of Rotomac Group and Frost International Ltd. and during investigation, it has been revealed that the approval was taken from Ministry of Corporate Affairs to investigate the affairs of another Company, i.e., F.I.L. and Ministry of Corporate Affairs vide order dated 22.8.2019 granted the said approval.

17. Thus, taking into account the nature and gravity of the offence which shakes the conscience of the society and public at large, the investigation being still pending and there are strong apprehensions that there would be chances of tampering of evidence by the applicants, the prayer for grant of **interim bail** is hereby refused.

18. Accordingly, the present application for grant of **interim bail** to the applicants, namely, Sujay Desai and Uday J. Desai in Arrest Order dated 19.3.2020 issued by respondent no. 2 in furtherance of Order No. 03/117/2018-CL-II (NR) dated 21.02.2018 and Order No. 7/117/2108/CL-II dated 22.08.2019 under sections 447 and 448 of the Companies Act, 2013, is hereby **rejected.**

19. However, it is directed that the I.G. (Prison) State of U.P. Lucknow is directed to ensure that the applicants are kept safely in District Jail, Kanpur Nagar where they are stated to be confined as on date taking all necessary precautions as has been issued by the State of U.P. in the context of Corona Virus (COVID-19) particularly, if any, also with respect to

prisoners detained in jail throughout the State.

20. It is further directed that the respondent no. 2 shall expedite the investigation of the present case and conclude the same at the earliest.

21. It is made clear that any observation made by this Court would not prejudice the right of the applicant for considration of his regular bail application under section 439 Cr.P.C., if any, filed before this Court or the Court below, as the case may be, as the same has been made only for the disposal of the present application.

22. Copy of this order shall be produced by the counsel for the applicants before I.G. (Prison) State of U.P. Lucknow for necessary information and follow up action. The learned Assistant Solicitor General shall also forward a copy of this order to the I.G. (Prison) State of U.P. Lucknow for its immediate follow up and compliance, forthwith.

(2020)03-05ILR A1339
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.05.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.

Crl. Misc. Bail Application No. 12048 of 2020

Rahul Kothari ...Applicant (In Custody)
Versus
Union of India ...Opposite Party

Counsel for the Applicant:
Sri Rahul Agarwal

Counsel for the Opposite Party:
A.S.G.I.

A. Criminal Law- Code of Criminal Procedure,1973-Section 439 & Companies Act, 2013-Section 212-application-rejection-applicant prayed for bail owing to Corona Virus Spread-he sought relief indirectly which he could not seek directly in the name of corona virus as per Apex court Order in this regard-applicant did serious fraud of crores in the company-punishment for such fraud is 10 years as per companies act-while apex court ordered for the release of only convicted persons on parole for 8 weeks and undertrial prisoners who are facing maximum 7 years sentence.(Para 9 to 17)

The applicant involved in grave offences having deep rooted conspiracies and huge loss of public funds affecting the economy of country and posing serious threat to the company's financial health.(Para 9)

The application is rejected. (E-6)

List of Cases Cited:

1. Gurucharan Singh Vs. St. (Delhi Administration),(1978) 1 SCC 118

2. Sanjay Chandra Vs. CBI, (2012) 1 SCC 40

3. S.F.I.O. Vs. Nittin Johari & anr. (Crl Appeal No. 1381 of 2019)

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

1. The present bail application under section 439 Cr.P.C. has been filed by the applicant. The prayer made in the bail application is reproduced here under:-

"Pass an order directing the immediate release of the applicant in the case pertaining to the order dated 21.02.2018 bearing no. 03/117/2018-CL-I (NR) passed by the Central Government

under section 212 of the Companies Act, 2013 directing the SFIO to investigate into the affairs of Rotomac Global Pvt. Ltd., in light of the threat posed to the life and personal liberty of the applicant because of rampant spread of Corona Virus/Covid-19 till such time that the pandemic is curtailed, on such terms and conditions as this Hon'ble Court deems fit and necessary; and

pass an order to enlarge the accused applicant on interim bail in the case pertaining to the order dated 21.02.2018 bearing no. 03/117/2018-CL-I (NR) passed by the Central Government under section 212 of the Companies Act, 2013 directing the SFIO to investigate into the affairs of Rotomac Global Pvt. Ltd. till disposal of the bail application moved by the applicant on such terms and conditions as are deemed fit and proper in the circumstances of the case and in the interest of justice as well;"

2. The present matter has been nominated to this Bench by Hon'ble The Chief Justice vide order dated 30.4.2020 and the same was heard *through video conferencing* and judgment/order was reserved by this Court on 1.5.2020.

3. Heard Sri S.V. Raju, learned Senior Advocate assisted by Sri Rahul Agarwal and Sri Pranjal Krishna, learned counsels for the applicant and Sri Gyan Prakash, learned Assistant Solicitor General of India appearing on behalf of the respondent.

4. Pleadings between the parties have been exchanged through e-mail which are on record.

5. The brief facts of the case are that on 21.2.2018 vide letter no. 03/117/2018-CL-I (NR) passed by the Central Government under section 212 (1) (c) of the Companies Act, 2013 (hereinafter referred as 'the Companies Act) directing the Special Fraud Investigation Office (hereinafter referred to as 'SFIO') to investigate into the affairs of Rotomac Global Pvt. Ltd. (hereinafter referred to as 'the RGPL') and 10 others and Frost International Limited (hereinafter referred to as 'FIL') **in the public interest**. The applicant was arrest by SFIO at New Delhi vide Arrest Order dated 19.3.2020. Thereafter, the SFIO obtained his transit remand from the court at Delhi and brought the applicant to Kanpur Nagar on 21.3.2020. Thereafter, the Additional Session Judge/Special Judge, Court No. 9, Kanpur Nagar which is the designated Court under section 436 of the Companies Act, 2013 remanded the applicant to judicial custody on 21.3.2020. A copy of the arrest order dated 19.3.2020 is annexed with the present bail application.

6. The applicant before approaching this Court for the prayers aforesaid has approached the Apex Court vide Writ Petition (Criminal) No. 125 of 2020 for grant of bail in view of the threat posed to his life in the light of Covid-19.

7. The Apex Court on 1.4.2020 was pleased to dispose of the said writ petition and directed the applicant to approach High Court by filing bail application, thus the applicant has filed the present bail application before this Court seeking bail for limited period, i.e., till such time that pandemic COVID-19 (Corona Virus) is curtailed.

8. Sri S.V. Raju, learned Senior Advocate appearing on behalf of the applicant has basically argued that in view of the rampant spread of Covid-19 (Corona

Virus) the applicant may be released on bail in the present case till such time when the pandemic is curtailed and further interim bail may be granted to him till the disposal of the present bail application. He submitted that the applicant is aged about 33 years and he is having a family of which he is the sole bread earner. The applicant has the liability of septuagenarian parents, who suffer from serious medical conditions. He has also the liabilities of his five year old son and his wife. It is further stated that the applicant himself is suffering from urinary infection which is not subsidizing and increasing the blood sugar level and he was also admitted on 27.3.2020 in the jail hospital, hence there is grave and impeding threat to his life on account of his arrest in the wake of rampant spread of the Corona Virus, hence the applicant be released on this ground alone. **He further pleaded in para-32 of the affidavit filed in support of the bail application that the applicant reserves liberty to file another bail application (if the need so arise, at a later stage).** It is further argued by learned counsel for the applicant that the SFIO was directed vide order dated 21.2.2018 to investigate into the affairs of RGPL pursuant to the registration of F.I.R. by the C.B.I. on 18.2.2018. It is stated that the allegation made in the F.I.R. dated 18.2.2018 and the investigation being conducted by the SFIO are pari-materia. On 22.2.2018, the applicant was arrested by the CBI in pursuance of the F.I.R. dated 18.2.2018 and after his arrest, the applicant was granted bail by the Lucknow Bench of this Court vide order dated 30.11.2018 passed in Bail Application No. 3492 of 2018 copy of which is annexed as annexure-4 to the present bail application. Being aggrieved by the said bail order, the C.B.I. filed an SLP before the Apex Court being S.L.P. (Crl.) No. 5931 of 2019 titled as "State through CBI/BS & FC/ v. Rahul Kothari". The Apex Court vide order dated 22.11.2019 refused to interfere with the judgment of the High Court and dismissed the S.L.P., copy of which is also annexed as annexure-5 to the bail application. He submitted that as the applicant has already been granted bail in case crime no. RC/BD1/2018/E/0001 for the offence under sections 120-B I.P.C. read with section 420, 467, 468, 471 I.P.C. and section 13 read with section 13 (1) (d) of the Prevention of Corruption Act, 1988, police station CBI/BS & FC/New Delhi, District Kanpur/Delhi, he is entitled to be released on bail in this case also for the offence under section 447 and 448 of the Companies Act which is punishable upto 10 years as in the case, registered by the C.B.I., in which he has been granted bail, the offences are punishable upto seven years and life imprisonment. He further submitted that the case of the applicant may be considered in the light of the judgment of the Apex Court passed in Suo Motu Writ Petition (Civil) No. 1 of 2020 wherein the Apex Court has directed the States/Union Territories to constitute a High Powered Committee to determine which class of prisoners can be released on parole or interim bail for such period as may be thought appropriate. The Apex Court further directed to consider the release of the prisoners, who have been convicted or under trial for the offence for which prescribed punishment is upto 7 years or less, with or without fine and the prisoners has been convicted for lesser number of years than the maximum. He has pointed out that the applicant before approaching this Court, has approached the Apex Court by filing S.L.P. (Crl.) No. 125 of 2020 in which the Apex Court vide order dated 1.4.2020 has given liberty to the applicant

to file a bail application before this Court copy of the same is annexed as annexure-12 to the bail application, hence the applicants has approached this Court by means of filing this application for bail till the curtailment of pandemic Corona Virus (COVID-19). Learned counsel for the applicant further submits that the applicant has been co-operating with the investigation at regular intervals since 2018 and on 18.3.2018, a day prior to his arrest, he had gone to New Delhi for the purpose of interrogation and the applicant is not at flight risk as he has already surrendered his passport before the Special Judge, Anti Corruption, C.B.I. at Lucknow. He also has argued that so far as the bar contained under section 212 (6) (ii) of the Companies Act,2013 will not apply while dealing with an application for bail on medical grounds in view of the Proviso to Section 212 (6) (ii) of the Companies Act, 2013 as compared to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the N.D.P.S. Act') as there is no such proviso under section 37 (1) (b) (11) in the N.D.P.S. Act and the applicant being a sick person, the bar does not apply on him in view of the proviso to section 212 (6) (ii) of the Companies Act, 2013, hence the applicant may be released on bail. Learned counsel for the applicant has relied upon ***para-22*** of the judgment of the Apex Court in the case ***Gurucharan Singh vs. State (Delhi Administration), (1978) 1 SCC 118*** and further relied on ***para-30*** of the judgment of the Apex Court in the case of ***Sanjay Chandra vs. CBI, (2012) 1 SCC 40*** relating to grant of bail.

9. Per contra, learned Assistant Solicitor General Sri Gyan Prakash appearing on behalf of the respondent opposed the prayer made in the present application and has vehemently argued that the applicant was arrested along with two other persons for commission of offence of fraud with Public Sector Banks involving total amount of Rs. 7500/- crores approximately for the offence under sections 447, 448 of the Companies Act, 2013 which provides for maximum punishment upto ten years. The Ministry of Corporate Affairs in exercise of its power under section 212 (1) (c) of the Companies Act, 2013 vide order dated 21.2.2018 has ordered investigation in the affairs of 11 Companies of Rotomac Group. On the basis of material collected during investigation an approval was sought from the Ministry of Corporate Affairs to investigate into the affairs of another Company, i.e., Frost International Ltd. and the Ministry of Corporate Affairs vide order dated 22.8.2019 granted the said approval. The provisions contained under sections 212 (3) of the Companies Act, 2013, empowers certain category of officials of SFIO to arrest any person on the basis of material collected during investigation and after recording reasons to believe that any person is guilty of offence punishable under section 447 of the Companies Act, 2013. In exercise of the aforesaid powers granted under section 212 (3) of the Companies Act, 2013 and after recording reason to believe in this regard on the basis of material collected during investigation since 21.2.2018 qua Rotomac Group of Companies and since 22.8.2019 qua Frost International Ltd., the applicant along with two others was arrested on 19.3.2020 for the offence punishable under section 447 of the Companies Act, 2013. The applicant has been arrested after there being sufficient material which was collected and obtained by respondent on 19.3.2020 and arrest was made by the Arresting Officer after recording reason to

believe and taking approval to arrest the aforesaid persons as per the prescribed rules. The applicant after being brought on transit remand was produced before the Special Judge (Companies Act) at Kanpur Nagar an application was moved by the applicant for seeking relief of interim bail/house arrest, home cooked food, bedding, clothes and medicines etc. on the ground of spread of Corona Virus (COVID-19) in pursuance of the order dated 16.3.2020 passed by the Apex Court in the aforesaid case, the Special Judge (Companies Act) rejected his prayer for interim bail/house arrest but the other prayers for home cooked food, bedding, clothes and medicines etc. was not opposed by SFIO and as such the same are being provided to the applicant while being in jail and remanded him to judicial custody. He submitted that the plea of sickness which has been taken by the applicant due to coming in contact with Corona Virus (COVID-19) infected persons, does not appeal to reason as the applicant is not such a sick person as has been argued as he is only suffering from urinary infection and making emotional argument before this Court for taking care of old parents and family though he is involved in an offence of fraud in the affairs of Company of Rotomac group which are 11 in number. So far as the argument of learned counsel for the applicant that on the instructions of SFIO, the CBI has registered an F.I.R. against the applicant for the offence in question, is absolutely incorrect and denied, as the C.B.I. has investigated into the offences other than the Companies Act, 2013 which is a Special Act. The CBI has not investigated the fraudulent affairs of Rotomac Group which consists of RGPL and 10 other Companies and FIL as has been ordered by the Ministry of Corporate Affairs. He argued that SFIO is a statutory Investigation Office established under Section 211 of the Companies Act, 2013 and in terms of Section 212 of the Companies Act, 2013 it may conduct investigation into the affairs of the Company under the order of Ministry of Corporate Affairs. Moreover, the investigation in question has been ordered by the Central Government in exercise of its power under section 212 (1) (c) of the Companies Act, 2013 in the instant case and not on the basis of registration of F.I.R. by C.B.I. He has drawn the attention of the Court towards paras-25 to 28 of the written submissions regarding denial made by respondent SFIO with respect to the averments made in para-14 of the affidavit filed in support of the bail application categorically. So far as the argument of learned counsel for the applicant with respect to the bar contained under section 212 (6) (ii) of the Companies Act will not apply while dealing with the application for bail on medical ground is concerned, it appears to be also not correct in view of the fact that the applicant is not such a sick person, who is not able to perform normal pursuits of his life as he is only suffering from urinary infection and stated to be having low blood sugar. He has drawn the attention of the Court towards the averment made in the written objection in para-32 in which it had **referred to the judgment of the Supreme Court dated 12.09.2019 in the matter of S.F.I.O. v. Nittin Johari and another (Criminal Appeal No. 1381 of 2019)** wherein the Apex Court has set aside order of the Delhi High Court on the said issue and remanded the matter to the High Court and thereafter the Delhi High Court rejected the bail application of the said accused as has been stated in para-34 of the written objection. Learned Assistant Solicitor General in support of his argument has relied upon the judgment of

the Supreme Court in the case of Serious Fraud Investigation Office vs. Nittin Johari and another (Criminal Appeal No. 1381 of 2019, P Chidrambaram vs. Directorate of Enforcement (2019) 9 SCC 24, Y.S. Jagan Moham Reddy vs. Central Bureau of Investigation, reported in 2013 (7) SCC 439, and in Rohit Tandon vs. Directorate of Enforcement, (2018) 11 SCC 46 and State of Gujarat vs. Mohanlal Jitamalji Porwal, (1987) 2 SCC 364 in which the Court has observed that ***economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of Public funds, needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the companies. The court thus observed that while granting bail, the court has to keep in mind the nature of accusations, nature of evidence in support thereof, the severity of punishment which conviction will ential, the larger interest of the public/State and other similar considerations.***

10. Considered the rival submissions made by learned counsel for the parties and perused the record.

11. It transpires from the record that the applicant before approaching this Court has filed Writ Petition (Crl.) No. 125 of 2020 before the Apex Court and on 1st April, 2020, the Apex Court passed the following order:-

"The above writ petitions are filed for grant of bail in favour of the petitioners in veiw of the threat posed to their lives in the light of COVID-19. Notice was issued on 27.03.2020.

Today, we are informed that the High Court of Allahabad is taking up matters which are of urgent nature. As the Writ Petitions pertain to grant of bail, we are of the opinion that the petitioners should withdraw these writ petitions to approach the High Court by filing bail applications. The High Court of Allahabad is requested to take up the bail applications at the earliest. We make it clear that we have ot heard the matters on merit.

The writ petitions are, accordingly, disposed of as withdrawn."

12. From a perusal of the aforesaid order passed by the Apex Court, it is apparent that the applicant was given liberty to approach this Court by filing bail application and the applicant in pursuance of the said order, had filed the present application under section 439 Cr.P.C. for ***immediate release on bail*** taking into account serious threat to his life because of the illness, from Corona Virus. Thus, it is clear that he has not moved a regular bail application under section 439 Cr.P.C. before this Court in the present case and has come with a limited prayer to immediately be released till such time that the pandemic COVID-19 (Corona Virus) is curtailed and further reserved his right to move another application (if need so arise, at a later stage) as has been averred by him in para-32 of the affidavit file in support of the bail application which speaks a lot of his conduct and the contention of learned counsel for the respondent appears to be justified to a great extent that the applicant want to seek relief indirectly which he cannot seek directly being a difficult task realizing the nature and gravity of the offence as nothing had stopped him to file a regular bail application before this Court on merits which this Court is also hearing, showing urgency in the matter.

13. Be that as it may. The applicant has chosen to file the present bail application under sections 439 Cr.P.C. for immediate release till such time that the pandemic COVID-19 (Corona Virus) is curtailed, the Court in the interest of justice proceeds to decide the same with the prayers made therein.

14. The main argument of learned counsel for the applicant is that due to Covid-19 (Corona Virus) infection, the applicants being a sick person has great risk to his life if he is kept in jail where there are much chances of he being infected by said Corona Virus. Due to over crowding in District Jail where he is confined, he cannot follow the guideline of social distancing measures, including significantly limiting face to face interaction and due to lack of medical care regarding his life in the prevalent environment in jail, he may be released immediately on bail by this Court. In this regard, the applicant's counsel has also drawn the attention of Court towards the order dated 23.3.2020 passed by the Apex Court Suo Motu in the aforesaid writ petition and also circular dated 18.3.2020 of this Court whereby the working of court below has been suspended. So far as the order dated 23.3.2020, it is evident that the Apex Court has directed each State/Union Territories to constitute a High Powered Committee to determine which class of prisoners can be released on parole or on interim bail for said period as may be thought appropriate. The Court has directed that the State/Union Territories could consider the release of the prisoners, who have been convicted or under trial for the offence which prescribed punishment upto 7 years or less, with or without fine and the prisoners, who have been convicted for lesser number of years than the maximum. The Apex Court further left it open for the High Powered Committee to determine the category of prisoners, who should be release as aforesaid, depending upon gravity and the nature of offence and other relevant factor thereto. In pursuance of the same, High Powered Committee had been constituted in the State of U.P. as has been informed by the Secretary U.P. Legal Services Authorities Lucknow vide order dated 27th March, 2020 and as per the resolution of the High Powered Committee in its meeting dated 27.3.2020 had issued certain directions regarding convicted and under trial prisoners and has resolved as follows:-

*"**The Committee has resolved that the following category of convicted prisoners (excepts who are Foreign Nationals) to be released on parole on furnishing personal bond with the undertaking written on the personal bond itself that he/she shall surrender before the prison authority after expiry of the parole period.:-***

a) Convicts already on parole would get extended special parole of 08 additional weeks.

b) Convicts who have already availed 01 parole peacefully and surrendered on time will be granted afresh one-time special parole for 08 weeks.

c) Convicts who are not facing a sentence of more than 7 years shall be released on special parole for 08 weeks.

The Committee further resolved that following category of under trial prisoners (except prisoners who are Foreign Nationals) may be released on Interim Bail.

a) Under trial prisoners facing criminal cases in which maximum sentence is 07 years and presently confined in jails may be released on interim bail for 08 weeks by the Sessions Court, Additional

Sessions Court or the Chief Judicial Magistrate including other Judicial Magistrates, as the case may be, on furnishing personal bond with the under taking written on the personal bond itself that he/she shall surrender before the Court after expiry of the interim bail period. Other conditions may be imposed by the Court if it thinks fit, considering the circumstances of the case.

b) The grant of interim bail may be done by visiting the jails, on alternate days, by the Sessions Judge/Additional Sessions Judge/the Chief Judicial Magistrate/other Judicial Magistrates, as the case may be, on the bail applications at the jails itself and it shall be done forthwith. For drafting bail applications, to be moved by under trial prisoners assistance and services of prison officers, jail staff, jail Para Legal Volunteers (PLVs) and Panel Lawyers empanelled with the District Legal Services Authority (DLSA) may be utilized under intimation to the Secretary, DLSA of the concerned district. For this purpose passes shall be issued to the Judges/Magistrate & Panel Lawyers during lock down period by the District Administration.

c) The Undertrial Review Committee contemplated by the Hon'ble Supreme Court in Re Inhuman Conditions in 1382 prisons, (2016) 3 SCC 700, shall meet every week and take such decisions in consultation with the concerned district authority as per the said judgment.

d) Jail Superintendent shall be in continuous touch with concerned Secretary, District Legal Services Authority regarding disposal of interim bail applications moved by the under trial prisoners so that proper arrangements may be made."

15. From a perusal of the resolution of the said Committee, it is apparent that the Committee has resolved to release the under trial prisoners on interim bail, who are facing criminal cases in which the maximum sentence is of 7 years and presently confined in jails, for a period of eight weeks by the competent courts. Thus, the contention of Assistant Solicitor General Sri Gyan Prakash appearing on behalf of the respondent, who vehemently argued that the applicant is not entitled for bail/interim bail as per the order passed by the Apex Court Suo Motu in the aforesaid writ petition by which a High Powered Committee has been constituted as the case of the applicant is distinguishable from the under trial prisoners as the offence in which the applicant has been confined in jail is punishable with a maximum sentence upto 10 years, appears to have substance. Moreover, so far as the risk of applicant being infected due to Corona Virus because of his illness in the lack of following strict norms of social distancing measures including face to face interaction is concerned, it has been pointed by learned Assistant Solicitor General that the applicant is not such a sick person, who is not able to perform normal pursuits of his life as he is only suffering from urinary infection and stated to be having low blood sugar for which there is adequate facility of his treatment in the jail hospital and the applicant had himself admitted that he was admitted in the jail hospital on 27.3.2020. Moreover, the applicant had moved an application before the Special Judge (Companies Act) Kanpur Nagar for providing him home cooked food, clothes, bedding and medicines etc. was not opposed by the S.F.I.O. which is being provided to him and the said fact has not been denied by learned counsel for the applicant. So far as the argument of learned counsel for the applicant with respect to the fact that the applicant had already been

released on bail in the F.I.R. lodged by the C.B.I. with respect to Rotomac Global Pvt. Ltd. for the offence in case crime no. RC/BD1/2018/E/0001 under sections 120-B I.P.C. read with section 420, 467, 468, 471 I.P.C. and section 13 read with section 13 (1) (d) of the Prevention of Corruption Act, 1988 by the Lucknow Bench of this Court on 30.11.2018 against which the S.L.P. filed by the C.B.I. before the Apex Court was dismissed on 22.11.2019 is concerned, it appears from the order passed by the Lucknow Bench of this Court that the applicant, who was one of the Director of the said Company and his father Vikram Kothari was Managing Director, Ms. Sadhna Kothari, who belong to his family were involved along with other public servants, who were Bank officials and the F.I.R. was lodged by the C.B.I. was on the complaint lodged by the Bank of Baroda against RGPL which was aggrieved by some of the transactions of the Company and the officials of the Bank of Baroda in collusion with the applicant and Vikram Kothari, who is the father of the applicant, were involved in forging and fabricating letter of credit and the charge-sheet has been submitted against the applicant and his father Vikram Kothari in the said case. It appears that because of Bank of Baroda being aggrieved by some of the transactions of RGPL had individually made a complaint to C.B.I to investigate the case and the C.B.I. had registered a case on its complaint against the Company in question in which the applicant and his father was Managing Director, hence the said bail order cannot be of any help to the applicant in the present case as the investigation in the present case ordered by the Ministry of Corporate Affairs, by the Central Government in pursuance of the order passed on 21.2.2018 into the fraudulent affairs of RGPL and 10 others and F.I.L. by the SFIO is in **public interest** in view of Section 212 (1) (c) of the Companies Act, 2013 which is a Special Act. It appears from the grounds of arrest received by the applicant on the date of his arrest on 19.3.2020 that the applicant was found to be functioning as the Director of RGPL on 1.12.2004 and as a whole time Director on 16.8.2014 and under his direction he used Mercantile Trade for rotation of funds continuously manipulating and falsified books of account and financial statements of the Company to fraudulently inducing the banks and public financial institutions for obtaining credit facilities. As a result of fraudulent activities the Company has defaulted against outstanding liabilities of ***Rs. 2886/- crores*** approximately to banks and public financial institutions thereby causing wrongful loss to them and his act and omission are punishable under section 447 and 448 of the Companies Act, 2013. He stated that the applicant has been co-operating in the investigation and a day prior to his arrest by respondent, the applicant went for the purpose of interrogation on 19.3.2020 at Delhi and no complaint has been filed till date under the Companies Act, 2013. Learned Assistant Solicitor General appearing on behalf of the respondent through his objection filed has drawn the attention of the Court that the applicant has been arrested for the commission of offence of fraud with Public Sector Banks and Financial Institutions involving total amount of Rs. ***7500/- crores*** approximately (Rs. 4000/- crores approximately in RGPL and Rs. 3500/- crores in F.I.L.) and the Ministry of Corporate Affairs vide order dated 21.2.2018 ordered investigation into the affairs of 11 Companies of Rotomac Group and Frost International Ltd. and during investigation, it has been revealed that the approval was taken from Ministry

of Corporate Affairs to investigate the affairs of another Company, i.e., F.I.L. and Ministry of Corporate Affairs vide order dated 22.8.2019 granted the said approval. There is also a criminal antecedent of the applicant which has been registered by the C.B.I. at the instance of Bank of Baroda in which the C.B.I. has submitted charge-sheet against the applicant and his father Vikram Kothari and is pending trial before the Special Judge, Anti Corruption, CBI Court at Lucknow.

16. Thus, taking into account the nature and gravity of the offence which shakes the conscience of the society and public at large, investigation being still pending and there are strong apprehension that there would be chances of tampering of evidence by the applicant, the prayer of the applicant for grant of immediate release till such time that pandemic COVID-19 (Corona Virus) is curtailed, is hereby refused.

17. Accordingly, the prayer made in the present bail application for immediate release on bail till such time that pandemic COVID-19 (Corona Virus) is curtailed to the applicant, namely, Rahul Kothari pertaining to the Order dated 21.02.2018 issued by respondent no. 2 in furtherance of Order No. 03/117/2018-CL-II (NR) dated 21.02.2018 and Order No. 7/117/2108/CL-II (NR) dated 22.08.2019 under sections 447 read with 36 (c) and 448 of the Companies Act, 2013, is hereby **rejected.**

18. However, it is directed that the I.G. (Prison) State of U.P. Lucknow is directed to ensure that the applicant is kept safely in District Jail, Kanpur Nagar where he is stated to be confined as on date taking all necessary precautions as has been issued by the State of U.P. in the context of Corona Virus (COVID-19) particularly, if any, also with respect to prisoners detained in jail throughout the State.

19. It is further directed that the respondent shall expedite the investigation of the present case and conclude the same at the earliest.

20. It is made clear that any observation made by this Court would not prejudice the right of the applicant for consideration of his regular bail application under section 439 Cr.P.C., if any, filed before this Court or the Court below, as the case may be, as the same has been made only for the disposal of the present bail application.

21. Copy of this order shall be produced by the counsel for the applicants before I.G. (Prison) State of U.P. Lucknow for necessary information and follow up action. The learned Assistant Solicitor General shall also forward a copy of this order to the I.G. (Prison) State of U.P. Lucknow for its immediate follow up and compliance, forthwith.

(2020)03-05ILR A1348
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.04.2020

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Bail No. 12506 of 2019
&
Bail No. 873 of 2020

Sudhanshu Dwivedi ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Brij Mohan Sahai, Pankaj Yadav, Saurabh Shankar Srivastav, Syed Mehfuzur Rehman

Counsel for the Opposite Party:
G.A.

A. Criminal Law- Prevention of Corruption Act,1988-Section 13(2)-Code of Criminal Procedure,1973-Sections 439 & Indian Penal Code,1860-Sections 409, 420, 467, 468, 471, 120B & application-rejection-applicants received brokerage amount from DHFL directly into their bank account-they failed to disclose as to how and why they have received amount into their account-trial court rightly rejected the bail of the accused person.

B. The instant case involves a scam of huge magnitude involving money of 42000 employees of the three Electricity Corporations who have invested it with a hope they would get good return. Trust of employees has been breached by conspiracy of the accused.economic offences constitute a class apart and need to be visited with a different approach in the matter of bail.

C. While granting bail, the court has to keep in mind the nature of accusations, evidence, the severity of the punishment,character and circumastances, reasonable possibility of securing the presence fo accused at trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/state and other similar considerations.

The accused in furtherance of criminal conspiracy with malafide intention for personal gain and in violation of the relavant provisions of law, invested huge amount of two funds. Their malafide decision caused huge loss to these funds to the amount of Rs. 2267.9 crores besides interest.

The application is rejected. (E-6)

List of Cases Cited:-

1. Y.S. Jagan Mohan Reddy Vs. CBI (2013) 7 SCC 439

2. St. Of Bih. Vs. Amit Kumar (2017) 13 SCC 751

3. Rohit Tandon Vs. ED (2018) 11 SCC 46

4. S.F.I.O. Vs. Nitin Johari & anr. (2019) 9 SCC 165

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

1. The present applications under Section 439 Cr.P.C. have been filed seeking bail in FIR No.540 of 2019 inititially registered under Sections 409, 420, 467, 468, 471, 120B IPC. Section 13(2) of the Prevention of Corruption Act has been added subsequently during the course of investigation.

2. On 2nd November, 2019, the aforesaid FIR came to be registered on the complaint of one I.M. Kaushal, Secretary, Trustof Uttar Pradesh Power Corporation Limited (hereinafter referred to as "U.P.P.C.L.") against one Mr. Praveen Kumar Gupta, ex-Secretary (Trust) and Mr. Sudhanshu Dwivedi, the accused-applicant in Bail No.12506 of 2019 who served U.P.P.C.L. in the capacity of Director (Finance) from June 2016 to June 2019.

3. As per the FIR, in pursuance of the implimentation of the Uttar Pradesh ElectricityReforms Transfer Scheme, 2000, the Uttar Pradesh State Electricity Board was divided on 14th January, 2000 into 3 Companies i.e. (i)Uttar Pradesh Power Corporation Limited, (ii) Uttar Pradesh Rajya Vidut Utpadan Nigam Limited, and (iii) Uttar Pradesh Hydro Power Corporation Limited. On 14th January, 2000 itself the employees working in the Uttar Pradesh State Electricity Board were

assigned to the aforesaid three corporations established in pursuance of the Reform Scheme. In respect of all the employees working in these three power corporations, Uttar Pradesh State Power Sector Employees Trust was constituted on 29th April, 2000 under the provisions of the Provident Fund Act, 1952 to manage general provident fund, gratuity fund and pension fund of the employees of three electricity corporaions so consituted.

4. A Trust-deed was executed on 24th April, 2000 for creation of the Trust. As per trust deed, the aforesaid three funds namely, General Provident Fund, Gratuity Fund and Pension Fund created for the benefit of employees of three power corporations shall be called "Uttar Pradesh State Power Sector Employees General Provident Fund", "Uttar Pradesh State Power Sector Employees Gratuity Fund" and "Uttar Pradesh State Power Sector Employees Pension Fund". These funds collectively would be referred to as "Funds'.

5. As per the Trust-deed, the funds vest in Board of Trustees who shall administer the Funds in accordance with the Rules as set out in the Schedule of the Trust-deed. The First Trustees are:

(i)"Chairman cum Managing Director, U.P.P.C.L.' Chairman of the Trust;

(ii) "Chairman cum Managing Director of U.P.R.V.U.N.L.' Member; and

(iii) "Chairman cum Managing Director, U.P. Hydro Power Corporation Ltd.', Member.

6. The other Trustees are to hold office on appointment by nomination or otherwise, in the manner as provided in the Uttar Pradesh State Power Sector Employees General Provident Fund Rules, 2000.

7. Clause 7 of the Trust-deed reads as under:-

"7. That the trustees of the Board shall hold the "Funds' and the amounts accruing in Trust for the Members and beneficiaries of the said "Funds' and shall administer and apply the same in accordance with these presents and the Rules, nevertheless subject to the Provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the Schemes framed thereunder, and the Income Tax Act, 1961 and the Income Tax Rules, 1962."

8. For the management of provident fund of the employees joining the U.P.P.C.L. on 14.01.2000 or later, Uttar Pradesh Power Corporation Contributory Provident Fund Rules, 2004 were enacted and made applicable with effect from 1st April, 2004. Uttar Pradesh Power Corporation Contributory Provident Trust (hereinafter referred to as "CPF") was constituted on 25th June, 2006 under the Provident Fund Act, 1952.

9. Appropriation and the management of Provident Funds of the employees of the Uttar Pradesh State Power Sector Employees Trust and the Uttar Pradesh Corporation C.P.F. Trust was the responsibility of Secretary (Trust) and Director (Finance) U.P.P.C.L. The management and appropriation and other related actions with respect to provident funds account of the employees were to be performed by the Secretary (Trust) and Director (Finance) of both the Trusts in accordance with the directions issued by the Central Government from time to time.

10. The amount deducted from the salaries of the member employees of the Uttar Pradesh State Power Sector Employees Trust and the Uttar Pradesh Corporation Contributory Provident Fund Trust were forwarded to the Trust office by all three Corporations which then were required to be invested by the Secretary (Trust) on the approval of Director (Finance) and trustee and in accordance with the directions issued from time to time by the Board of Trustees in various approved schemes.

11. On 08.05.2013, it was resolved by the Board of Trustees of the U.P. State Power Sector Employees Trust that the amount of the General Provident Fund would be invested in term deposits of the nationalised Banks for a period of 1 to 3 years. Further, it was resolved in the meeting of the Board of Trustees of the Uttar Pradesh State Power Sector Employees Trust on 21st April, 2014 that in case there were alternative investment avenues available which were as safe as investment in the Banks and offered more assured interests, they should be presented after contemplation and, if needed then the Director (Finance) should be duly authorised to take the services of investment advisor.

12. In pursuance of the aforesaid resolutions till October, 2016, Provident Fund amounts of the two Trusts were deposited in the Nationalised Banks in term deposits accruing interest.

13. However, in the month of December, 2016 on the proposal of the then Secretary of the Trust, Mr. Praveen Kumar Gupta, after obtaining the approvals from the then Director (Finance), Mr. Sudhanshu Dwivedi and the then Managing Director, U.P.P.C.C.L., Mr. A.P. Mishra, co-accused,they started investing the G.P.F. and C.P.F. funds in the P.N.B. Housing term deposits. In the same series, the G.P.F. and C.P.F. funds were invested as term deposits by Mr. Sudhanshu Dwivedi and Mr. Praveen Kumar Gupta from March, 2017 in a private institution named Deewan Housing Finance Ltd (hereinafter referred to as "DHFL') without taking the recommendation/cognizance of M.D./Chairman and without any authority of law in illegal and mala fide manner for personal gains.

14. It is further alleged that appropriation of funds was not done in accordance with the notification dated 2nd March, 2015 issued by the Ministry of Finance, Government of India.It is further alleged that according to the aforesaid notification, the funds of non Government Provident Fund could have been invested in the unscheduled commercial banks to the maximum limit of 50%.

15. It is alleged that the forged and fabricated minutes of the meeting of the Board of Trustees of the Contributory Provident Fund allegedly held on 24th March, 2017 were prepared. In the aforresiad meeting it was allegedly resolved that "the Board of Trustees agreed to consider the investment proposals as per the government notification dated 2nd March, 2015 in the securities with higher security and high interest rates other than deposits of nationalised banks in AAA rated Companies. As per prevailing practice, further investment and the securities would be decided by Secretary (Trust) on the case to case basis with the consent/approval of Director (Finance), U.P.P.C.L. trustee.

16. It has been alleged that as per record available in the office of trust from March, 2017 to December, 2018, the then Secretary (Trust) Mr. Praveen Kumar Gupta who was in charge of both C.P.F. and G.P.F. Trust after obtaining approval from the then Director (Finance), Mr. Sudhanshu Dwivedi and transgressing the clear directives of the Government of India as contained in its notification dated 2nd March, 2015 according to which clear directions were issued that the moneys of the employees Provident Fund should not be invested in any of the institutions other than scheduled/unscheduled commercial banks, with ill intentions invested more than 50% of the amount in term deposit of DHFL, knowing well that it did not fall in the category of unscheduled commercial banks and it was an unsecured private institution.

17. It is also alleged that according to the records available, GPF contributions amounting to Rs.2631.20 crores were invested in DHFL out of which only Rs.1185.50 crores have been received by the trust office and an amount of Rs.1445.70 crores plus interest is yet to be received. Similarly, an amount of Rs.1491.5 crores of the Contributory Provident Fund was invested in the DHFL, out of which Rs.669.3 crores have been received by the office of the trust and Rs.822.2 crores plus ineterest is yet to be received.Thus,the total amount of Rs.2267.90 crores (Principal Amount) and interest is yet to be received from the DHFL.

18. It is alleged that the then Director (Finance) and the Secretary Trust by not following the directives issued by the Government of India dated 2nd March, 2015 and investing more than 50% of the amount of employees' GPF and CPF in DHFL have committed the offence of Criminal Breach of Trust.

19. Thus, allegations in sum and substance are that the accused in furtherance of criminal conspiracy with malafide intention for personal gain and in violation of the relevant provisions of law, have invested huge amount of two funds i.e. Uttar Pradesh Power Sector Employees General Provident Fund and Uttar Pradesh Power Corporation Limited Contributory Provident Fund in DHFL, a company incorporated under the Companies Act. Their malafide decision has caused huge loss to these funds to the amount of Rs.2267.9 crores (Principal Amount) besides interest. The investigation has revealed that the investments have been made in the DHFL by the accused for personal gain as they have received the huge amount from DHFL as commission for making such investments.

20. The aforesaid two trusts were created under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and rules made thereunder as well as the provisions of Indian Trust Act, 1882.

21. Rule 11 of the Uttar Pradesh State Sector Employees General Provident Fund Rules 2000 which provides power and function of the secretary of the Trust reads as under:-

"(a) The Company Secretary of the UPPCL shall function as the Secretary of the Board.

(b) The Secretary will be assisted by such staff for the efficient discharge of his function as the Board may decide.

(c) The Director (Finance) of UPPCL and the Secretary of the Board

shall jointly operate the accounts of the Fund."

22. Rule 22 provides investment of the Assets of the fund which reads as under:-

"22.Investment of the Assets of the Fund:

(a) The trustees shall, subject to the Provisions contained herein invest all money of the Fund, in accordance with the provisions of Section 418 of the Companies Act, 1956 and in the manner prescribed by the Central Government from time to time, in this behalf, so however, that the securities in which the money is invested shall be payable in India both in respect of capital and interest.

Provided that the investments must be in accordance with provisions laid down in the Income Tax Rules, 1982 and as may be prescribed by the RPFC.

(b) The Trustees may deposit such sums of money as are not invested in accordance with sub-rule (a) above or are required for day to day needs of the Fund in a Post Office Saving Bank Account or in any Scheduled Bank, and open account or accounts in such Bank or Banks for the purpose in the name of the fund, and such accounts shall be operated by the Director (Finance) of UPPCL and the Secretary of the Board.

(c) All investments made or to be made as aforesaid shall be held in the name of the Fund."

23. Thus, according to the aforesaid Rule 22 the money of the Fund is to be invested in accordance with the provisions of Section 418 of the Companies Act, 1956 and in the manner prescribed by the Central Government from time to time in this behalf. It is also provided that the investments must be in accordance with the provisions laid down in the Income Tax Rules, 1962 and as may be prescribed by the RPFC.

24. Similarly, some of the provisions of UPPCL Contributory Provident Fund Rules, 2004 would be apt to make note of for disposal of the present bail applications.

25. Rule 14 provides for investment of the fund amount which reads as under:-

"14.0 Investment

(i) All moneys of the Fund shall be invested expeditiously not later than the close of the month of recovery subject to such directions the Board may give from time to time. The investments shall be in the securities mentioned or referred to in clause (a) to (d) of Section 20 of the Indian Trust Act, 1882 (II of 1882), provided that such securities are payable both in respect of capital and in respect of interest in India and in such other securities as the Central Government may from time to time approve in this regard. Furthermore guidelines issued by the Ministry of Finance and Ministry of Labour regarding investment pattern shall be followed for making investment.

(ii) All expenses incurred in respect of, and loss, if any, arising from any investment shall be charged to the Fund."

26. Thus, 2004 Rules are Pari materia provisions with the 2000 rules.

27. Section 20 of the Indian Trust Act, 1982 postulates that the investment shall be made in the security satisfying clause (a) to (d) for investment of Trust money reads as under:-

"20. Investment of trust-money.--Where the trust property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to

invest the money on the following securities and on no others:--

(a)in promissory notes, debentures, stock or other securities3[of any4[State Government] or] of the5[Central Government], or of the United Kingdom of Great Britain and Ireland:6[Provided that securities, both the principal whereof and the interest whereon shall have been fully and unconditionally guaranteed by any such Government, shall be deemed, for the purposes of this clause, to be securities of such Government;

(b) in bonds, debentures and annuities7[charged or secured by the8[Parliament of the United Kingdom]9[before the 15th day of August, 1947] on the revenues of India or of the10[Governor-General in Council11] or of any Province11]:12[Provided that after the fifteenth day of February, 1916, no money shall be invested in any such annuity being a terminable annuity unless a sinking fund has been established in connection with such annuity; but nothing in this proviso shall apply to investments made before the date aforesaid;]

12[(bb)in India three and a half per cent. stock, India three per cent. stock, India two and a half per cent. stock or any other capital stock13[which before the 15th day of August, 1947, was] issued by the Secretary of State for India in Council under the authority of an Act of Parliament14[of the United Kingdom] and charged on the revenues of India;15[or which16[was] issued by the Secretary of State on behalf of the Governor-General in Council under the provisions of Part XIII of the Government of India Act, 1935];]

(c)in stock or debentures of, or shares in, railway or other companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council; 15[or by the Central Government] 15[or in debentures of the Bombay 16[Provincial] Co-operative Bank Limited, the interest whereon shall have been guaranteed, by the Secretary of State for India in Council] 13[or the State Government of Bombay]; 17

(d) in debentures or other securities for money issued, under the authority of 18[any Central Act or Provincial Act or State Act], by or on behalf of any municipal body, port trust, or city improvement trust in any Presidency-town or in Rangoon Town, or by or on behalf of the trustees of the port of Karachi:] 19[Provided that after the 31st day of March, 1948, no money shall be invested in any securities issued by or on behalf of a municipal body, port trust or city improvement trust in Rangoon Town, or by or on behalf of the trustees of the port of Karachi;]

(e) on a first mortgage of immovable property situate in 20[any part of the territories to which this Act extends]: Provided that the property is not a lease hold for a term of years, and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the mortgage-money; 21[***] 22[(ee) in units issued by the Unit Trust of India under any unit scheme made under section 21 of the Unit Trust of India Act, 1963 (52 of 1963); or]

(f) on any other security expressly authorized by the instrument of trust, 22[or by the Central Government by the notification in the Official Gazette] or by any rule which the High Court may from time to time prescribe in this behalf: Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (d), (e)

and (f) shall be made without his consent in writing."

28. Section 418 of the Companies Act, 1956 provides that the amount of provident fund shall be deposited in the post office, State Bank of India or in a Nationalised Schedule Bank. The aforesaid provision is applied to safeguard the provident fund deposits of the employees. However, it has been alleged that in clear departure from the statutory provisions, the applicant and co-accused for the purpose of earning illicit brokerage, deposited the provident funds amounts in DHFL, a private entity and such investment was completely unsafe and hazardous. As a consequence of the illegal decisions and actions of the applicant and other co-accused, Rs. 2267.90 crores (Principal Amount) and interest of the provident funds of the employees have been dishonestly misappropriated.

29. Section 418 of the Companies Act 1956 is reproduced here under:-

"418. Provisions applicable to provident funds of employees.

(1)Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such fund (whether by the company or by the employees) or received or accruing by way of interest or otherwiseto such fund shall, within fifteen days from the date of contribution, receipt or accrual, as the case may be, either-

(a)be deposited-

(i)in a post office savings bank account, or

(ii)in a special account to be opened by the company for the purpose in the State Bank of India or in a Scheduled Bank, or

(iii) where the company itself is a Scheduled Bank, in a special account to be opened by the company for the purpose either in itself or in the State Bank of India or in any other Scheduled Bank; or

(b)be invested in the securities mentioned or referred to in clauses (a) to (e) of section 20 of the Indian Trusts Act, 1882 (2 of 1882).

(2)Notwithstanding anything to the contrary in the rules of any provident fund to which sub- section (1) applies or in any contract between a company and its employees, no employee shall be entitled to receive, in respect of such portion of the amount to his credit in such fund as is invested in accordance with the provisions of sub- section (1), interest at a rate exceeding the rate of interest yielded by such investment.

(3)Nothing in sub- section (1) shall affect any rights of an employee under the rules of a provident fund to obtain advances from or to withdraw money standing to his credit in the fund, where the fund is a recognised provident fund within the meaning of clause (a) of section 58A of the Indian Income- tax Act, 1922 (11 of 1922) 3, or where the rules of the fund contain provisions corresponding to rules 4, 5, 6, 7, 8, and 9 of the Indian Income- tax (Provident Funds Relief) Rules.

(4)Where a1trust has been created by a company with respect to any provident fund referred to in sub- section (1), the company shall be bound to collect the contributions of the employees concerned and pay such contributions as well as its own contributions, if any, to the trustees2within fifteen days from the date of collection]; but in other respects, the obligations laid on the company by this section shall devolve on the trustees and shall be discharged by them instead of by the company."

30. Relevant portion of the notification dated 2nd March, 2015 issued by Ministry of Finance is reproduced hereunder:-

"F. No. 11/14/2013-PR.--In partial modification of this Ministry's Notification No. 5(88)/2006-PR dated 14th August, 2008, the pattern of investment to be followed by Non-Government Provident Funds, Superannuation Funds and Gratuity Funds shall be as follows, effective from 1st April, 2015:--

Category	Investment Pattern	Percentage amount to be invested
(i)	Government Securities and Related Investments Government Securities, Other Securities {"Securities' as defined in section 2(h) of the Securities Contracts (Regulation) Act, 1956} the principal whereof and interest whereon is fully and unconditionally guaranteed by the Central Government or any StateGovernment. The portfolio invested under this sub-category of securities shall not be in excess of 10% of the total portfolio of the fund. Units of Mutual Funds set up as dedicated funds for investment in Govt. securities and regulated by the Securities and Exchange Board ofIndia: Provided that the portfolio invested in such mutual funds shall not be more than 5% of the total portfolio at any point of time and fresh investments made in them shall not exceed 5% of the fresh accretions in the year.	Minimum 45%and upto 50%
(ii)	Debt Instruments and Related Investments Listed (or proposed to be listed in case of fresh issue) debt securities issued by bodies	Minimum 35%and upto 45%

corporate, including banks and public financial institutions ("Public Financial Institutions' as defined under Section 2 of the Companies Act, 2013), which have a minimum residual maturity period of three years from the date ofinvestment.	bonds are listed and regularly traded.
Basel III Tier-I bonds issued by scheduled commercial banks under RBI Guidelines: Provided that in case of initial offering of the bonds the investment shall be made only in such Tier-I bonds which are proposed to be listed.	Total portfolio invested in this sub-category, at any time, shall not be more than 2% of the total portfolio of the fund.
Provided further that investment shall be made in such bonds of a scheduled commercial bank from the secondary market only if such Tier I	No investment in this sub-category in initial offerings shall exceed 20% of the initial offering. Further, at any point of time, the aggregate value of Tier I bonds of any particular bank held by the fund shall not exceed 20% of such bonds issued by that Bank.
	Rupee Bonds having an outstanding maturity of at least 3 years issued by institutions of the International Bank for Reconstruction and Development, International Finance Corporation and Asian

DevelopmentBank.

Term Deposit receipts of not less than one year duration issued by scheduled commercial banks, which satisfy the following conditions on the basis of published annual report(s) for the most recent years, as required to have been published by them underlaw:

having declared profit in the immediately preceding three financialyears;

maintaining a minimum Capital to Risk Weighted Assets Ratio of 9%, or mandated by prevailing RBI norms, whichever ishigher;

having net non-performing assets of not more than 4% of the net advances;

having a minimum net worth of not less than Rs. 200Crores.

Units of Debt Mutual Funds as regulated by Securities and Exchange Board of India:

Provided that fresh investment in Debt Mutual Funds shall not be more than 5% of the fresh accretions invested in the year and the portfolio invested in them shall not exceed 5% of the total portfolio of the fund at any point in time.

The following infrastructure related debtinstruments :

Listed (or proposed to be listed in case of fresh issue) debt securities issued by body corporates engaged mainly in the business of development or operation and maintenance of

infrastructure, or development, construction or finance of low costhousing.

Further, this category shall also include securities issued by Indian Railways or any of the body corporates in which it has majorityshareholding.

This category shall also include securities issued by any Authority of the Government which is not a body corporate and has been formed mainly with the purpose of promoting development of infrastructure.

It is further clarified that any structural obligation undertaken or letter of comfort issued by the Central Government, Indian Railways or any Authority of the Central Government, for any security issued by a body corporate engaged in the business of infrastructure, which notwithstanding the terms in the letter of comfort or the obligation undertaken, fails to enable its inclusion as security covered under category (i) (b) above, shall be treated as an eligible security under this sub-category.

Infrastructure and affordable housing Bonds issued by any scheduled commercial bank, which meets the conditions specified in (ii)(d)above.

Listed (or proposed to be listed in case of fresh issue) securities issued by Infrastructure debt funds operating as a Non-Banking

Financial Company and regulated by Reserve Bank ofIndia.

Listed (or proposed to be listed in case of fresh issue) units issued by Infrastructure Debt Funds operating as a Mutual Fund and regulated by Securities and Exchange Board ofIndia.

It is clarified that, barring exceptions mentioned above, for the purpose of this sub-category (f), a sector shall be treated as part of infrastructure as per Government of India's harmonized master-list of infrastructure sub-sectors:

Provided that the investment under sub-categories (a), (b) and (f) (i) to (iv) of this category No. (ii) shall be made only in such securities which have minimum AA rating or equivalent in the applicable rating scale from at least two credit rating agencies registered with Securities and Exchange Board of India under Securities and Exchange Board of India (Credit Rating Agency) Regulation, 1999. Provided further that in case of the sub-category (f) (iii) the ratings shall relate to the Non-Banking Financial Company and for the sub-category (f) (iv) the ratings shall relate to the investment in eligible securities rated above investment grade of the scheme of the fund.

Provided further that if the securities/entities have been rated by more

		than two rating agencies, the two lowest of all the ratings shall beconsidered. Provided further that investments under this category requiring a minimum AA rating, as specified above, shall be permissible in securities having investment grade rating below AA in case the risk of default for such securities is fully covered with Credit Default Swaps (CDSs) issued under Guidelines of the Reserve Bank of India and purchased along with the underlying securities. Purchase amount of such Swaps shall be considered to be investment made under thiscategory. For sub-category (c), a	single rating of AA or above by a domestic or international rating agency will be acceptable. It is clarified that debt securities covered under category (i) (b) above are excluded from this category (ii).
	(iii)	Short-term Debt Instruments and Related Investments Money market instruments: Provided that investment in commercial paper issued by body corporates shall be made only in such instruments which have minimum rating of A1+ by at least two credit rating agencies registered with the Securities and Exchange Board of India. Provided further that if commercial paper has been rated by more	Upto 5%

	than two rating agencies, the two lowest of the ratings shall be considered. Provided further that investment in this sub-category in Certificates of Deposit of up to one year duration issued by scheduled commercial banks, will require the bank to satisfy all conditions mentioned in category (ii) (d) above. Units of liquid mutual funds regulated by the Securities and Exchange Board of India. Term Deposit Receipts of up to one year duration issued by such scheduled commercial banks which satisfy all conditions mentioned in category (ii) (d)above.		Shares of body corporates listed on Bombay Stock Exchange (BSE) or National Stock Exchange (NSE), which have: Market capitalization of not less than Rs. 5000 crore as on the date of investment;and Derivatives with the shares as underlying, traded in either of the two stockexchanges. (b) Units of mutual funds regulated by the Securities and Exchange Board of India, which have minimum 65% of their investment in shares of body corporates listed on BSE or NSE. Provided that the aggregate portfolio invested in such mutual funds shall not be in excess of 5% of the total portfolio of the fund at any point in time
(iv)	Equities and Related Investments	Minimum 5% and upto 15%	

		and the fresh investment in such mutual funds shall not be in excess of 5% of the fresh accretions invested in the year. Exchange Traded Funds (ETFs)/Index Funds regulated by the Securities and Exchange Board of India that replicate the portfolio of either BSE Sensex Index or NSE Nifty 50Index. ETFs issued by SEBI regulated Mutual Funds constructed specifically for disinvestment of shareholding of the Government of India in bodycorporates. Exchange traded derivatives regulated by the Securities and Exchange Board of India having the underlying of any permissible listed stock or any of the permissible indices, with the sole purpose ofhedging. Provided that the portfolio invested in derivatives in terms of contract value shall not be in excess of 5% of the total portfolio invested in sub-categories (a) to (d) above.	
	(v)	Asset Backed, Trust Structured and Miscellaneous Investments Commercial mortgage based Securities or Residential mortgage based securities. Units issued by Real Estate Investment Trusts regulated by the Securities and Exchange Board ofIndia. Asset Backed Securities regulated by the Securities and Exchange Board ofIndia. Units of	Upto 5%

Infrastructure Investment Trusts regulated by the Securities and Exchange Board of India.
Provided that investment under this category No. (v) shall only be in listed instruments or fresh issues that are proposed to be listed.
Provided further that investment under this category shall be made only in such securities which have minimum AA or equivalent rating in the applicable rating scale from at least two credit rating agencies registered by the Securities and Exchange Board of India under Securities and Exchange Board of India (Credit Rating Agency) Regulations, 1999. Provided further that in case of the sub-categories (b) and (d) the ratings shall relate to the rating of the sponsor entity floating thetrust.
Provided further that if the securities/entities have been rated by more than two rating agencies, the two lowest of the ratings shall beconsidered.

31. Heard Mr. Saurabh Shankar Srivastava and Mr.P. Chakravarty, learned counsels for the applicants, Mr. V.K Shahi, learned Additional Advocate General and Mr. Anurag Verma for the State.

32. The applicant, Sudhanshu Dwivedi was appointed as Director (Finance) of UPPCL on 30th June, 2016.In the capacity of Director (Finance) of UPPCL, he became Trustee of the aforesaid two trusts.

33. So far as accused-applicant, Sudhanshu Dwivedi is concerned, Mr.Saurabh Shankar Srivastava, learned counsel has submitted that it was largely the secretary of the trust who was also the General Manager (Finance and Accounts) of U.P.P.C.L. who in fact was looking after its day to day operations along with his assisting team. He has further submitted that initially the monies of the provident funds were invested in term deposits with the schedule Nationalised Banks. However,

when better interest rates were offered by unscheduled commercial banks, they became the preferred investment avenues. After demonetisation and following economic slowdown, the term deposits with the banks started yielding much lower rates of interest and as such the Board of Trustees in the best interest of the employees, explored the new investment avenues and, therefore, it was collectively decided by the trustees that the investment can be done in the AAA rated Housing Finance Companies which were duly recognised by the National Housing Bank, a body constituted under the National Housing Bank Act, 1987 which gives due recognition to the housing finance Companies operational in India on the basis of several qualifying variables. He has further submitted that in December 2016, it was unanimously resolved by the Board of Trustees that in order to get best returns on the funds, the monies would be invested in the term deposits with Punjab National Bank Housing Company which yielded better returns than those offered by the banks.

34. The Secretary of the trust informed that better rates were offered by DHFL which was a AAA rated company and was also duly recognised by the National Housing Bank. Thereafter, an opinion was sought from all the trustees including the applicant. Learned counsel has submitted that role of the applicant was only to the extent of recommending on the financial health and viability of the DHFL. The applicant conducted an extensive research and found that the top investors of the DHFL were the variousscheduled banks including State Bank of India and many other well recognised companies and investment funds. After making such exercise, he approved DHFL for investment. It is also submitted that some dispute erupted between the DHFL and Reliance Nippon Asset Management Limited and the matter went to the Bombay High Court in Commercial Suit (Lodging) No.1034 of 2019 and, the Bombay High Court by an oral order dated 30th September, 2001 restrained the DHFL from making any payments to any of its other creditors without the leave of the Court.

35. Learned counsel for the accused-applicant has also submitted that notification of the Government of India dated 2nd March, 2015 is not applicable on the twoTrusts as they are not registered with the EPFO which regulates the Provident Funds which are registered with it and are exempted in accordance with the Employees Provident Fund and Miscellaneous Provisions Act, 1952. It is further submitted that since the Trusts are not registered with EPFO, the investments done by UPPCL are to be treated as the ones essentially coming from a company and not from the trust.

36. It is further submitted that the decision to invest in the DHFL was approved by the Board of trustees in its meeting held on 22-24th April 2017 in which Mr Sanjay Agrawal, Chairman UPPCL and Trust, Mr. A.P. Mishra, Managing Director, UPPCL, Mr. Satya Prakash Pandey, Director (P & A) U.P.P.C.L.and Trustee, Mr Sudhanshu Dwivedi, the Director (Finance) and Mr. P. K. Gupta, General Manager (F & A,) Secretary (Trust) were present. It is further submitted that all these persons had signed the resolution. It is said that Sanjay Agrawal was the Chairman who signed the resolution but he has not been made the accused as he is an influential person. It is further submitted that the decision on

investment was not taken with a malafide intention and, there is nothing in evidence which would connect illegal gratification/commission having been paid to the accused-applicant by DHFL in lieu of investment made. He has further submitted that he acted with due care and with bonafide intention and there is no criminality involved for which he is being prosecuted. Investments made in DHFL were for earning better rate of interest in favour of the employees and, therefore, the FIR in question has been lodged in hurried manner and , the accused applicant should be enlarged on bail.

37. In the Supplementary affidavit, it has been stated that the accused applicant had only rendered an advice on investment in DHFL and measuring its then excellent financial health, he had himself invested Rs.20 lakh of his GPF fund in the said Company. Since the proceedings under the insolvency and bankruptcy code have been initiated against the DHFL,the accused-applicant has also filed this claim before the NCLT, Bombay. In view of the aforesaid, it has been submitted that the accused-applicant did not have any malafide intention in giving consent for investment of funds in DHFL.

38. Mr. V.K. Shahi, learned Additional Advocate General has submitted that the management and investment of the GPF/PPF amount of all the 42000 employees of the Power Corporation was required to be carried out in conformity with GPF Rules, 2000, CPF Rules, 2004 and the Gazette notification of Government of India dated 2nd March, 2015. These rules specifically provide that the investment is to be made in accordance with the rules and the notifications issued by the Government of India. He, therefore, has submitted that there is no substance in the submission of the learned counsel for the accused-applicant that the Government of India notification dated 2nd March 2015 has no application in respect of the two Trusts whose money was invested in DHFL. He has further submitted that the notification dated 2nd March, 2015, spells out in detail the investment patterns, which is required to be followed and adhered to in making investments of CPF amounts. He has further submitted that investment in DHFL has been made in blatant violation of the guidelines, contained in the notification dated 2nd March, 2015 as well as GPF Rules, 2000 and CPF Rules 2004 as well as provisions of Indian Trust Act and Indian Companies Act, 1956.

39. It has been further submitted that the Director (Finance), Secretary and Managing Director of UPPCL being trustees were under duty and responsibility to invest GPF and CPF contributions of the employees safely and in accordance with law. However, for the illicit purposes of earning brokerage amount, the applicant in connivance with the Secretary, P. K. Gupta and Managing Director, A.P. Mishra invested GPF and CPF contributions of the employees in GPF and CPF Trusts illegally and unsafely invested in the shape of FDRs in DHFL, a non banking financial company.

40. It has been further submitted that the decisions regarding investment of PF amount, could have been taken only by the Board of trustees, however, in the instant case no meeting of Board of trustees was convened and on 17th December, 2016 the applicant, Mr, Praveen Kumar Gupta and A.P. Mishra co-accused took a decision for investment of provident fund amount in PNB Housing Finance. Subsequently,the

investment was made in LIC Finance Company in defiance of the provision of law and stipulation. In the same series on 16th March 2017, the investments were unlawfully made in DHFL. To ratify the investments so made and in furtherance of illegal and malafide designs, allegedly a meeting of the Board of trustees was convened on 24th March, 2017 by circulation. The minutes of the said meeting were also found to be false, forged and fictitious. Mr Sanjay Agrawal, a senior IAS official has mentioned in his statement that his alleged signatures on the minutes of meeting, allegedly convened on 24th March, 2017 are forged and fictitious. In the Supplementary affidavit filed by the State, a true copy of the report of the Forensic Science Laboratory, Uttar Pradesh, Mahanagar, Lucknow in respect of the forged signature in the minutes of alleged meeting of the Board dated 24th March, 2017 has been placed on record. It has been found that the signatures of Mr Sanjay Agrawal on the minutes of the alleged meeting of the Board of Trustees held on 24.03.2017 are forged and he did not append his signatures.

41. Thus, it is submitted that only the Board of Trustees comprising of 10 members was empowered to take appropriate decisions with regard to investment of CPF and GPF amounts. However, the accused-applicant being Director (Finance),P.K. Gupta,(Secretary,Trust) and Mr. A.P. Mishra (Managing Director) of UPPCL and trustee in furtherance of criminal conspiracy and to earn illicit brokerage amount, without convening any meeting of the Board of trustees, carried out authorised and illegal investments of the provident fund amounts in clear breach and violation of the Rules and provisions of Indian Trust Act and Companies Act, Provident Funds and Miscellaneous Provisions Act, 1952 and Government of India notifications.

42. It has been further submitted that the amount of brokerage was transmitted from DHFL to 14 companies including Alpine Associates, a company run and operated by one Ashish Chaudhari, a close confidant of accused, Abhinav Gupta s/o Mr. P. K. Gupta. The brokerage amount was subsequently transferred to several other firms through RTGS with the assistance of certain Chartered Accountants. The said firms in turn, for the purposes of justifying their proscribed money, made cash payments to several Chartered Accountants and the money after exchange of several hand, reached Abhinav Gupta s/o Praveen Kumar Gupta, Secretary (Trust).

43. Mr. Abhinav Gupta has stated in his statement before the investigating officer that a sum of approximately 30 crores was received as brokerage from C.A., Lalit Goyal and, the said amount was divided amongst the present applicant Director (Finance), P.K.Gupta (Secretary,Trust) and A.P. Mishra (Managing Director). A copy of the statement given by accused, Abhinav Gupta has been placed on record with the counter affidavit.

44. I have considered the submissions and the provisions of the relevant rules and the Acts carefully.

45. The accused-applicant was Director (Finance) and the trustee who was to operate the account of the trust with secretary of the Trusts. He was the person who recommended for investment in the DHFL.The investments were made on 16th

March, 2017 without there being any authorisation of the Board of Trustees, but to justify the investment forged minutes of meeting allegedly held on 24th March, 2017 were prepared on which signature of the Chairman, Mr Sanjay Agrawal were forged. Statement of Abhinav Gupta s/o Praveen Kumar Gupta has prima facie disclosed that the brokerage amount of Rs.30 crores was given by DHFL for making investment and this brokerage amount was divided among three accused. The acts of commission and omission of the accused along with other co-accused have caused huge loss to the two trusts created for the welfare of poor 42000 employees of the threee electricity corporations out of their hard earnrd money.

46. The economic crime of such scale and magnitute are carefully and meticulously planned and executed. It is well settled that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. While granting bail, the court has to keep in mind the nature of accusations, magnitude and gravity of offence and nature of evidence in support of the accusations.

47. The Supreme Court in the case of **Y.S. Jagan Mohan Reddy vs CBI: (2013) 7 SCC 439** in paras 34 and 35 in respect of granting bail in economic offences having deep rooted conspiracy and large public money involved has held as under:-

"34.Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35.Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country."

48. In judgment rendered in the case of **State of Bihar Vs. Amit Kumar (2017) 13 SCC 751**, it has been held that while considering the bail involving socio-economic offences stringent parameters should be applied. Paras 8-9 of the said judgment are extracted hereunder:-

"8.A bare reading of the order impugned discloses that the High Court has not given any reasoning while granting bail. In a mechanical way, the High Court granted bail more on the fact that the accused is already in custody for a long time. When the seriousness of the offence is such the mere fact that he was in jail for however long time should not be the concern of the courts. We are not able to appreciate such a casual approach while granting bail in a case which has the effect of undermining the trust of people in the integrity of the education system in the State of Bihar.

9.We are conscious of the fact that the accused is charged with economic offences of huge magnitude and is alleged to be the kingpin/ringleader. Further, it is alleged that the respondent-accused is involved in tampering with the answer sheets by illegal means and interfering with

the examination system of Bihar Intermediate Examination, 2016 and thereby securing top ranks, for his daughter and other students of Vishnu Rai College, in the said examination. During the investigation when a search team raided his place, various documents relating to property and land to the tune of Rs 2.57 crores were recovered besides Rs 20 lakhs in cash. In addition to this, allegedly a large number of written answer sheets of various students, letterheads and rubber stamps of several authorities, admit cards, illegal firearm, etc. were found which establishes a prima facie case against the respondent. The allegations against the respondent are very serious in nature, which are reflected from the excerpts of the case diary. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the credibility of the education system of the State of Bihar."

49. Further, the aforesaid view has been reiterated in the case of **Rohit Tandon vs Directorate of enforcement (2018) 11 SSC 46**. Paras 21 and 22 of the aforesaid judgement read as under:-

"21.The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the 2002 Act.

22.It is not necessary to multiply the authorities on the sweep of Section 45 of the 2002 Act which, as aforementioned, is no more res integra. The decision in*Ranjitsing Brahmajeetsing Sharmav.State of Maharashtra[Ranjitsing Brahmajeetsing Sharmav.State of Maharashtra*, (2005) 5 SCC 294 : (2005) SCC (Cri) 1057] and*State of Maharashtrav.Vishwanath Maranna Shetty[State of Maharashtrav.Vishwanath Maranna Shetty*, (2012) 10 SCC 561 : (2013) 1 SCC (Cri) 105] dealt with an analogous provision in the Maharashtra Control of Organised Crime Act, 1999. It has been expounded that the Court at the stage of considering the application for grant of bail, shall consider the question from the angle as to whether the accused was possessed of the requisite mens rea. The Court is not required to record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is required to record a finding as to the possibility of the accused committing a crime which is an offence under the Act after grant of bail.

50. The Supreme Court in its judgement in **Serious Fraud Investigation Office Vs. Nitin Johri and another, (2019) 9 SCC 165**, while considering the

factors to be taken into account while considering the bail involving serious economic offences in para 24-27 has held as under:-

"24.At this juncture, it must be noted that even as per Section 212(7) of the Companies Act, the limitation under Section 212(6) with respect to grant of bail is in addition to those already provided in CrPC. Thus, it is necessary to advert to the principles governing the grant of bail under Section 439 of CrPC. Specifically, heed must be paid to the stringent view taken by this Court towards grant of bail with respect of economic offences. In this regard, it is pertinent to refer to the following observations of this Court in*Y.S. Jagan Mohan Reddy[Y.S. Jagan Mohan Reddyv.CBI*, (2013) 7 SCC 439 : (2013) 3 SCC (Cri) 552] : (SCC p. 449, paras 34-35)

"34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."

This Court has adopted this position in several decisions, including*Gautam Kunduv.Directorate of Enforcement[Gautam Kunduv.Directorate of Enforcement*, (2015) 16 SCC 1 : (2016) 3 SCC (Cri) 603] and*State of Biharv.Amit Kumar[State of Biharv.Amit Kumar*, (2017) 13 SCC 751 : (2017) 4 SCC (Cri) 771] . Thus, it is evident that the above factors must be taken into account while determining whether bail should be granted in cases involving grave economic offences.

25.As already discussed supra, it is apparent that the Special Court, while considering the bail applications filed by Respondent 1 both prior and subsequent to the filing of the investigation report and complaint, has attempted to account not only for the conditions laid down in Section 212(6) of the Companies Act, but also of the general principles governing the grant of bail.

26.In our considered opinion, the High Court in the impugned order has failed to apply even these general principles. The High Court, after referring to certain portions of the complaint to ascertain the alleged role of Respondent 1, came to the conclusion that the role attributed to him was merely that of colluding with the co-accused promoters in the commission of the offence in question. The Court referred to the principles governing the grant of bail as laid down by this Court in*Ranjitsing Brahmajeetsing Sharmav.State of Maharashtra[Ranjitsing Brahmajeetsing Sharmav.State of Maharashtra*, (2005) 5 SCC 294 : 2005 SCC (Cri) 1057] , which discusses the effect of the twin mandatory conditions pertaining to the grant of bail for offences under the Maharashtra Control of Organised Crime Act, 1999 as laid down in Section 21(4) thereof, similar to the conditions embodied in Section 212(6)(ii) of the Companies Act. However, the High Court went on to grant bail to Respondent 1 by observing that bail was justified on the "broad probabilities" of the case.

27.In our considered opinion, this vague observation demonstrates non-application of mind on the part of the Court even under Section 439 CrPC, even if we keep aside the question of satisfaction of the

mandatory requirements under Section 212(6)(ii) of the Companies Act."

51. The present case involves a scam of huge magnitude involving money of 42000 employees of the Three Electricity Corporations who had invested it with a hope that they would get good return on it at the time they would need money. Trust has been breached in criminal conspiracy by the accused which has resulted huge loss to the two Trusts resultantly to the employees. The accused is an influential person. The money trail is yet to be completely discovered and, therefore, at this stage, the accused-applicant cannot be released on bail.

52. The trial court in well considered order has rejected the bail application of the accused applicant. I have not been persuaded to take a different view than taken by the trial court. In view thereof, the bail application of the accused, Sudhanshu Dwivedi is ***rejected***.

53. So far as bail application of the accused-applicant, Vikas Chawla is concerned, as per the prosecution version, name of the accused-applicant has come into light during the course of Investigation. Role of the the accused-applicant in the offence is that of receiving brokerage amount from DHFL directly into his bank account which the accused failed to disclose/ account for as to how and why he has received the said amount into his account.

54. The accused has received huge brokerage amount of Rs.5.69 crores in his account from DHFL directly for which he has not accounted properly and satisfactorily.This is a documentary evidence. He has not been able to show anything for having any connection with DHFL or having any business relation with DHFL. The allegation against the accused-applicant is that he along with others have criminally conspired to commit the offence by receiving the said brokerage amount from the DHFL. Direct brokerage details are part of the case diary which prima facie reveals that the several times amounts were transmitted by the DHFL to several companies. The said brokerage amount is in crores. The accused company's name also find place at Serial No.4 and Serial No.14 which reveals that the brokerage amount has also been received by the company of the accused.

55. Whether the accused had knowledge of the above mentioned transactions with the DHFL or the Chartered Accountant had kept him in dark, is a matter of Investigation and evidence which would not be seen at this stage.

56. Considering the allegation and the evidence available on record and the fact that a deep rooted conspiracy involved in the present case, I do not find it to be appropriate to release the accused applicant on bail at this stage and thus, his bail application is also ***rejected***.

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(2020)03-05ILR A1371
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Crl. Misc. Ist Bail Application No. 33603 of 2017

Ram Pratap ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Smt. Meenakshi Chauhan, Abhilasha Singh, Sri Ashutosh Yadav, Sri S.P.S. Chauhan, Sri Shyam Lal, Sri Gaurav Kumar

Counsel for the Opposite Party:

A.G.A.

A. Criminal Law--Dowry Prohibition Act, 1961 - Sections 498-A, 304-Section ¾ Indian Penal Code, 1860-application-adjournment-Counsel for applicant did not appear to argue-the applicant is in jail for 3 years- counsel did not show any interest to argue the matter.(Para 2)

The matter is adjourned. (E-6)

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

1. A request has been made by Sri Gaurav Kumar, Advocate holding brief of Sri S.P.S. Chauhan, learned counsel for applicant to adjourn this matter today.

2. This bail application is pending since 2017 and applicant is in jail since 17.08.2016. It appears that learned counsel for last more than three and half years did not make any attempt to argue the case and allowed detention of his client in jail. Even today, he did not show any interest by arguing the matter. He does not want to give a chance to his client to celebrate Holi at his residence.

3. Under these circumstances, I have no option but to adjourn this matter for today.

4. List in the next cause list.

(2020)03-05ILR A1372
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.02.2020

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Crl. Misc. Bail Application No. 44814 of 2019

Swami Chinmayanand @ Krishna Pal Singh ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Dileep Kumar, Sri Rajrshi Gupta, Sri Manish Singh, Sri Raj Kumar Singh Chauhan

Counsel for the Opposite Party:
A.G.A., Sri R.K. Jain, Sri Swetashwa Agarwal

A. Criminal Law-Indian Penal Code,1860-Sections 376-C, 354-D, 342 , 506 & Code of Criminal Procedure 1973-Section 439-application-allowed-it is a complete matter of quid pro quo-greed for extracting money advanced the prosecutrix for hatching a conspiracy against the accused and tried to blackmail him.(Para 31)

At the stage of considering bail application, detailed examination of the merits or demerits of the materials relied upon by the prosecution, should be avoided. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case such as nature and severity of punishment, character, behaviour, reasonable apprehension of tampering with the witnesses.(Para 17 to 23)

The application is allowed. (E-6)

List of cases cited:-

1. St. of U.P. Thru CBI Vs. Amarmani Tripathi (2005) 8 SCC 21

2. Shri P. Chidambaram Vs. CBI in Crl. Appeal No. 1603 of 2019

3. Nikesh Tarachand Shah Vs. UOI & anr.in W.P.(Crl) No. 67 of 2017

4. Gudikanti Narasimhulu Vs. Public Prosecutor, HC of A.P.(1978) AIR 429,(1978) SCR (2) 371

5. Gurcharan Singh Vs. St.(Delhi Administration){ (1978) 1 SCC 118 : 1978 SCC (Cri) 41}

6. Gurbaksh Singh Sibbia Vs. St. Of Punj. (1980) 2 SCC 565

7. Nagendra Vs. King-Emperor (1924) AIR Cal 476

8. Emperor Vs. Hutchinson (1931) AIR All 356

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

1. Battery of lawyers headed by Sri Dileep Kumar, learned Senior Advocate assisted by Sri Rajrshi Gupta, Manish Singh, Raj Kumar Singh Chauhan for the applicant, Sri Ravi Kiran Jain, learned Senior Advocate assisted by Sri Swetashwa Agarwal, learned counsel for the complainant, Sri SK Pal, learned G.A., Sri Ghanshyam Kumar, learned AGA assisted by Sri Mohd. Afzal, brief holder were heard at length.

2. The pleadings between the parties have been exchanged and matter is ripe for final arguments.

3. The instant is a much discussed case in the social media/news papers which has created upheaval and turmoil in the society whereby the accused applicant Chinmayanand, Ex-Member of Parliament who once also adorned the post of Minister for internal affairs in the Government of India is suffering incarceration in jail since 20th August, 2019 in connection with Case Crime No. 0445 of 2019, P.S. Kotwali, District Shahjahanpur. The FIR of the case was initially registered by Harish Chandra Sharma, father of the alleged victim, Miss "A", on 27.08.2019 under sections 364 and 506 IPC at P.S. Kowali, District Shahjahanpur naming the applicant Swami Chanmayanand, Rector of SS Law College, Shahjahanpur as well as certain other persons. Eventually, an Special Investigating Team, constituted on the directions of the Hon'ble Apex Court, when the Hon'ble Apex Court has taken a *suo moto* cognizance Writ (Crl) No. 2 of 2019, entitling **"In Re- MISSING OF AN LL.M. STUDENT AT SWAMI SUKHDEVANAND LAW COLLEGE (SS LAW COLLEGE), FROM SHAHJAHANPUR, U.P.**, vide its direction dated 02.09.2019. The aforesaid team, after collecting the evidence during investigation, submitted its report under section 173 (2) of the Code of Criminal Procdure (in short "Cr.P.C.") under sections 376-C, 354-D, 342 and 506 IPC against the sole named accused- Swami Chinmayanand alias Krishna Pal Singh and learned Magistrate took cognizance for the aforesaid offence against the accused.

4. In the FIR, lodged by Harish Chandra Sharma, father of the alleged victim, the complainant has admitted that his daughter was persuing her LL.M. Education from SS Law College, Shahjahanpur and she was residing in the hostel of the aforesaid College. He alleged therein that since 23.08.2019, the mobile telephone of the victim was switched off and through the facebook account of (Miss "A"-daughter of Harish Chand) saw certain videos and pictures uploaded by the daughter. For the first time, came to know

that her daughter and some other girls were being subjected to sexual misadventures by the accused applicant and they are being extended threats for their lives by his hired goons. He further raised his eyebrows alleging therein that his daughter is being duped in hot water by the miscreants, including the named applicant. In advancement of the allegation, the complainant mentioned that the whereabouts of his daughter is not known and in distress. When he in-vainly tried to contact the accused-Chinmayanand alias Krishna Pal Singh on phone, yielded no result, her room in the hostel of the alleged victim was found locked. It was highlighted in the aforesaid FIR that the accused-applicant is a man of status, high stature and being political giant, he along with his accomplice is quite capable to spindle with the evidence and room of the victim was desired to be sealed by the authorities in front of responsible media personals.

5. Beyond the aforesaid FIR, it is quite evident that only relying upon the evidence of the facebook account and uploaded videos, father of the alleged victim has galvanized and prompted the present FIR. It appears from the text of the FIR, lodged by father that there was no direct contact between the daughter and her father. The relationship between father and the daughter seems to be quite strange as they were having no direct contacts and were alien to each other and the father was taking stock of the situation of his daughter through her facebook account.

6. During the pendency of the present bail application one more development came into fora, when the copy of another FIR was demonstrated before this Court, which was lodged on 25.08.2019 for the incident occurred on 22.08.2019 at P.S. Shahjahanpur, District Shahjanapur lodged by one Om Singh, Advocate, the legal supervisor of the Mumukshu Ashram, Shahjahanpur (said to be owned by the accused applicant- Swami Chinmayanand alias Krishna Pal Singh). In fact, a case was lodged by Om Singh on 25.08.2019 for the incident of 22.08.2019 bearing CC No. 442 of 2019 under sections 387, 507 IPC and 67 of the Information Technology (Amendment) Act 2008 against unknown holder of mobile No. 8604207465 with the allegation on the holder of above mobile, that the applicant (herein accused) received a call on his mobile no. 9415326300 from the aforesaid phone (No. 8604207465) demanding ransom of Rs. Five Crore and threatening him of defamation in the society by making certain nude videos and pictures of the accused, viral in the social network, if the aforesaid ransom demand remains unfulfilled. The gist and substance of CC No. 442 of 2019, lodged on 25.08.2019 derives that it was got registered as a contrivance only to malign the stature and status to the extent of assassination of the applicant's character.

Fortifying the aforesaid narratives of the allegations, it is contended that soon thereafter sensing some rat in the dirty ragged story, father of Miss "A"- Harish Chanda lodged CC No. 445 of 2019 on 27.08.2019 in a foxy manner and design, two days after the aforesaid FIR, enrolling applicant as accused and slapping all sort of malicious allegations upon him to reduce his high reputation into ashes. To build up mountain of his argument, learned counsel for the applicant submitted that the complainant of the aforesaid FIR, even has diced his daughter Miss "A" to win the dirty game for the sake of monetary and material gains.

7. After lodging FIR No. 0442 of 2019 against the holder of mobile phone number 8604207465, the police investigated the matter by hotly pursued accused, who were at run, who demanded the ransom amount from the applicant. This

fact was also much tossed in the print and in the electronic media and the Hon'ble Apex Court took *suo-moto* cognizance of both the matters in Writ (Criminal) No. 2 of 2019 re: **Missing of an LL.M student at Swami Shukhdevana Law College (SS Law College) from Shahjahanpur** under section PIL-W on the new papers report as well as on online new portals stating therein that an LL.M student Miss "A" of the aforesaid College is missing from 24.08.2019, wherein the missing girl levelled certain allegations on the persons running the institutions in SS Law College. When the the matter was taken up for consideration by Hon'ble the Apex Court on 30.08.2019, learned counsel appearing for the petitioners informed the Court that the missing girl has been located in Rajasthan and she was enroute to Shahjahanpur. It was directed by the Court that the missing girl shall be produced within two and half hours before the Court. Thereafter on the same day at about 7.30 P.M. on 30.08.2019 the missing girl "A" appeared before the Court. She stated before the Court on camera, that prior to Raksha Bandhan, she left Shahjahanpur along with her three collegemates, who were also her "family friends". She made certain grievances against the institution as well as the management of the College, made certain apprehensions and refuted to return to her home State without meeting and conversing with her parents at Delhi. Subsequently on the suggestions of the Amicus Curiae, the registry of the Court was directed to ensure the stay Miss "A" in All India Woman's Conference "Bapnu Ghar" at Bhagwan Das Marg, New Delhi for four days the alleged victim girl was also permitted to talk to her parents on landline phone installed therein. Furthermore, relying upon the aforesaid statement of Miss "A" the Commissioner of Police, Delhi was directed to constitute a police team for escorting the parents of Miss "A" from Shahjahanpur to New Delhi to meet her. On 2nd September 2019 the case was again taken up by the Hon'ble Apex Court.

8. Sri Dileep Kumar, learned Senior Advocate appearing for the applicant pointed out that in the aforesaid statement the alleged victim girl before Hon'ble Apex Court did not even whisper of any sexual assault upon her by the applicant or any other person at Shahjahanpur, though she raised certain grievances against the institution as well as the management. It is contended by learned Senior Advocate Sri Dilip Kumar that the victim is a major girl, student of LL.M. had got fullest opportunity to share all her so-called atrocities faced by her during almost one year by the accused applicant, at least to her blood relations (parent) but astoundingly, kept mum and not only this Miss "A" also maintained her aberrant silence before the highest Court of the country. A girl, whose virginity is at stake, not uttering a single word to her own parent or before the Court regarding the alleged incident, is an astonishing conduct which speak volumes about the ingeniousness of the prosecution story.

9. Both the cases i.e. Case Crime No. 0445 of 2019 under sections 364 and 506 IPC and CIR No. 0442 of 2016 under sections 387, 507 and 67 of the Information and Technology Act were entrusted to the Special Investigation Team for investigation, lead by Shri Navin Arora (IGP, Public Grievance Cell).

10. Learned counsel for the applicant has drawn attention of the Court to the letter written by Miss "A" dated 05.09.2019

addressed to the Incharge Inspector, Lodhi Colony, South Delhi vide DD No. 42 -A wherein for the first time, after her missing report, she narrated the entire saga of outrageous criminality committed upon her since October 2018 to July 2019. The aforesaid letter is self revealing wherein she has given vivid description, giving every minutest detail of alleged atrocities and sexual advances/excesses faced by her by none other but the applicant -Swami Chinmayanand. The period of aforesaid misdeeds has been mentioned to be from October 2018 to July 2019 during which she accused the applicant to forcibly make his body massaged and perforce used to establish corporeal relationship with her. Thereafter her statement under section 161 Cr.P.C. was recorded and her *Majid* statement was recorded on 13.09.2019 wherein she stated that she was subjected to consistent rape during aforesaid period by the accused applicant- Chinmayanand. In the month of October 2018 during her stay in the Hostel, she was taken by the goons of the accused forcibly and forced to massage and establish sexual relationship with him. During this period, she purchased an online spy camera (spectacle fit-in with hidden camera), with which she used to record the entire distasteful episodes. Her statement recorded under section 164 Cr.P.C. on 16.09.2019, also contains almost same flavour and texture with certain modifications hither and thither. After receiving directions from the Hon'ble Apex Court, the Special Investigating Team was constituted and on 04.11.2019. The SIT, lead by Sri Navin Arora, after holding thread bear investigation and probed both the cases i.e., Case Crime Nos. 442 of 2019 and 445 of 2019 were entrusted to SIT. After having in-depth probe, the SIT submitted charge sheet and thereafter the concerned Magistrate took cognizance in both the offences against respective accused persons on different dates. The SIT after thrashing voluminous evidence in the twin cases, summarized their story, salient features unearthed therein are enumerated herein below :

Miss "A" was a regular student B.A., LL.B., in the aforesaid College and after completing the degree course, she was keen to pursue future Master's course of study by getting herself admitted in LL.M. Since her merit was too low in the admission test/graduation (LL.B.) course, she developed contacts with the applicant-Chinmayanand, who is the Rector of the aforesaid College. The applicant, using his good authority and offices, got Miss "A" admitted in the aforesaid Law College and not only this he purchased and gifted a Scooty and made its payment, through one Vivek Gupta, not only this her boarding was also arranged in the OBC hostel of the College, mother of Miss "A" was given employment in a school run by the Ashram. All these benevolence showered upon Miss "A" brought her closer to the accused applicant. Miss "A" initially was forced to go to Ashram thereafter she used to visit the Ashram of the accused as a frequent visitor, where she used to stay at with the applicant, serve the accused-applicant and not only this, she offered opportunity of sexual advancement and affinity. In the span of time Miss "A" purchased the special spectacles, referred to above, and recorded certain nude photographs/video clips while massaging the applicant. In order to black mail the accused applicant, Miss "A" in connivance with her accomplices namely, Sanjay, Sachin, Vikram and few others in the garb of the aforesaid photographs/video clips planned to demand ransom from the applicant threatening him to make those nude pictures/video of the accused-applicant

viral on the social media otherwise pay ransom of Rs. Five Crores. All the accused persons on a rented car motored to Ghaziabad, Delhi, Shimla, Rajasthan and other places. Meanwhile, co-accused Sanjay somehow managed to install whatsapp application on his mobile using SIM, issued from the ID and OTP of mobile number no. 8604207465, which belonged to another person. Thereafter, using the aforesaid number, he took screenshots of the selected obscene video clips, prepared by Miss "A" and sent to accused applicant- Chinmayanand's number 9415326300, demanding ransom of Rs. Five Crores. In furtherance of the execution of the aforesaid plan, to hingle the accused applicant -Chinmayanand, on 09.08.2019 co-accused Sachin went to Chinmayanand's Mumukshu Ashram for bargaining the ransom amount in liu of the aforesaid obscene photographs/video clips and kneel him down before them.

11. To rebut the aforesaid allegations levelled against Miss "A" and her accomplices, father of Miss "A" Case Crime No. 445 of 2019, under sections 364/506 IPC was lodged at P.S. Kotwali, District Shahjahanpur against the applicant- Chinmayanad and other unknown persons of the Mumukshu Ashram.

12. Perusal of the record establishes that the applicant misused his position of stature in getting Miss "A" admitted in the LL.M. (P.G.) course. Not only this, on behalf of Miss "A" he deposited the requisite fee of her class, provided her accommodation in the hostel and part time job to her in the e-Library, the employment of the mother of Miss "A" in the Institution run by Ashram. The relationship between both the parties got deepened when Miss "A" started serving the applicant at his personal level and became a frequent visitor of applicant's Ashram.

13. What is mind boggling, disturbing and matter of concern is that a student of LL.M., i.e. Miss "A" comes into contact with the applicant, seeks and enjoys his 'patronage' and 'benevolence' as well as on her family members and in lieu of that she was said to be exploited physically by the applicant, keeps mum throughout the entire long period for almost 9-10 months. She never shared anything with anyone including her parents. On the other hand, during those dark period, on her own, purchased an spy-camera fitted goggles, from which she shot nude pictures and recorded videos of the accused, which were used by her in demanding the ransom money from the accused applicant, after blackmailing her. During the entire period of the alleged atrocities committed by the applicant, she was sharing private moments with the applicant, got her family member employed in the College and other material benefits from the applicant. There is nothing on record to show that she ever objected to or raised any protest or divulged anything adverse before the claimed incident. Therefore, it is difficult to decipher as to who has used whom ? It seems to be a matter of *quid pro quo*.

14. The applicant, who is aged about more than 72 years, suffering from number of ailments, who was Member of Parliament and has once adorned the post of State Minister for internal affairs in the Government of India has got himself involved in a most discreet incident and that too for a considerable period of time, as per the report of 173 (2) Cr.P.C. of the police.

15. It is derived from the record that for the first time her woos on 05.09.2019 busted out after coming in contact with her parents at Delhi, prior to this date there is not any whisper by her that the accused applicant has exploited her. She never

shared the alleged nightmare faced by her during last 9-10 months with her parents or any near and dear ones.

16. Sri Ravi K. Jain, Senior Advocate assisted by Sri Swetashwa Agarwal refuted the submissions advanced by learned counsel for the applicant tooth and nail. It is submitted by Sri Jain, that a person who adorn the position of Union Minister and now Rector of group of educational institution, stoop down to this level is deplorable. He at this elderly age acted in such a shabby manner and behavior, exploited a young girl to quench his sexual lust by using his musclemen to lift her (victim) from hostel, developed affinity with her and then compelled her to massage him and then ravished her. Rebutting her question marked conduct and behavior for 9-10 months raised by the learned counsel for the applicant, it was argued that the victim was being mercilessly exploited by the applicant for 9-10 months and during the entire weeping dark period, she was at receiving end, therefore, to win over the devastating situation, she mustered the courage, stood straight and decided to take revenge by exposing the demonized character and behavior of the accused-Chinmayanand.

Adding spirit to his aforesaid argument Sri Jain relied upon the celebrated judgement of Hon'ble Apex Court passed in the case of **State of U.P. Through CBI v. Amarmani Tripathi [(2005) 8 SCC 21]** whereby Hon'ble the Apex Court has enumerated the factors, while considering and deciding the bail application, extract of which are reproduced herein below:

"15. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of accused absconding or fleeing if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail (see Prahlad Singh Bhati vs. NCT, Delhi 2001 (4) SCC 280 and Gurcharan Singh vs. State (Delhi Administration) AIR 1978 SC 179). .."

It is contended by Shri Jain, learned Senior Advocate that accused-applicant is an ex-union minister, a political giant belonging to ruling party? He is involved in the grevious offence of sexual exploitation of young girl "Miss A". Besides this, keeping in view his position standing in the society, if released on bail, it is highly likely that trial would not see its final day.

17. Before adjudicating the bail application, the Court is conscious about the "word of caution" provided by Hon'ble the Apex Court in its recent judgment in the case of **Shri P. Chidambaram v. Central Bureau of Investigation in Criminal Appeal No. 1603 of 2019 [arising out of SLP (Crl) No. 9269 of 2019] along with Criminal Appeal No. 1605 of 2019 [arising out of SLP (Crl) No. 9445 of 2019]** decided by the Hon'ble Apex Court, wherein Hon'ble the Supreme Court had deprecated the practice of giving any finding on the merits, while deciding the Bail Application. Paragraph 18 of the judgement in the aforesaid case is relevant in the matter, which has been enumerated herein below:

"18. In the present case, in the impugned judgment, paras (51) to (70) relate to the findings on the merits of the prosecution case. As discussed earlier, at the stage of considering the application for bail, detailed examination of the merits of the prosecution case and the merits or demerits of the materials relied upon by the prosecution, should be avoided. It is therefore, made clear that the findings of the High Court in paras (51) to (70) be construed as expression of opinion only for the purpose of refusal to grant bail and the same shall not in any way influence the trial or other proceedings."

(underlined by the Court).

18. On the aforesaid premises, this Court is also shunning to express its opinion on the merits of the case but the fact remains that both the referred cases has been investigated by the police thoroughly and has submitted its report under section 173 (2) Cr.P.C., charge sheet has also been filed and the learned Magistrate concerned has taken cognizance of the offences in both the cases. Besides this, the Bail Application of Miss "A" was allowed by coordinate Bench of this Court while deciding Criminal Misc. Bail Application No. 43814 of 2019 on 04.12.2019 and all the accomplices of her on different occasions, who are accused of Case Crime No. 442 of 2019.

19. In the present scenario where this Court finds that it might be a case of *quid pro quo*, the intriguing question arises whether the applicant be granted bail or not ? In this regard, let us examine the Bail in criminal jurisprudence by examining the celebrated judgements of Hon'ble Apex Court. In the circumstances, principles of law down in the case of **Nikesh Tarachand Shah v. Union of India and another passed in Writ Petition (Criminal) No. 67 of 2017** by the Hon'ble Apex Court is flambeaus, which categorically establishes the concept of validity and lucidity for adjudication of bail to any person. For ready reference, paragraph 13 of the aforesaid judgement, is required to be enumerated below, which runs as under :

"13. What is important to learn from this history is that clause 39 of Magna Carta was subsequently extended to pre-trial imprisonment, so that persons could be enlarged on bail to secure their attendance for the ensuing trial. It may only be added that one century after the Bill of Rights, the US Constitution borrowed the language of the Bill of Rights when the principle of habeas corpus found its way into Article 1 Section 9 of the US Constitution, followed by the Eighth Amendment to the Constitution which expressly states that, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

20. Therefore, perusal of the aforesaid principles of law enunciated in the case of **Nikesh Tarachand Shah (Supra)** categorically establishes that seeking bail is the fundamental right of any person under law, which cannot be suspended. It is the sacrosanct duty of any court to protect life and personal liberty of any person except according to fair, just and reasonable procedure established by valid law and here the law laid down under Article 21 of the Constitution of India, which deals with lives and personal liberty of any citizen,

can in no way be ignored or jeopardized in any manner.

21. Now coming nearer home, it is pertinent to mention the observation made by Hon'ble Krishna Iyer, J., in the case of **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh [1978 AIR 429, 1978 SCR (2) 371]** wherein the Court observed that the issue of bail is one of the liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right.

22. Similarly in the case of **Gucharan Singh v. State (Delhi Administration)[(1978) 1 SCC 118 : 1978 SCC (Cri) 41]** it was observed as below :

"There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail."

23. Apart of all the aforesaid citations, referred to above, this Court, while adjudicating the instant bail matter, is more focussing on the principles laid down by Hon'ble the Apex Court in the case of Shri P.Chidambaram (Supra) wherein the Court has described well settled principles with regard to the facts and circumstances of each case and the factors, which are to be essentially considered while adjudicating bail application of any applicant. For ready reference, relevant paragraphs 22 and 23 of the aforesaid judgment are enumerated herein below :

"22. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:- (i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; (ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; (iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; (iv) character behaviour and standing of the accused and the circumstances which are peculiar to the accused; (v) larger interest of the public or the State and similar other considerations (vide Prahlad Singh Bhati v. NCT, Delhi and another (2001) 4 SCC 280). There is no hard and fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner."

24. The aforesaid essential ingredients with regards to the facts and circumstances as well as the factors, emanating therein, are the alma mater for consideration of any bail application lying before this Court.

25. Though, learned counsel for the informant has tried to establish that there was a conspiracy hatched by the applicant against Miss "A" and the conspiracy has

given birth to the FIR mentioning therein the ransom and blackmailing of the accused by Miss "A" and her accomplices, therefore, the application for bail of the accused application is liable to be rejected.

26. Sri Dilip Gupta, learned Senior Advocate for the applicant has tried to fortify his argument by drawing attention of the Court towards the case of **Dataram Singh v. State of U.P. and another reported in reported in AIR 2018 SC 980,** specially paragraph 17, extract of which is referred to herein below :

"17. In our opinion, it is not necessary to go into the correctness or otherwise of the allegations made against the appellant. This is a matter that will, of course, be dealt with by the trial judge. However, what is important, as far as we are concerned, is that during the entire period of investigations which appear to have been spread over seven months, the appellant was not arrested by the investigating officer. Even when the appellant apprehended that he might be arrested after the charge sheet was filed against him, he was not arrested for a considerable period of time. When he approached the Allahabad High Court for quashing the FIR lodged against him, he was granted two months time to appear before the trial judge. All these facts are an indication that there was no apprehension that the appellant would abscond or would hamper the trial in any manner. That being the case, the trial judge, as well as the High Court ought to have judiciously exercised discretion and granted bail to the appellant. It is nobody's case that the appellant is a shady character and there is nothing on record to indicate that the appellant had earlier been involved in any unacceptable activity, let alone any alleged illegal activity."

27. Hon'be the Apex Court after thrashing the case of Nikesh Tarachand Shah (Supra) going back to the decision of Magna Carta. In that decision, reference was made to **Gurbaksh Singh Sibbia v. State of Punjab (1980) 2 SCC 565)** wherein it is observed that it was held way back in **Nagendra v. King-Emperor (AIR 1924 Cal 476)** that bail is not to be withheld as a punishment. Reference was also made to **Emperor v. Hutchinson (AIR 1931 All 356)** wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days.

28. However, it does not meant that bail should be granted in every case liberally rather while adjudicating any bail application, the Court must consider authentic evidence collected during investigation, available on record with humanity and compassion and if it thinks that there are possibilities of granting bail to an accused, the conditions thereof should not be so strict that it turns to be incapable to be complied with and thus making the bail order illusionary.

29. Thus taking into stock of all the facts and circumstances of the case, submissions of the learned counsel for the rival parties, discussions referred to herein above, especially the principles of law and the essential factors to be focused upon while adjudicating any bail application by Hon'ble Apex Court in the latest case of **Shri P. Chidambaram v. CBI (Supra)**,

this Court is drawing its conclusion in the instant case.

30. No doubt, the accusations leveled against the accused- Chinmayanad (who is supposed to have deep influence in the society as well in the administration because of his atomizing stature), are severe and there are reasonable apprehensions of his tampering with the evidence, which endangers the security of the presence of the rival party/s during the trial, as well as the circumstances, which are peculiar to the octogenarian accused, who is suffering from number of old age ailments, as canvassed by the learned Senior Advocate of the applicant, has further agitated that the medical evidence of Miss "A" is also unable to sufficiently indicate that she was subject to sexual exploitation for a long time. Besides this, the police after holding an indepth probe into the matter has submitted in charge sheet under sections 376 C, 354 D, 342 and 506 IPC. The maximum punishment is under section 376 C IPC, not less than five years but extend to ten years because legislation in its own wisdom has excluded this offence from the realm of 'Rape'. In this connection, it is worthwhile to point out here that the learned Magistrate has already taken cognizance of the offences and blurred chances of any tempering of evidence at this stage. It is also canvassed that accused of Case Crime No. 445 of 2019, Miss "A" was already admitted on bail in extortion matter by a coordinate Bench of this Court that there is no justifiable reason to deny the bail to the present applicant- Chinmayanad. As pointed out earlier, that both the parties crossed their limits and at this stage it is very difficult to adjudicate as to who exploited whom?? In fact, both of them used each other.

31. To the contrary it is also noteworthy there are material on record where the family members of Miss "A" were being benefited out of the solipsistic behavior of the accused applicant. It is also noticeable that there is also nothing on record that during the period of the alleged atrocities committed upon Miss "A" she made any complaint or even any whisper to her family members against the accused applicant, therefore, at this juncture, this Court draws its conclusion that it was a complete matter of *quid pro quo* but over a span of time the greed for extracting "more", she along with her accomplices seems to have advanced for hatching a conspiracy against the applicant and tried to black mail him for ransom, through the obscenic video clips recorded by herself.

32. It is apprehended by the complainant that the accused applicant - Swami Chinmayanad alias Krishna Pal Singh is an affluent giant robust personality of Shahjahanpur, therefore, he may infringe law of the land in any manner, he has the capacity to influence/tamper the evidence and thus fair trial in his home town i.e. Shahjahanpur may be affected. The apprehension raised by the complainant is not unfounded and this Court acknowledging the same is duty bound to give sun on the path of justice to the court below in accordance with law.

33. This Court is conscious of the fact that many times, the learned trial courts sway away be the observations of the Apex Court while adjudicating the bail orders. It is, therefore, earnestly directed that no observation of this Court in passing this order shall effect either ways by the trial court during trial. The trial court would apply its own judicial discretion and accused while adjudicating the trial of the instant case.

34. In view of the above, let the applicant-Swami Chinmayanand alias Krishna Pal Singh, be released on bail on his executing a personal bond and furnishing two **heavy** sureties each in the like amount to the satisfaction of the court

concerned in case crime no. 0445 of 2019, under Sectrions 376-C, 354-D, 342 and 506 IPC, P.S. Kotwali, District Shahjahanpur with the following conditions:-

(i) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE FIXED FOR EVIDENCE WHEN THE WITNESSES ARE PRESENT IN COURT. IN CASE OF DEFAULT OF THIS CONDITION, IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT IT AS ABUSE OF LIBERTY OF BAIL AND PASS ORDERS IN ACCORDANCE WITH LAW.

(ii) THE APPLICANT SHALL REMAIN PRESENT BEFORE THE TRIAL COURT ON EACH DATE FIXED, EITHER PERSONALLY OR THROUGH THEIR COUNSEL. IN CASE OF THEIR ABSENCE , WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HIM UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT MISUSE THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANT FAILS TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST HIM IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(iv) THE APPLICANT SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE APPLICANTS ARE DELIBERATE OR WITHOUT SUFFICIENT CAUSE, THEN IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT SUCH DEFAULT AS ABUSE OF LIBERTY OF BAIL AND PROCEED AGAINST HIM IN ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANTS.

35. However, it is made clear that any violation of above conditions by the applicant, shall have serious repercussion on his/her bail so granted by this court and the trial court is at a liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

36. After release of the applicant by the court of Shahjahanpur it is further directed that trial of both the aforementioned criminal cases i.e., CC No. 442 of 2019 and 445 of 2019 be transmitted to the court of corresponding jurisdiction at Lucknow from the court of the court of Shahjahanpur thereafter the court concerned at Lucknow is directed to take both the cases on priority basis, if possible on day to day basis, and adjudicate them pursuant to the aforesaid conditions, referred to above.

37. The Senior Superintendent of Police, Lucknow is directed to ensure the security and safety of Miss "A", her family members and witnesses during the entire trial period by deputing an officer to the rank of Senior Sub Inspector and armed constables.

38. With the aforesaid directions, the bail application stands allowed with the aforesaid riders.

(2020)03-05ILR A1384
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2020

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Second Appeal No. 94 of 2020
connected with
Second Appeal No. 92 of 2020

Harihar Tiwari ...Appellant
Versus
Kshetriya Sri Gandhi Ashram, Moradabad ...Respondent

Counsel for the Appellant:
Sri Ambrish Chandra Pandey, Sri Sandeep Kumar Tiwari

Counsel for the Respondent:
Sri Digvijay Singh, Sri Sudhir Kumar Singh

A. Civil Law-Civil Procedure Code – Section 100 – Substantial question of law Determination – If the question is settled then it would not be a substantial question of law – Merely because in the substantial question of law so framed in the memo of appeal involving interpretation of any particular provision of the law by itself could not be a substantial question of law. (Para 22 and 23)

B. Civil Law- U.P. Public Premises (Eviction of Unauthorized Occupant) Act, 1972 – Section 2(e)(iv) and 15 – Application of the Act – Public Premises – Act would apply only in case, when a society is registered under the Societies Registration Act, 1860, the governing body whereof consists wholly of public officers or nominees of the State Government or both – Unless the governing body of the society consists of wholly of public officer or nominees of the State Government or both, it cannot be treated as a society referred to in Section 2(e) (iv) of the Act and premises whereof would not be treated as a 'public premises'. (Para 17)

Appeal dismissed (E-1)

Cases relied on :-

1. Kiran Singh & ors. Vs. Chaman Paswan and others AIR (1954) SC 340

2. Sir Chunilal Vs. Mehta and sons Ltd Vs. Century Spinning and Manufacturing Co. Ltd. AIR (1962) SC 1314

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned counsel for the defendant-appellant, who is plaintiff-appellant in the connected Second Appeal No. 92 of 2020 and Sri Digvijay Singh, learned counsel appearing for the plaintiff-respondent in the present appeal, who is defendant-respondent in the connected Second Appeal No. 92 of 2020.

2. Since, same premises in question is involved in Original Suit No. 114 of 2017 (Computer No. 101 of 2017) as well as in the Original Suit No. 9 of 2017 (Computer No. 102 of 2017) between the same parties, the same are being connected and are being decided by a common judgment.

3. Second Appeal No. 94 of 2020 has been filed for setting aside the judgment and order dated 16.10.2019 (decree dated 22.10.2019) passed by the Additional District and Session Judge, Court No. 1, Moradabad in Civil Appeal No. 30 of 2019 (Harihar Tiwari vs. Kshetriya Sri Gandhi Ashram) as well as order dated 3.4.2019 passed by the Additional J.S.C.C. / Additional Civil Judge (Senior Division) in O.S. No. 114 of 2017 (Kshetriya Sri Gandhi Ashram vs. Harihar Tiwari).

4. Second Appeal No. 92 of 2020 has been filed for setting aside the judgment

and order dated 16.10.2019 (decree dated 22.10.2019) passed by the Additional District and Session Judge, Court No. 1, Moradabad in Civil Appeal No. 31 of 2019 (Harihar Tiwari vs. Kshetriya Sri Gandhi Ashram) as well as order dated 3.4.2019 (decree dated 9.4.2019) passed by the Additional J.S.C.C. / Additional Civil Judge (Senior Division) in O.S. No. 09 of 2017 (Harihar Tiwari vs. Kshetriya Sri Gandhi Ashram).

5. Original Suit No. 09 of 2017 was filed by Harihar Tiwari against Kshetriya Sri Gandhi Ashram for permanent injunction regarding the premises in question, which is in his possession as employee of the Kshetriya Sri Gandhi Ashram. Original Suit No. 114 of 2017 was filed against Harihar Tiwari by Kshetriya Sri Gandhi Ashram for mandatory injunction on the allegation that after termination of his services he is unauthorized occupant in the premises in question and therefore, decree of eviction/possession against him was prayed for.

6. Common facts are involved in both the suits. Though they were not consolidated but were decided by the judgments of the same date.

7. In the present second appeal, submission of learned counsel for the appellant is that his occupation of the premises in question was as an employee of the Kshetriya Sri Gandhi Ashram. His services were undisputedly terminated by the Management Committee on 8.7.2013 and the Assistant Registrar Firm, Society and Chits, Moradabad set aside the said order vide order dated 4.3.2014. Challenging the same Writ Petition No. 17553 of 2014 was filed by Kshetriya Sri Gandhi Ashram, wherein the interim order dated 26.3.2014 was granted staying the operation of the order dated 4.3.2014 passed by the Assistant Registrar. He submits that since writ petition is still pending, therefore, he is not unauthorized occupant and that the suit itself was not maintainable.

8. For the purpose of entertaining present appeal as well as the connected appeal learned counsel for the appellant submitted that the suit itself was not maintainable in view of the provisions of Section 15 of the U.P. Public Premises (Eviction of Unauthorized Occupant) Act, 1972 (hereinafter referred to as the Act of 1972). After arguments learned counsel for the appellant admitted that infact, his suit was filed as a regular civil suit and was decided by the Civil Judge as a regular civil court and therefore, other grounds and questions relating to J.S.C.C. would not be relevant.

9. I have carefully gone through the substantial questions of law framed in the memo of appeal in both the appeals.

10. Substantial questions of law framed in both the appeals are quoted as under:-

Second Appeal No. 94 of 2020

"A. Whether both the courts below have exceeded their jurisdiction in deciding the suit/appeal which was bar under section 15 of U.P. Public Premises (Eviction of Unauthorized Occupants) Act, 1972.

B. Whether the J.S.C.C. Court has erred in taking the cognizance of the suit which is barred by Article 4, Article 17, and Artical 19 of Scheduled 2 of the Provincial Small Cause Court Act, 1887.

C. Whether the lower appellate court was justified in deciding the appeal whereas no appeal lies under section 96 of C.P.C. against the judgment and decree of J.S.C.C. Courts.

D. Whether both the court below was justified in passing the order of eviction on the ground of dismissal of service which is still subjudice before this Hon'ble High Court.

E. Whether the J.S.C.C. Court erred in taking the cognizance of the suit on the ground of pecuniary jurisdiction as the valuation of suit is above 1,00,000/-."

Second Appeal No. 92 of 2020

"A. Whether both the courts below have exceeded their jurisdiction in deciding the suit/appeal which was bar under section 15 of U.P. Public Premises (Eviction of Unauthorized Occupants) Act, 1972.

B. Whether the trial court below was justified in dismissing the suit without deciding the issue no. 4, regarding the jurisdiction of court, which is in the teeth of the requirement of order XX Rule 5 C.P.C.

C. Whether the lower appellate court was justified in deciding the appeal whereas no appeal lies under section 96 of C.P.C. against the judgment and decree of J.S.C.C. Courts.

D. Whether the J.S.C.C. Court has erred in taking the cognizance of the suit which is barred by Article 4, Article 17, and Artical 19 of Scheduled 2 of the Provincial Small Cause Court Act, 1887.

E. Whether both the court below was justified in passing the order of eviction on the ground of dismissal of service which is still subjudice before this Hon'ble High Court.

F. Whether the J.S.C.C. Court erred in taking the cognizance of the suit on the ground of pecuniary jurisdiction as the valuation of suit is above 1,00,000/-."

11. He submits that substantial question of law involved in the case is as to whether the suit filed by the Kshetriya Sri Gandhi Ashram was barred by Section 15 of the Act of 1972. He has placed reliance on judgment of Hon'ble Apex Court in the case of **Kiran Singh and others vs. Chaman Paswan and others AIR 1954 SC 340** to submit that question of jurisdiction can be raised at any point of time even if the same was not raised earlier. He submits that in case the court has no jurisdiction then the decree and judgment of the trial court or any other court not having jurisdiction would be a nallity.

12. Per contra, learned counsel for the respondent has disputed the same and submits that the suit was maintainable. He further submits that hence no substantial question of law is involved and the present second appeal is devoid of merits. He submits that Harihar Tiwari was unauthorized occupant after termination of his services and his status as on date is that of an unauthorized occupant and hence, no relief can be granted to the appellant.

13. I have considered the submissions and have perused the record.

14. The facts are not in dispute.

15. In support of his arguments of learned counsel for the appellant that a substantial question of law is involved, he has also drawn attention to Section 15 of the Act of 1972, which provides that the jurisdiction of civil court is barred in case of a public premises.

16. A reference to definition of public premises as given in the Act would, therefore, be relevant. Section 2(e) of the Act of 1972 provides for definition of

public premises. Sub-section (iv) of Section 2(e) provides as under:-

"(e) "public premises" means any premises belonging to or taken on lease or requisitioned by, or on behalf of, the State Government, and includes any premises belonging to, or taken on lease by, or on behalf of-

(i) ...…
(ii) ...…
(iii)...…
(iv) any society registered under the Societies Registration Act, 1860, the governing body whereof consists, under the rules or regulations of the society, wholly of public officers or nominees of the State Government or both."

(emphasis supplied)

17. A perusal of the aforesaid definition clearly indicates that the Act would apply only in case, when a society is registered under the Societies Resigration Act, 1860, the governing body whereof consists, under the rules or regulations of the society, wholly of public officers or nominees of the State Government or both. Therefore, it is very much clear that unless the governing body of the society consists of wholly of public officer or nominees of the State Government or both, only then it can be treated as a society referred to in Section 2(e) (iv) of the Act and premises whereof would be treated as a "public premises".

18. In the present case, it is not the case of Harihar Tiwari that the society (his employer) consists of any such governing body or any such persons as given in Clause (iv) of Section 2(e) of the Act of 1972.

19. A perusal of the trial court's judgment would clearly indicates that issue no. 5 was framed in respect as to whether the court has jurisdiction to try the suit. This issue was decided against the defendant Harihar Tiwari vide order dated 27.2.2018 and was made part of the judgment.

20. A perusal of memo of 1st appeal filed before the lower appellate court clearly indicates that the said finding on issue no. 5 was not challenged and the jurisdiction of the court was thus, admitted by the appellant Harihar Tiwari.

21. Even if it is accepted that the question of jurisdiction can be challenged at any stage, this Court is of the opinion that since the society is not being alleged to be a society governing body whereof consists of wholly of public officers or nominees of the State Government or both, under such circumstances, Kshetriya Sri Gandhi Ashram cannot be treated to be a society, premises whereof can be held to be "public premises" as provided under Section 2(e) of the Act of 1972. Fact of the matter is that there was even no pleading to this effect.

22. A Constitutional Bench of 5 Judges of Hon'ble Apex Court in **Sir Chunilal V. Mehta and sons Ltd vs. Century Spining and Manufacturing Co. Ltd AIR 1962 SC 1314** has considered the question 'as to what is the substantial question of law'. Various judgments of High Courts and Full Bench were considered by the Hon'ble Constitutional Bench and it was held that if the question is settled then it would not be a substantial question of law. Paragraph 6 of the aforesaid judgment is quoted as under:-

"6. We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by. the Bombay High Court is rather narrow the one taken by the former High

Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."(emphasis supplied)

23. Therefore, it is clear that merely because in the substantial question of law so framed in the memo of appeal involving interpretation of any particular provision of the law by itself could not be a substantial question of law.

24. In the present case, definition of the word "public premises" itseld would make it abundantly clear that in absence of any pleading or evidence on record to the effect that the defendant society was a society covered under Clause (iv) of Section 2(e) of the Act of 1972, the suit cannot be said to be barred by Section 15 of the Act of 1972.

25. In the opinion of this Court it is not a substantial question of law, which requires any interpretation by this Court in view of the law laid down by Hon'ble Apex Court in **Sir Chunilal V. Mehta and sons Ltd (supra)** the question framed above, even if it is treated to be a question of law, it is not open to interpretation.

26. Insofar as the substantial questions of law as framed in the memo of appeal regarding applicability of the Provincial Small Causes Court Act are concerned, it is clear that both the suits filed as regular original suits and were decided on regular civil side and not by the court as Judge, Small Causes, therefore, first appeal is maintainable under Section 96 of C.P.C. Hence, no substantial question requiring interpretation of or applicability of Provincial Small Causes Court Act, 1887 is involved in the present appeal in this regard is involved. His position has also been admitted by learned counsel for the appellant during course of arguments.

27. This Court is of the opinion that no substantial question of law is involved in the present case.

28. Both the appeals are devoid of merits and are accordingly dismissed.

(2020)03-05ILR A1388
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2020

BEFORE

THE HON'BLE VIRENDRA KUMAR-II, J.

Second Appeal No. 171 of 2010

Banshraj ...Appellant
Versus
Ram Naresh & Anr. ...Respondents

Counsel for the Appellant:
Rajendra Prasad Tripathi

Counsel for the Respondents:
Nishant Srivastava, Dinesh Kr. Shukla

A. Civil law-Civil Procedure Code – Section 11 – U.P. Panchayat Raj Act, 1957 –

Section 52 and 64 – Binding effect of the order of Nyaya Panchayat – Nyaya Panchayat was not having jurisdiction to decide the dispute of civil nature of shares – Judgment of Nyaya Panchayat was not binding on the respondent on the basis of principle of res-judicata – The suit was not barred by provisions of Section 11 of the C.P.C. (Para 31, 32 and 48)

B. . Civil law- Civil Procedure Code – Order XLI, Rule 1 – Reasons for the Decision – Judgment of the appellate court has to state the reasons for the decision – The first appellate court has a defined role and its judgment should show application of mind and reflect the reasons on the basis of which it agrees with the trial court – There has to be an 'expression of opinion' in the proper sense of the said phrase. (Para 65 and 67)

C. Civil law- Civil Procedure Code – Section 96 – Concurrent Finding and Reversing Finding – Duty of the first appellate court – Appellate court has the jurisdiction to appreciate the evidence de novo while hearing the first appeal and either affirm the finding of the trial court or reverse it – If the appellate court affirms the finding, it is called 'concurrent finding of fact' whereas if the finding is reversed, it is called 'reversing finding' – Where the judgment of the lower appellate court is a judgment of reversal it is primary duty of the appellate court to consider the reasons given by the trial court and those reasons must also be reversed. (Para 75 and 78)

D. . Civil law-Civil Procedure Code – Section 100 and 103 – Second Appeal – Substantial Question of Law – Interference in question of fact – It is the intention of the legislature to limit the scope of second appeal only when a substantial question of law is involved. It never wanted the High Court to be a fact-finding court – However, it is not an absolute rule that the High Court cannot interfere in a second appeal on a question of fact – Section 103 CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100 – When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, the court is empowered to interfere on a question of fact as well – Held, unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact. (Para 83)

Appeal dismissed (E-1)

Cases relied on :-

1. Ambanna Vs. Ghanteappa; AIR 1999 Karnataka 421

2. R.S. Anjayya Gupta Vs. Thippaiah Setty; (2019) 7 SCC 300

3. Thulasidhara Vs. Narayanappa; (2019) 6 SCC 409

4. Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar; (1999) 3 SCC 722]

5. Gurnam Singh Vs. Lehna Singh; (2019) 7 SCC 641

6. St. of M.P. Vs. Dungaji; (2019) 7 SCC 465

7. Narayana Gramani Vs. Mariammal; (2018) 18 SCC 645

8. Arulmighu Nellukadai Mariamman Tirukkoil Vs. Tamilarasi; (2019) 6 SCC 686

9. Chand Kaur Vs. Mehar Kaur; (2019) 12 SCC 202 : 2019 SCC OnLine SC 426

10. Rajasthan Vs. Shiv Dayal, reported in (2019) 8 SCC 637 : (2019) 4 SCC (Civ) 203 : 2019 SCC OnLine SC 1034 639

11. S.V.R.Mudaliar (Dead) by Lrs. and ors. Vs. Rajabu F.Buhari (Mrs) (Dead) by Lrs. & ors., AIR 1995 SC 1607

12. Rani Hemant Kumari Vs. Maharaja Jagadhindra Nath, 10 CWN 630

13. Smt. Sona Devi Vs. Nagina Singh & ors., AIR 1997 Patna 67

14. Jaideo Yadav Vs. Raghunath Yadav & anr., 2009(3) PLJR 529

15. Doodhnath & anr. Vs. Deonandan AIR 2006 Allahabad 3

16. St. of M.P. Vs. Sabal Singh; (2019) 10 SCC 595 : 2019 SCC OnLine SC 1340 at page 605

17. Jagdish Chander Vs. Satish Chander; (2019) 12 SCC 237 : 2019 SCC OnLine SC 283

18. Ramathal Vs. Maruthathal; (2018) 18 SCC 303

(Delivered by Hon'ble Virendra Kumar-II, J.)

1. Heard Mr. Rajendra Kumar Tripathi, learned counsel for appellant ex-parte as none is responding on behalf of the respondents.

2. The present second appeal has been preferred by the appellant assailing impugned judgment and decree dated 26.3.2010 delivered by learned District Judge, Court No.-2 Gonda in Civil Appeal No. 135 of 2008 (Ram Naresh Vs. Banshraj and another) by which learned first appellate court has set aside the judgment and decree dated 12.9.2008 delivered by trial court of learned Additional Civil Judge (Jr. Div.) III, Gonda in Original Suit No. 253 of 1994 (Ram Naresh Vs. Banshraj and another).

3. The trial court had dismissed the suit of plaintiff/respondent no. 1 and first appellate court has decreed the suit of plaintiff/respondent no. 1 by setting aside impugned judgment and decree dated 12.9.2008 and held 1/3 share of plaintiff and both the defendants. It is directed by first appellate court to prepare preliminary decree accordingly.

4. It is pleaded in grounds of appeal that first appellate court has not appreciated oral and documentary evidence minutely and in correct perspective, as it was done by the trial court. It is also mentioned that disputed property was comprising of ancestral property, land purchased by means of sale deed and new Abadi. It was not appreciated by first appellate court that property purchased by means of sale deed gives rise to only purchaser and none-else.

5. Likewise first appellate court has not correctly appreciated the provisions of Uttar Pradesh Panchayat Raj Act, 1947 regarding jurisdiction of Nyay Panchayat. The findings of the first appellate court is incorrect that Nyay Panchayat was not competent to deliver judgment regarding disputed property. The plaintiff/respondent no. 1 could participate in proceedings conducted by Nyay Panchayat, but he had not opted to participate knowingly. He was bound by the decision given by Nyay Panchayat. The provisions of Section 11 of the C.P.C. applies to the proceedings of present dispute between the parties.

6. It is further pleaded that since disputed property also comprised land of New Abadi, therefore, Gram Sabha was the necessary party.

7. On the basis of aforesaid pleadings, the impugned judgment and decree dated 26.3.2010 has been sought to be set aside.

8. On 26.2.2020 present appeal was heard ex-parte and the following order was passed:-

"Heard learned counsel for the appellant ex-parte, because none is responding on behalf of respondents.

It was directed vide order dated 05.12.2019 as follows:

"List revised. Learned counsel for appellant is present. None is responding on behalf of respondents today.

On 14.11.2019 this Court has passed the following order:

"List revised. Case called out twice.

None is responding on behalf of the respondents.

Learned counsel for appellant is present.

In this case record of first appellate court and trial court has been received.

In the interest of justice, the case is adjourned.

List on 05.12.2019.

Learned counsel for respondents has to appear and argue the case on the next date of listing, otherwise this case shall be decided in accordance with law."

Learned counsel for respondents has to appear and argue the present second appeal on the next date of listing, otherwise, it shall be heard exparte.

List on 08.01.2020."

After 05.12.2019, on next date of listing i.e. 08.01.2020, 14.01.2020, 17.01.2020, 24.01.2020 and 11.02.2020, learned counsel for respondents did not appear for arguments, therefore, today ex-parte arguments of learned counsel for the appellant heard and concluded.

Judgment reserved."

9. Learned counsel for respondents has not appeared during proceedings of present appeal after 19.12.2017. On 19.12.2017 Mr. Dinesh Kumar Shukla, Advocate informed his illness on behalf of the respondents.

10. Notices issued against respondent nos. 1/1/1 and 1/1/2 were served sufficiently. In absence of respondents, the following substantial questions of law were formulated on 3.1.2018:-

1- Whether judgment given by Nayay Panchayat on the same subject matter between the same parties would have effect of resjudicata and Section-11 C.P.C is a bar for fresh trial?

2- In any suit for partition identification for disputed properties as ancestral is essential or not?

3- Where between the parties it is admitted that most of the properties have been divided, the presumption of property to be joined would not help the person who is seeking partition of the property in dispute?

4- Whether non-compliance of the provisions contained in order 41, Rule 31 by lower appellate court has resulted in prejudice to the present appellant, if so, its effect?

Thereafter the appeal was admitted.

11. Learned counsel for appellants on the basis of substantial questions of law formulated by this Court has put forth his argument on the basis of contentions made in grounds of appeal. He submitted relying on decision of this Court dated 1.9.2017 delivered in Second Appeal No. 403 of 2014 ***(Jagannath Vs. Savitri Devi and others)*** that first appellate court has not framed any point of determination and has violated the provisions of order XLI, Rule 31 of C.P.C.

12. Likewise, learned counsel for appellant relying on decision of Karnataka High Court in the case of ***Ambanna Vs. Ghanteappa*** reported in ***AIR 1999 Karnataka 421*** (Principal Seat at Bengaluru) has submitted that if particulars of property has not been mentioned in plaint of suit for partition, then such plaint is liable to be rejected under Order VII, Rule 3 of C.P.C. The plaintiff/respondent no. 1 has not mentioned particulars like description of property in correct

perspective with correct boundaries. These particulars has not been proved during course of trial of original suit. Therefore, the provisions of Order VII, Rule 3 are attracted to the contentions of plaint of present matter. Therefore, plaint instituted by the plaintiff ought to have been rejected for violation of aforesaid provisions.

13. Learned counsel for appellant has further submitted that the disputed property comprises ancestral property, the property purchased by respondent/appellant Banshraj by means of sale deed and some portion of disputed property was allotted by Gram Sabha to him. Therefore, the Land Management Committee of Village Dixit Purwa, Mauza Semara Shekhpur, Tehsil Tarabganj, District Gonda was the necessary party of present suit.

14. It is further submitted that the trial court and first appellate court has not considered and recorded the findings on issue no. 5 in correct perspective, rather both the learned courts below have not considered the issue no. 5 on the basis of contentions of written statement filed by appellant Banshraj.

15. It is also submitted that likewise, judgment delivered by Nyay Panchayat was operative as res-judicata according to provisions of Section 11 of C.P.C. The principle of res judicata was not complied with by the first appellate court and argument of learned defence counsel was discarded on this score illegally.

16. I have perused record of Original Suit No. 253 of 1994 (Ram Naresh Vs. Banshraj and another) and impugned judgment and order dated 26.3.2010 delivered by first appellate court in Civil Appeal No. 135 of 2008.

Factual matrix

17. The plaintiff/respondent no. 1 Ram Naresh instituted suit for partition before the trial court. He has contended that ancestral house is marked as अ ब स द in plaint map and Abadi land is marked by ब स य र ल, which is situated as courtyard for keeping debris, Kundaur and Khalihan. On this land trees of Eucalyptus, Mango, Neem, Mahua, Shisham and Imli are standing.

18. The plaintiff and defendants are real brothers and the disputed property is their joint property. They are living separately from 15 years ago and agricultural land was divided 10-12 years ago. The land of Abadi could not be divided. Now there was extension in family of plaintiff and there is paucity of accommodation, he is having 1/3 share in the disputed property and wants to construct separate house for his family. He requested the defendants to divide the disputed property and give him 1/3 share, but defendants refused for partition on 20.5.1994. Therefore, suit was instituted by the plaintiff.

19. Respondent no. 2 Hansraj filed his written statement 25 Ka before the trial court and pleaded that there is Kachcha house in dilapidated condition, which is inhabitant. He constructed Pakka Dalan. He has corroborated this fact that trees of aged 20 years are standing in the disputed property. Ghari, Madwa, place for debris, and Kandaur are also situated on this land. The plaintiff and defendants are having equal share in the disputed property, whereas defendants Banshraj took possession of Abadi land greater than his share. The plaintiff and defendants are residing in the disputed property from the period of their ancestors.

20. The defendant Banshraj filed his written statement Ka-15. He has pleaded that disputed property is not identifiable

and plaint map is incorrect. He has further pleaded that only property marked by अ ब स द is ancestral property. He purchased property marked with ब स य र ल व by means of sale deed dated 8.7.1965 executed by Smt. Ram Dulari widow of Bindeshwari Prasad and this land is in his possession.

21. He has further pleaded that land marked with द र ल व is new Abadi, which was obtained by him on Patta executed by Land Management Committee regarding Khasra No. 1015. He has mentioned in paragraph no. 13 and 14 that trees are standing on land marked by द र ल व and ब स य र. He has further mentioned that Hansraj purchased land, which was situated on east and northern side of their ancestral house and constructed his house. The plaintiff did not purchase any land or property. He has disclosed the entire property as ancestral property incorrectly.

22. The defendant Banshraj has also relied upon decision delivered by Nyay Panchayat in the year 1980 and contended that 1/3 share was given to him in ancestral house. The remaining property was decided as his self acquired property. He has claimed that entire property was partitioned 32-35 years between the plaintiff and defendants. He has accepted that the plaintiff and defendant are real brothers. In paragraph no. 9, he has mentioned his pedigree.

23. On the basis of pleadings of both the parties, the trial court framed the following issues:-

1- क्या विवादित सम्पत्ति पक्षकारों की पैतृक सम्पत्ति है?

2- क्या विवादित सम्पत्ति में सभी पक्षकारों का 1/3 भाग है?

3- क्या विवादित भूमि अपरिच्यात्मक है?

4- क्या वाद अमूल्यांकित है एवं न्यायशुल्क कम अदा किया गया है?

5- क्या विवादित सम्पत्ति गॉव सभा की भूमि है एवं उसे आवश्यक पक्षकार न बनाये जाने के कारण वाद निरस्त होने योग्य है?

6- वादी किस अनुतोष को पाने का अधिकारी है?

(i) Whether the disputed property is ancestral property of both the parties?

(ii) Whether both the parties are having 1/3 share in the disputed property?

(iii) Whether the disputed property is not identifiable?

(iv) Whether the suit is under valued and court fee paid is deficient?

(v) Whether disputed property belongs to Land Management Committee and it is necessary party of the suit and it should be dismissed because the Land Management Committee was not arrayed as party?

(vi) To what relief plaintiff is entitled?

Substantial question of Law No. 1

24. Learned counsel for appellant has relied upon paper no. 211/53/1 (complaint), 211/53/2 (agreement), 211/54/1, 211/54/2 report submitted before the Nyay Panchayat 211-211/55/1 to 211/55/4 judgment delivered by Nyay Panchayat, which is available on record of trial court. The learned first appellate court has considered the provisions of Uttar Pradesh Panchayat Raj Act and these documents relied upon by learned defence counsel before the trial court.

25. On perusal of these documents, it reveal that Banshraj defendant no. 2/appellant submitted a complaint on 5.6.1980 for offence punishable under Section 448, 504 and 323 IPC regarding incident dated 5.6.1980 committed by Hansraj-respondent no. 2 and his wife Smt.

Savita Devi. He apprised the Nyay Panchayat that Hansraj Mishra has taken forcible possession over the Dalan and assaulted his two daughters. The plaintiff Ram Naresh/respondent no. 1 was not party to the proceedings conducted by Nyay Panchayat. On 28.6.1980 Banshraj and Hansraj executed agreement to authorize Nyay Panchayat to decide dispute between them.

26. It is relevant to mention here that DW-3 Agnu was examined on behalf of appellant as defence witness. The evidence of DW-3 was appreciated by learned first appellate court and found that he could not disclose the nature of proceedings conducted by Nyay Panchayat. He has denied that these proceedings were conducted for criminal offence, but stated that this proceeding was related to civil dispute. He was the Punch of Nyay Panchayat, even then he could not disclose the details of disputed property, regarding which, Nyay Panchayat delivered its judgment. He could not disclose this fact also that when disputed land was inspected by Nyay Panchayat. He stated this fact incorrectly, as Bashraj himself filed complaint against Hansraj and his wife. Therefore, the evidence of DW-3 was discarded by first appellate court.

27. It is relevant to mention here that learned trial court has also appreciated the evidence of DW-3 Agnu and found that he stated before the trial court that Ram Naresh instituted a case of civil nature against Banshraj before the Nyay Panchayat. He stated this fact incorrectly as Banshraj himself filed complaint against Hansraj and his wife. He has specifically stated that he was unable to disclose the details of disputed property.

28. The trial court has not recorded any specific finding about the proceedings conducted by Nyay Panchayat. Therefore, first appellate court has rightly observed that the proceedings instituted by Banshraj before the Nyay Panchayat was mainly of criminal nature and Nyay Panchayat decided the civil dispute also by composite judgment regarding criminal and civil dispute. Therefore, the details of property क ख ग घ mentioned in inspection report does not extend any benefit to the appellant that the disputed property क was ancestral property. ख was property purchased by Banshraj by means of sale deed and ग property was given by Pradhan and Consolidation Officer to him of Patta being Abadi of Gram Samaj and property घ Ghari was a joint property of plaintiff and defendants.

29. It is pertinent to mention here that neither the sale deed nor the Patta was produced during proceedings conducted by Nyay Panchayat by Banshraj. Appellant-Banshraj and respondent no. 2- Hansraj only participated before the Nyay Panchayat. Complainant/respondent no. 1-Ram Naresh was not summoned by Nyay Panchayat nor any allegation is levelled by Banshraj against him in his complaint submitted on 5.6.1980. The statement of complainant Banshraj and witnesses Ramesh Pratap Singh and Paras Nath Pandey were examined by Nyay Panchayat regarding the incident of assault and Hansraj was also examined.

30. It is mentioned in the judgment dated 10.8.1980 delivered by Nyay Panchayat that at the point of time of inspection of disputed property, the persons present on the spot had apprised; the Nyay Panchayat that Consolidation Officer and Village Head gave disputed property ग on Patta to complainant Banshraj. There was no request in complaint of Banshraj that Nyay Panchayat should also decide the shares of the parties. Therefore, Nyay Panchayat could not decide the shares of

complainant-defendant regarding the disputed property mentioned in map prepared at the point of time of inspection.

31. In these circumstances, the Nyay Panchayat was not having jurisdiction to decide the dispute of civil nature of shares of complainant and defendants, because complainant Ram Naresh/respondent no. 1 was not participating during aforesaid period. Therefore, judgment dated 10.8.1980 relied upon by learned counsel for appellant was not binding on respondent no. 1/Ram Naresh on the basis of provisions of Section 11 of i.e. principle of res-judicata.

32. Learned first appellate court has considered Section 64, 52/1A of U.P. Panchayat Raj Act, 1957. Section 52 and 64 provides as follows:-

52. Offences cognizable by Nyaya Panchayats - [(1) The following offences as well as abetments of and attempts to commit such offices, if committed within the jurisdiction of a Nyaya Panchayat shall be cognizable by such Nyaya Panchayat] :

(a) offences under sections 140, 160, 172, 174, 179, 269, 277, 283, 285, 289, 290, 294, 324, 334, 341, 352, 357, 358, 374, 379, 403, 411, (where the value of the stolen or misappropriated property in cases under Sections 379, 403 and 411 does not exceed fifty rupees), 426, 428, 430, 431, 447, 448, 504, 506, 509, and 510 of the Indian Penal Code, 1860;

(b) offences under sections 24 and 26 of the Cattle Trespass Act, 1871;

(c) offences under sub-section (1) of Section 10 of the United Provinces District Board Primary Education Act, 1926;

(d) offences under Sections 3, 4, 7 and 13 of the Public Gambling Act, 1867;

(e) any other offence under aforesaid enactments or any other enactment as may, by notification in the official Gazette, be declared by the State Government to be cognizable by a Nyaya Panchayat; and

(f) any offence under this Act or any rule made there-under.

(1-A) The State Government may by order published in the Official Gazette empower any Nyaya Panchayat to take cognizance of offences under Sections 279, 286, 336 and 356 of the Indian Penal Code, 1860 and may likewise withdraw any offence referred to in clauses (a) to (d) of sub-section (1) from the cognizance of Nyaya Panchayats generally or such Nyaya Panchayats as may be specified. (2) Any criminal case relating to an offence under Section 143, 145, 151 or 153 of the Indian Penal Code, 1860, pending before any court may be transferred for trial to the Nyaya Panchayat if in the opinion of such court the offence is not serious.

64. Extent of jurisdiction in civil cases - (1) Subject to the provisions of Section 66 a Nyaya Panchayat may take cognizance of any civil case of the following description if its value does not exceed one hundred rupees -

(a) a civil case for money due on contract other than a contract in respect of immovable property;

(b) a civil case for the recovery of movable property or for the value thereof;

(c) a civil case for compensation for wrongfully taking or injuring a movable property; and

(d) a civil case for damages caused by cattle trespass.

(2) The State Government may, by notification in the official Gazette, direct that the jurisdiction of any Nyaya

Panchayat shall extend to all such civil cases of the value not exceeding five hundred rupees."

33. Learned counsel for appellant has argued before first appellate court that according to Section 64 of Nyay Panchayat, Nyay Panchayat was competent to decide civil dispute of property of costs less than Rs.100/-

34. Appellant Banshraj relied upon sale deed, which was of Rs.100/-. Therefore, first appellate court has held that Nyay Panchayat was not having jurisdiction to decide civil dispute also.

35. According to Section 64 of U.P. Panchayat Raj Act, 1947, Nyay Panchayat is not competent to hear and decide the suit for partition of immovable and civil case of property valued Rs.100/- or its value, which exceed Rs.100/-. The category of cases within jurisdiction of Nyay Panchayat has been enumerated in Section 64 and civil dispute of partition of property between the parties was not entertainable by Nyay Panchayat. The Nyay Panchayat was not having jurisdiction to decide suit for partition.

36. Likewise, no notification issued by the State Government of U.P. enhancing pecuniary jurisdiction upto Rs.500/- was not produced before the trial court. The present suit was valued at Rs.3,600/-.

37. Therefore, Nyay Panchayat was not having pecuniary jurisdiction to entertain the present dispute. The Nyay Panchayat was not having jurisdiction to take cognizance of offence under Sections 379, 403 and 411 IPC, where the value of the stolen or misappropriated case property exceeded Rs.50/-. According to Section 52/1A of U.P. Panchayat Raj Act, 1957 provides also that Nyay Panchayat was not competent to decide disputed property of costs above Rs.50/-.

38. Likewise, the first appellate court has considered criminal proceedings also in light of provisions of Section 52 of U.P. Panchayat Raj Act.

39. Learned first appellate court has also recorded finding regarding sale deed dated 8.7.1965 relied upon by the appellant in light of provisions of Section 54 of Transfer of Property Act, which provides that transaction/transfer of property of costs of Rs.100/- or above could be made only by means of registered document, but sale deed paper no. Ka/52 has not been registered, therefore, no rights could be transferred by Ram Dulari wife of Bindeshwari Prasad on the basis of sale deed dated 8.7.1965 in favour of appellant Banshraj.

40. Learned first appellate court has appreciated and analysed the evidence of both the parties and found that in the year 1965 appellant and respondent were living jointly and there was no partition of agricultural land or Abadi land in the year 1965. The present original suit no. 253 of 1984 (Ram Naresh Vs. Banshraj and another) was instituted on 27.5.1994. It is pleaded in the plaint that plaintiff and defendant were living separately from 15 years ago and agricultural land was divided 10-12 years ago.

41. Therefore, the appellant was obliged to prove this fact that consideration of alleged sale deed dated 8.7.1965 was paid by his source of income and it was his self acquired property. The consideration of sale deed was not paid by the income/joint fund of both the parties.

42. Learned first appellate court has also tallied the boundaries mentioned in the

sale deed with the disputed property mentioned in map of plaint and found that there was no mention of fact that on western side, property of appellant Ram Naresh was situated and ancestral property of parties was situated.

43. I have also tallied the boundaries mentioned in sale deed dated 8.7.1965 and boundaries mentioned in map of plaint and in map prepared by Amin paper no. 24/2 ग. On eastern side of sold property way along with house of Ram Deen was existed as per sale deed. On western side Ghari has been shown. On southern side Aaraji Majruba. On north side, house of Mustari was mentioned.

44. Learned first appellate court has observed that in map of plaint, the place marked **ब स य र** was bounded. On western side of house of appellant Ram Naresh and main door of his house was opened towards eastern side i.e. towards disputed property marked with ब स य र. Therefore, learned first appellate court has observed on the basis of boundaries mentioned in plaint map and sale deed dated 8.7.1965 that it could not be proved that disputed property marked with ब स य र was the same property, which was sold by Ram Dulari widow of Bindeshwari Prasad.

45. It is relevant to mention here that the trial court has not tried to consider the identity of disputed property mentioned in plaint map on the basis of inspection report 24 ग/1 and map 24 ग/2 prepared by Amin under orders of trial court in correct perspective, before holding that disputed property was not identifiable. It is relevant to mention here that complainant/respondent no. 1 has appended plaint map Ka15/6 of disputed property and facts mentioned in plaint map are corroborated by map 24 ग/2 prepared by Amin.

46. Therefore, finding of trial court regarding issue no. 3 that disputed property was not capable of identification was incorrect. Moreover, the trial court was obliged to appreciate the evidence of plaintiff/respondent no. 1, appellant/defendant DW-1 and respondent no. 2 DW-4 in light of map prepared by Amin 24 ग/2 and facts mentioned in plaint map. The sufficient material was available on record for consideration of trial court regarding identification of disputed property in this regard.

47. Learned first appellate court has mentioned in judgment and order dated 26.4.2010 that none of the parties argued on issue no. 3 and 4, which were framed by trial court regarding identification of disputed property and deficiency of violation of the suit and court fees. The finding recorded by the trial court on issue no. 3 is liable to be set aside as it is not recorded on the basis of material available on record.

48. On the basis of appreciation of evidence available on record, learned first appellate court has rightly recorded the finding in correct perspective regarding sale deed dated 8.7.1965 and documents relating to Nyay Panchayat relied upon by appellant Banshraj. The suit of plaintiff/respondent no. 1 was not barred by provisions of Section 11 of the C.P.C.

49. **The substantial question of law no. 1 is decided against the appellant.**

Substantial question of law no. 2 and 3:-

50. These substantial question of law are formulated on the basis of grounds of appeal regarding identification of disputed properties and joint property. Where between the parties, it is admitted that most of the properties have already been divided, then the presumption of property to be joint would not help the person, who is seeking partition of the property dispute?

51. The trial court after appreciation of evidence of both parties has recorded finding that disputed property was not identifiable and the plaintiff could not prove the details of disputed property, according to him, which was subject of partition.

52. On perusal of impugned judgment delivered by learned trial court, it reveal that trial court has only considered the plaint map and it has not considered map 24 ग/2 prepared by Amin of civil court. The every minute details, i.e. measurement and boundaries of disputed property has been mentioned in this map, which could be relied upon by the trial court.

53. The appellant Banshraj has specifically contended in his written statement that the disputed property marked with द र ल व related to Nai Abadi and it was given by Land Management Committee to him, by executing Patta of Khasra No. 1015. The appellant has not produced any Patta given by Consolidation Officer and Village Head to him of this property, before the proceedings conducted by Nyay Panchayat.

54. The appellant was also present on spot, when Amin inspected the disputed property under order of the trial court. Amin has submitted his report 24 ग along with map of disputed property 24 ग/2. The appellant had not stated before Amin as per report 24 ग that the property was obtained by him by means of Patta, which was included in the disputed property.

55. During course of trial also, the appellant was not able to prove his specific contention mentioned in written statement that disputed property द र ल व was part of Nai Abadi and he took it on Patta from Land Management Committee of Khasra No. 1015. No Patta was produced before the trial court also.

56. The complainant Ram Naresh PW-1 and his witnesses PW-2 Anirudh, PW-3 Kubernath and DW-5 Hansraj defendant/respondent no. 2 has proved this fact that sale deed dated 8.7.1965 relied upon by appellant Banshraj is fictitious and his contention that land of Nai Abadi on Kharsa No. 1015 was included in the disputed property, was incorrect, which was obtained by him on Patta from Land Management Committee.

57. The appellant DW-1 Banshraj was unable to prove the fact of Patta obtained by him of Khasra No. 1015 by producing it before the trial court. His witnesses DW-2 Triyugi Narain, DW-3 Agnu, DW-4 Dharm Baksh Singh also were unable to prove the identification of property obtained by Banshraj on Patta.

58. On perusal of map 24 ग/2 prepared by Amin discloses this fact that all the properties sought to be partitioned in this matter is situated in the same campus. PW-1 Ram Naresh, and DW-5 Hansraj are co-sharer and real brothers of appellant Banshraj. They have proved that disputed property mentioned in plaint map is their

joint property of Abadi and it was not ever partitioned.

59. Learned first appellate court has appreciated the evidence of both the parties and observed that issue no. 1 and 2 framed by trial court was liable to be decided in positive in favour of plaintiff and both the defendant and plaintiff Ram Naresh were having 1/3 share in the disputed property and entire property was ancestral property of them.

60. The learned defence counsel on behalf of the appellant has not pressed issue no. 5 even before the trial court regarding necessity of Land Management Committee ought to have been arrayed in the original suit.

61. It is pertinent to mention here that when issue no. 5 was not pressed, even before the trial court and alleged Patta given by Land Management Committee was not produced by appellant Banshraj before the trial court, therefore, it cannot be said that Land Management Committee was the necessary party of the original suit.

62. Learned first appellate court has observed in the impugned order dated 26.4.2010 that appellant Banshraj had not produced any evidence before the trial court. Therefore, the trial court has decided issue no. 5 in negative against the appellant.

63. Therefore, the learned first appellate court has rightly recorded finding that complainant Ram Naresh and defendant-appellant Banshraj and Harsraj-respondent no. 2 are having 1/3-1/3 share in the disputed property and rightly decreed suit of the plaintiff and a direction has been given for preparation of preliminary decree. The impugned judgment and order dated 12.9.2008 has been set aside in correct perspective after due appreciation of evidence of both the parties. Therefore, **substantial question of law no. 2 and 3 are hereby decided against the appellant.**

64. The impugned judgment and order dated 26.4.2010 is modified that map 24 ग/2 prepared by Amin of civil court shall be considered while preliminary decree would be prepared by the trial court.

Substantial question of law no. 4:-

65. Learned counsel for appellant has argued that learned first appellate court has not complied with provisions of Order XLI, Rule 31 of C.P.C., which resulted in prejudice to the appellant, if so affect?

66. On perusal of impugned judgment and order dated 26.3.2010, it reveal that first appellate court has addressed the dispute by analyzing and evaluating the evidence adduced by both the parties before the trial court on the basis of issue framed by trial court and substantially complied with provisions of Order XLI, Rule 31 C.P.C. On the point of compliance of Order XLI, Rule 31 C.P.C., the following exposition of law is relevant:-

67. Hon'ble the Apex Court in the case of ***R.S. Anjayya Gupta v. Thippaiah Setty***, reported in **(2019) 7 SCC 300** has held as under:-

17. In a recent decision of this Court in *U. Manjunath Rao [U. Manjunath Rao v. U. Chandrashekar*, (2017) 15 SCC 309 : (2018) 2 SCC (Civ) 682] , the Court after adverting to*Santosh Hazari [Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179, para 15], *Sarju Pershad Ramdeo*

Sahu v. Jwaleshwari Pratap Narain Singh [Sarju Pershad Ramdeo Sahu v.Jwaleshwari Pratap Narain Singh, AIR 1951 SC 120, para 15], *Madhukar [Madhukar v.Sangram*, (2001) 4 SCC 756, para 5], *H.K.N. Swami v. Irshad Basith [H.K.N. Swami v. Irshad Basith*, (2005) 10 SCC 243, para 3] and *SBI v. Emmsons International Ltd. [SBI v.Emmsons International Ltd.*, (2011) 12 SCC 174 : (2012) 2 SCC (Civ) 289] went on to observe thus: *(U. Manjunath Rao case [U. Manjunath Rao v. U. Chandrashekar*, (2017) 15 SCC 309 : (2018) 2 SCC (Civ) 682] , SCC pp. 313-15, paras 11-14)

"11. ... *"3*. ... Thus, in the first appeal the parties have the right to be heard both on the questions of facts as well as on law and the first appellate court is required to address itself to all the aspects and decide the case by ascribing reasons.'

12. In this context, we may usefully refer to Order 41 Rule 31 CPC which reads as follows:

"ORDER 41

Appeals from Original Decrees

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31. Contents, date and signature of judgment.--The judgment of the appellate court shall be in writing and shall state--

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.'

13. On a perusal of the said Rule, it is quite clear that the judgment of the appellate court has to state the reasons for the decision. It is necessary to make it clear that the approach of the first appellate court while affirming the judgment of the trial court and reversing the same is founded on different parameters as per the judgments of this Court. In *Girijanandini Devi [Girijanandini Devi v. Bijendra Narain Choudhary*, AIR 1967 SC 1124] , the Court ruled that while agreeing with the view of the trial court on the evidence, it is not necessary to restate the effect of the evidence or reiterate the reasons given by the trial court. Expression of general agreement with reasons given in the trial court judgment which is under appeal should ordinarily suffice. The same has been accepted by another three-Judge Bench in *Santosh Hazari [Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179, para 15]. However, while stating the law, the Court has opined that expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage to be adopted by the appellate court for shirking the duty cast on it. We are disposed to think, the expression of the said opinion has to be understood in proper perspective. By no stretch of imagination it can be stated that the first appellate court can quote passages from the trial court judgment and thereafter pen few lines and express the view that there is no reason to differ with the trial court judgment. That is not the statement of law expressed by the Court. The statement of law made in *Santosh Hazari [Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179, para 15] has to be borne in mind.

14. In this regard, a three-Judge Bench decision in *Asha Devi v. Dukhi Sao [Asha Devi v. Dukhi Sao*, (1974) 2 SCC 492] is worthy of noticing, although the context was different. In the said case, the question arose with regard to power of the Division Bench hearing a letters patent

appeal from the judgment of the Single Judge in a first appeal. The Court held that the letters patent appeal lies both on questions of fact and law. The purpose of referring to the said decision is only to show that when the letters patent appeal did lie, it was not restricted to the questions of law. The appellant could raise issues pertaining to facts and appreciation of evidence. This is indicative of the fact that the first appellate court has a defined role and its judgment should show application of mind and reflect the reasons on the basis of which it agrees with the trial court. There has to be an "expression of opinion" in the proper sense of the said phrase. It cannot be said that mere concurrence meets the requirement of law. Needless to say, it is one thing to state that the appeal is without any substance and it is another thing to elucidate, analyse and arrive at the conclusion that the appeal is devoid of merit."

Under Order XLI, Rule 33 of C.P.C. reads as under:-

"33. "Power of Court of Appeal-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

Principles for entertaining Second Appeal

68. On the point of admission of Second appeal, the following exposition of law is relevant:-

69. In the case of **Thulasidhara v. Narayanappa, (2019) 6 SCC 409** the Hon'ble Supreme Court has held as under:

"7.1. At the outset, it is required to be noted that by the impugned judgment and order *[Narayanappa v. Rangamma*, 2007 SCC OnLine Kar 737] , in a second appeal and in exercise of the powers under Section 100 CPC, the High Court has set aside the findings of facts recorded by both the courts below. The learned trial court dismissed the suit and the same came to be confirmed by the learned first appellate court. While allowing the second appeal, the High Court framed only one substantial question of law which reads as under:

"Whether the appellant is the owner and in possession of the suit land as he purchased it in the year 1973, that is, subsequent to the date 23-4-1971 when Ext. D-1, partition deed, Palupatti is alleged to have come into existence?"

No other substantial question of law was framed. We are afraid that the aforesaid can be said to be a substantial question of law at all. It cannot be disputed and even as per the law laid down by this Court in the catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 CPC after

the 1976 Amendment, is confined only with the second appeal involving a substantial question of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC.

7.2. As observed and held by this Court in **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722]**, in the second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being:

(i) Contrary to the mandatory provisions of the applicable law;

or

(ii) Contrary to the law as pronounced by the Apex Court;

or

(iii) Based on inadmissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in the second appeal. It is further observed that the trial court could have decided differently is not a question of law justifying interference in second appeal.

7.3. When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in *Ishwar Dass Jain v. Sohan Lal* ***[Ishwar Dass Jain v. Sohan Lal*, (2000) 1 SCC 434]** . In the aforesaid decision, this Court has specifically observed and held: (SCC pp. 441-42, paras 10-13)

"10. Under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so.

11. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. …

12. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. …

13. In either of the above situations, a substantial question of law can arise."

70. In the case of **Gurnam Singh v. Lehna Singh, (2019) 7 SCC 641** the Hon'ble Supreme Court has held as under:

"13.1.The suspicious circumstances which were considered by the learned trial court are narrated/stated hereinabove. On reappreciation of evidence on record and after dealing with each alleged suspicious circumstance, which was dealt with by the learned trial court, the first appellate court by giving cogent reasons held the will genuine and consequently did not agree with the findings recorded by the learned trial court. However, in second appeal under Section 100 CPC, the High Court, by the impugned judgment and order has interfered with the judgment and decree passed by the first appellate court. While interfering with the judgment and order passed by the first appellate court, it appears that while upsetting the judgment and decree passed by the first appellate court, the High Court

has again appreciated the entire evidence on record, which in exercise of powers under Section 100 CPC is not permissible. While passing the impugned judgment and order, it appears that the High Court has not at all appreciated the fact that the High Court was deciding the second appeal under Section 100 CPC and not first appeal under Section 96 CPC. As per the law laid down by this Court in a catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 CPC after the 1976 Amendment, is confined only when the second appeal involves a substantial question of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC. As observed and held by this Court in ***Kondiba Dagadu Kadam [Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722]*** , in a second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being:

(i) Contrary to the mandatory provisions of the applicable law;

or

(ii) Contrary to the law as pronounced by the Supreme Court;

or

(iii) Based on inadmissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. It is further observed that the trial court could have decided differently is not a question of law justifying interference in second appeal."

71. Hon'ble Supreme Court in **State of M.P. v. Dungaji, (2019) 7 SCC 465** has propounded regarding interference by High Courts in exercising of power under Section 100 C.P.C. as follows:

"10. Now, so far as the impugned judgment and order *[Dungaji v. State of M.P.*, Second Appeal No. 580 of 2003, order dated 29-10-2010 (MP)] passed by the High Court declaring and holding that the marriage between Dungaji and Kaveribai had been dissolved by way of customary divorce, much prior to the coming into force the provisions of the 1960 Act and therefore after divorce, the property inherited by Kaveribai from her mother cannot be treated to be holding of the family property of Dungaji for the purposes of determination of surplus area is concerned, at the outset, it is required to be noted that as such there were concurrent findings of facts recorded by both the courts below specifically disbelieving the dissolution of marriage between Dungaji and Kaveribai by way of customary divorce as claimed by Dungaji, original plaintiff. There were concurrent findings of facts recorded by both the courts below that the original plaintiff has failed to prove and establish that the divorce had already taken place between Dungaji and Kaveribai according to the prevalent custom of the society. Both the courts below specifically disbelieved the divorce deed at Ext. P-5. The aforesaid findings were recorded by both the courts below on appreciation of evidence on record. Therefore, as such, in exercise of powers under Section 100 CPC, the High Court was not justified in interfering with the aforesaid findings of facts recorded by both the courts below.

Cogent reasons were given by both the courts below while arriving at the aforesaid findings and that too after appreciation of evidence on record. Therefore, the High Court has exceeded in its jurisdiction while passing the impugned judgment and order in the second appeal under Section 100 CPC.

11. Even on merits also both the courts below were right in holding that Dungaji failed to prove the customary divorce as claimed. It is required to be noted that at no point of time earlier either Dungaji or Kaveribai claimed customary divorce on the basis of divorce deed at Ext. P-5. At no point of time earlier it was the case on behalf of the Dungaji and/or Kaveribai that there was a divorce in the year 1962 between Dungaji and Kaveribai. In the year 1971, Kaveribai executed a sale deed in favour of Padam Singh in which Kaveribai is stated to be the wife of Dungaji. Before the competent authority neither Dungaji nor Kaveribai claimed the customary divorce. Even in the revenue records also the name of Kaveribai being wife of Dungaji was mutated. In the circumstances and on appreciation of evidence on record, the trial court rightly held that the plaintiff has failed to prove the divorce between Dungaji and Kaveribai as per the custom.

12. At this stage, it is required to be noted that before the competent authority, Kaveribai submitted the objections. Before the competent authority, she only stated that she is living separately from Dungaji and Ramesh Chandra, son of Padam Singh, has been adopted by her. However, before the competent authority neither Dungaji nor Kaveribai specifically pleaded and/or stated that they have already taken divorce as per the custom much prior to coming into force the 1960 Act. Therefore, as rightly observed by the learned trial court and the first appellate court only with a view to get out of the provisions of the Ceiling Act, 1960, subsequently and much belatedly, Dungaji came out with a case of customary divorce. As rightly observed by the learned trial court that the divorce deed at Ext. P-5 was got up and concocted document with a view to get out of the provisions of the Ceiling Act, 1960. As observed hereinabove, the High Court has clearly erred in interfering with the findings of facts recorded by the courts below which were on appreciation of evidence on record."

72. Hon'ble the Apex Court in the case of ***Narayana Gramani v. Mariammal,*** reported in **(2018) 18 SCC 645** has held as under:-

17. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Sub-section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other

words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section (4). The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of respondent and, therefore, sub-section (5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognises the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal. (See *Santosh Hazari v. Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179] and *Surat Singh v. Siri Bhagwan [Surat Singh v. Siri Bhagwan*, (2018) 4 SCC 562 : (2018) 3 SCC (Civ) 94])

73. In the case of ***Arulmighu Nellukadai Mariamman Tirukkoil v. Tamilarasi,*** reported in **(2019) 6 SCC 686**, Hon'ble Apex Court has held as under:-

10. The need to remand the case has occasioned because we find that the High Court failed to frame any substantial question of law arising in the case while admitting the appeal as required under Section 100(4) of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") and further failed to decide the appeal as provided under Section 100(5) CPC.

11. It is noticed that the High Court framed two substantial questions of law (see para 7 of the impugned judgment *[Tamilarasi v. Arulmighu Nellukadai Mariamman Tirukkoil*, 2011 SCC OnLine Mad 1684]) for the first time in the impugned judgment *[Tamilarasi v.Arulmighu Nellukadai Mariamman Tirukkoil*, 2011 SCC OnLine Mad 1684] itself. In other words, what was required to be done by the High Court at the time of admission of the appeal was to formulate a question of law after hearing the appellant as provided under Section 100(4) CPC, but the High Court did it in the impugned judgment. Similarly, the High Court could have taken recourse to the powers conferred by the proviso to Section 100(5) CPC for framing any additional question of law at the time of final hearing of the appeal by assigning reasons for framing additional question, if it considered that any such question was involved. It was, however, not done. Instead, the High Court framed the questions for the first time while delivering the impugned judgment.

12. In our considered opinion, the procedure and the manner in which the High Court decided the second appeal regardless of the fact whether it was allowed or dismissed cannot be countenanced. It is not in conformity with the mandatory procedure laid down in Section 100 CPC.

13. Recently, this Court had an occasion to examine this very question in *Surat Singh v.Siri Bhagwan [Surat Singh v. Siri Bhagwan*, (2018) 4 SCC 562 : (2018) 3 SCC (Civ) 94] . The law is explained in

paras 19 to 35 of this decision which read as under: (SCC pp. 567-69)

"19. ... Section 100 of the Code reads as under:

"**100.** ***Second appeal.***--(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.'

20. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Sub-section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law
framed by the High Court.

21. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section (4). The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of respondent and, therefore, sub-section (5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognises the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal.

22. Adverting to the facts of this case at hand, we are at a loss to understand as to how the High Court while passing a final judgment *[Bhagwan v. Murti Devi*, 2006 SCC OnLine P&H 2175] in its concluding paragraph could frame the substantial question of law for the first time and simultaneously answered the said question in appellant's favour. Obviously, the learned Judge must have done it by taking recourse to sub-section (4) of Section 100 of the Code.

23. Here is the case where the High Court was under a legal obligation to frame the substantial question at the time of admission of the appeal after hearing the appellant or/and his counsel under sub-section (4) of Section 100 of the Code, but the High Court did it while passing the final judgment in its concluding paragraph.

24. Such novel procedure adopted by the High Court, in our considered opinion, is wholly contrary to the scheme of Section 100 of the Code and renders the impugned judgment legally unsustainable.

25. In our considered opinion, the High Court had no jurisdiction to frame the substantial question at the time of writing of its final judgment in the appeal except to the extent permitted under sub-section (5). The procedure adopted by the High Court, apart from it being against the scheme of Section 100 of the Code, also resulted in causing prejudice to the respondents because the respondents could not object to the framing of substantial question of law. Indeed, the respondents could not come to know on which question of law, the appeal was admitted for final hearing.

26. In other words, since the High Court failed to frame any substantial question of law under sub-section (4) of Section 100 at the time of admission of the appeal, the respondents could not come to know on which question of law, the appeal was admitted for hearing.

27. It cannot be disputed that sub-section (5) gives the respondents a right to know on which substantial question of law, the appeal was admitted for final hearing. Sub-section (5) enables the respondents to raise an objection at the time of final hearing that the question of law framed at the instance of the appellant does not really arise in the case.

28. Yet, the other reason is that the respondents are only required to reply while opposing the second appeal to the question formulated by the High Court under sub-section (4) and not beyond that. If the question of law is not framed under sub-section (4) at the time of admission or before the final hearing of the appeal, there remains nothing for the respondent to oppose the second appeal at the time of hearing. In this situation, the High Court will have no jurisdiction to decide such second appeal finally for want of any substantial question(s) of law.

29. The scheme of Section 100 is that once the High Court is satisfied that the appeal involves a substantial question of law, such question shall have to be framed under sub-section (4) of Section 100. It is the framing of the question which empowers the High Court to *finally decide* the appeal in accordance with the procedure prescribed under sub-section (5). Both the requirements prescribed in sub-sections (4) and (5) are, therefore, mandatory and have to be followed in the manner prescribed therein. Indeed, as mentioned supra, the jurisdiction to decide the second appeal *finally* arises only after the substantial question of law is framed under sub-section (4). There may be a case and indeed there are cases where even after framing a substantial question of law, the same can be answered against the appellant. It is, however, done only after hearing the respondents under sub-section (5).

30. If, however, the High Court is satisfied after hearing the appellant at the time of admission that the appeal does not involve any substantial question of law, then such appeal is liable to be dismissed in limine without any notice to the respondents after recording a finding in the dismissal order that the appeal does not involve any substantial question of law within the meaning of sub-section (4). It is needless to say that for passing such order in limine, the High Court is required to assign the reasons in support of its conclusion.

31. It is, however, of no significance, whether the respondent has appeared at the time of final hearing of the appeal or not. The High Court, in any case, has to proceed in accordance with the procedure prescribed under Section 100 while disposing of the appeal, whether in limine or at the final hearing stage.

32. It is a settled principle of rule of interpretation that whenever a statute requires a particular act to be done in a particular manner then such act has to be done in that manner only and in no other manner. *(See Interpretation of Statutes* by G.P. Singh, 9th Edn., p. 347 and *Baru Ram v. Prasanni [Baru Ram v. Prasanni*, AIR 1959 SC 93].)

33. The aforesaid principle applies to the case at hand because, as discussed above, the High Court failed to follow the procedure prescribed under Section 100 of the Code while allowing the second appeal and thus committed a jurisdictional error calling for interference by this Court in the impugned judgment.

34. While construing Section 100, this Court in *Santosh Hazari v. Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari,* (2001) 3 SCC 179] succinctly explained the scope, the jurisdiction and what constitutes a substantial questions of law under Section 100 of the Code.

35. It is, therefore, the duty of the High Court to always keep in mind the law laid down in *Santosh Hazari [Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179] while formulating the question and deciding the second appeal."

(emphasis in original)

14. In the light of the foregoing discussion, we cannot sustain the impugned judgment [*Tamilarasi v. Arulmighu Nellukadai Mariamman Tirukkoil*, 2011 SCC OnLine Mad 1684] which, in our view, is not in conformity with the mandatory requirements of Section 100 CPC and hence calls for interference in this appeal.

15. The appeal thus deserves to be allowed and it is accordingly allowed. The impugned judgment is set aside. The case is remanded to the High Court for deciding the second appeal afresh in accordance with law. The High Court will frame proper substantial question(s) of law after hearing the appellant and if it finds that any substantial question(s) of law arises in the case, it will first formulate such question(s) and then accordingly decide the appeal finally on the question(s) framed in accordance with law.

74. The Division Bench of Hon'ble Apex Court in the case of **Chand Kaur v. Mehar Kaur, (2019)** reported in **12 SCC 202 : 2019 SCC OnLine SC 426** at page 203 has held in paragraph no. 3 to 5 has held as under:-

3. The need to remand these cases to the High Court is called for because we find that the High Court though disposed of bunch of second appeals (RSAs Nos. 2066 to 2068 of 1987 and RSAs Nos. 2292 to 2294 of 1987) but it did so without framing

any substantial question(s) of law as is required to be framed under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code").

4. In our opinion, framing of substantial question(s) of law in the present appeals was mandatory because the High Court allowed the second appeals and interfered in the judgment of the first appellate court, which was impugned in the second appeals. It is clear from the last paragraph of the impugned order [*Mehar Kaur v. Chand Kaur*, 2011 SCC OnLine P&H 17686] quoted hereinbelow: (*Mehar Kaur case [Mehar Kaur v. Chand Kaur*, 2011 SCC OnLine P&H 17686] , SCC OnLine P&H paras 15-16)

"15. However, I am unable to convince myself with the latter part of the judgment of the learned lower appellate court wherein Chand Kaur was held to be entitled to ½ share of the property of Jaimal, by placing reliance on the judgment delivered in the previous litigation between Mehar Singh and Chand Kaur. Once the learned lower appellate court arrived at a specific finding of fact that Chand Kaur was neither the daughter of Santo nor Santo is daughter of Cheta, thus, there was no basis for it to hold that Chand Kaur was entitled to hold half of the property of late Jaimal. By placing reliance on the previous judgment, the learned lower appellate court went against its own judgment and impliedly admitted that Santo was the daughter of Cheta. It is obvious that such a status of things cannot co-exist. By necessary implication, as a result of the finding arrived at by the learned lower appellate court regarding Santo not being the daughter of Cheta, the entitlement of the property of late Jaimal falls on Mehar Singh and Mehar Kaur in equal shares.

16. In view of above, RSAs Nos. 2066-68 of 1987 filed by Mehar Kaur succeed and RSAs Nos. 2292-94 of 1987 filed by Chand Kaur are dismissed. The findings of the learned lower appellate court are modified to the extent that Mehar Singh and legal heirs of Mehar Kaur are held entitled to succeed to the entire property of late Jaimal Singh in equal shares and the legal heirs of Chand Kaur shall have no right to such property at all."

5. This Court has consistently held that the High Court has no jurisdiction to allow the second appeal without framing a substantial question of law as provided under Section 100 of the Code. In other words, the sine qua non for allowing the second appeal is to first frame the substantial question(s) of law arising in the case and then decide the second appeal by answering the question(s) framed. (See *Surat Singh v. Siri Bhagwan [Surat Singh v. Siri Bhagwan*, (2018) 4 SCC 562 : (2018) 3 SCC (Civ) 94] and *Vijay Arjun Bhagat v. Nana Laxman Tapkire [Vijay Arjun Bhagat v. Nana Laxman Tapkire*, (2018) 6 SCC 727 : (2018) 3 SCC (Civ) 801] .)

75. The Division Bench of Hon'ble Apex Court in the case of State of **Rajasthan v. Shiv Dayal**, reported in **(2019) 8 SCC 637 : (2019) 4 SCC (Civ) 203 : 2019 SCC OnLine SC 1034 at page 639** has held in paragraph nos. 7, 8 and 11 to 17 and 25 as under:-

7. By impugned order [*State v. Shiv Dayal*, Civil Second Appeal No. 83 of 1999, order dated 23-3-1999 (Raj)] , the High Court dismissed the second appeals holding that the appeals did not involve any substantial question of law. It is against this order, the State felt aggrieved and has filed the present appeals by way of special leave before this Court.

8. So, the short question, which arises for consideration in these appeals, is

whether the High Court was justified in dismissing the State's second appeals on the ground that these appeals did not involve any substantial question of law.

11. In our opinion, the need to remand the case to the High Court has arisen because we find that the second appeals did involve several substantial questions of law for being answered on merits in accordance with law. The High Court was, therefore, not right in so holding.

12. Indeed, we find that the High Court dismissed the second appeals essentially on the ground that since the two courts have decreed the suit, no substantial question of law arises in the appeals. In other words, the High Court was mostly swayed away with the consideration that since two courts have decreed the suit, resulting in passing of the decree against the State, there arises no substantial question of law in the appeals. It is clear from the last paragraph of the impugned order, which reads as under:

"Under these circumstances, when both the learned courts have arrived at the conclusion that the disputed area is outside the forest area. Therefore, the principles laid down in *T.N. Godavarman Thirumulpad v. Union of India* (abovequoted) cannot be enforced in this appeal. (emphasis supplied)

13. We do not agree with the aforementioned reasoning and the conclusion arrived at by the High Court. It is not the principle of law that where the High Court finds that there is a concurrent finding of two courts (whether of dismissal or decreeing of the suit), such finding becomes unassailable in the second appeal.

14. True it is as has been laid down by this Court in several decisions that "concurrent finding of fact" is usually binding on the High Court while hearing the second appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"). However, this rule of law is subject to certain well-known exceptions mentioned infra.

15. It is a trite law that in order to record any finding on the facts, the trial court is required to appreciate the entire evidence (oral and documentary) in the light of the pleadings of the parties. Similarly, it is also a trite law that the appellate court also has the jurisdiction to appreciate the evidence de novo while hearing the first appeal and either affirm the finding of the trial court or reverse it. If the appellate court affirms the finding, it is called "concurrent finding of fact" whereas if the finding is reversed, it is called "reversing finding". These expressions are well known in the legal parlance.

16. When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded dehors the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached. (See observation made by learned Judge, Vivian Bose, J., as his Lordship then was a Judge of the Nagpur High Court in*Rajeshwar Vishwanath Mamidwar v. Dashrath Narayan Chilwelkar [Rajeshwar Vishwanath Mamidwar v. Dashrath Narayan Chilwelkar*, 1942 SCC OnLine MP 26 : AIR 1943 Nag 117] para 43.)

17. In our opinion, if any one or more ground, as mentioned above, is made out in an appropriate case on the basis of the pleading and evidence, such ground will constitute substantial question of law within the meaning of Section 100 of the Code.

25. In our view, the High Court, therefore, should have admitted the second appeal by framing appropriate substantial question(s) of law arising in the case and answered them on their respective merits rather than to dismiss the appeals without considering any of the aforementioned questions.

On the point of concurrent finding, following exposition of is relevant:-

76. **In S.V.R.Mudaliar (Dead) by Lrs. and Ors. Vs. Rajabu F.Buhari (Mrs) (Dead) by Lrs. and Ors. AIR 1995 SC 1607**, the Court in paras 14 and 15 of the judgment has upheld the contention that though the appellate court is within its right to take a different view on the question of fact, but that should be done after adverting to the reasons given by trial court in arriving at the findings in question. Appellate Court before reversing a finding of fact has to bear in mind the reasons ascribed by Trial Court. Court relied and followed earlier decision of Privy Council in **Rani Hemant Kumari Vs. Maharaja Jagadhindra Nath, 10 CWN 630** and in para 15 of the judgment said:

"There is no need to pursue the legal principle, as we have no doubt in our mind that before reversing a finding of fact, the appellate court has to bear in mind the reasons ascribed by the trial court. This view of ours finds support from what was stated by the Privy Council in Rani Hemant Kumari Vs. Maharaja Jagadhindra Nath, (1906) 10 Cal.W.N. 630, wherein, while regarding the appellate judgment of the High Court of judicature at Fort William as "careful and able", it was stated that it did not "come to close quarters with the judgment which it reviews, and indeed never discusses or even alludes to the reasoning of the Subordinate Judge."

77. Following the above decision Hon'ble B.L.Yadav, J in **Smt. Sona Devi Vs. Nagina Singh and Ors. AIR 1997 Patna 67** observed that whenever judgment of Appellate Court is a judgment of reversal, it is the primary duty of Appellate Court while reversing the findings of Trial Court to consider the reasons given by Trial Court and those reasons must also be reversed. Unless that is done, judgment of lower Appellate Court cannot be held to be consistent with the requirement of Order XLI, Rule 31, which is a mandatory provision.

78. The above view has also been followed recently in **Jaideo Yadav Vs. Raghunath Yadav & Anr., 2009(3) PLJR 529** wherein the Court said that Trial Court recorded its findings but lower Appellate Court had not reversed the said findings and rather on the basis of some findings of its own, title appeal was allowed by lower Appellate Court without appreciating findings of Trial Court on the concerned issue. The court then said :

"The law is well settled in this regard that where the judgment of the lower appellate court is a judgment of reversal it is primary duty of the appellate court to consider the reasons given by the trial court and those reasons must also be reversed."

79. This court has also followed the same view in **Doodhnath and another Vs. Deonandan AIR 2006 Allahabad 3.** Recently this view has also been followed in **Second Appeal No. 47 of 2015, Awadh Narayan Singh Vs. Harinarayan, decided on 22.1.2015.**

80. The Division Bench of Hon'ble the Apex Court in the case of ***State of M.P. v. Sabal Singh***, reported in **(2019) 10 SCC 595 : 2019 SCC OnLine SC 1340 at page 605** in paragraph nos. 31 and 32 has held as under:-

31. About entries in revenue record the trial court and first appellate court, have recorded a concurrent finding of fact that the land was not under personal cultivation. It was not open to the High Court to interfere with the findings of fact, which was based on the proper appreciation of evidence on record. Even the plaintiff was unable to state whether there was any crop in the relevant year 2007 before Zamindari Abolition. Such finding of fact based on proper appreciation of evidence could not have been interfered with by the High Court within the ken of Section 100 CPC.

32. The decision of the High Court of Madhya Pradesh in *Bheron Singh v. State of M.P.[Bheron Singh v. State of M.P.*, 1983 RN 243 (MP)] has been relied upon, on behalf of the respondent-plaintiffs, in which the entry of "bir" land i.e. grassland came up for consideration, which was made in the column of "Alavajot" i.e. not under plough. The plaintiff in the said case was erstwhile Zamindar of the suit land, and it was recorded as "khudkasht land". We are unable to accept the proposition mentioned above as the provision of Section 4(1) of the Abolition Act, 2003 had not been considered in *Bheron Singh [Bheron Singh v. State of M.P.*, 1983 RN 243 (MP)] . Where "bir" land vests in the State and only the land under personal cultivation as defined in Section 2(c) and so recorded as khudkasht as per Section 4(2), was saved from vesting. "Grass" was recorded in Alavajot column i.e. in area not under plough. The decision in *Bheron Singh [Bheron Singh v. State of M.P.*, 1983 RN 243 (MP)] cannot be said to be laying down good law, as such it is overruled.

81. The Division Bench of Hon'ble Apex Court in the case of **Jagdish Chander v. Satish Chander**, reported in **(2019) 12 SCC 237 : 2019 SCC OnLine SC 283 at page 241** in paragraph no. 16 has held as under:-

16. Though, it is the contention of the respondent that such gift deed was not executed by Smt Vidya Devi on her free will and consent, there is no evidence on record placed to substantiate such allegation. Further, in absence of challenge to the gift deed, it is not open to record any findings on the validity of the gift. The High Court also committed error in relying on the mutation proceeding, which itself is based on the registered gift deed. Further, the High Court fell in error in reappreciating the evidence on record to come to a different conclusion than the findings recorded by the trial court, in exercise of power under Section 100 of the Code of Civil Procedure. As the findings recorded by the trial court and the first appellate court are in accordance with the evidence on record, and further the High Court has misconstrued the document of gift, we are of the view that judgment [*Satish Chander v. Jagdish*, 2016 SCC OnLine HP 3781] of the High Court is liable to be set aside.

82. In the case of ***Ramathal v. Maruthathal,*** reported in ***(2018) 18 SCC 303,*** Hon'ble Apex Court has held as under:-

3. A brief reference to the facts which are necessary for disposal of the

appeal before us are, the appellant herein who is the plaintiff in the suit (hereinafter "the buyer", for brevity) and Respondent 2 who is the defendant (hereinafter "the seller", for brevity unless context otherwise requires) entered into an agreement of sale in respect of suit schedule property on 10-12-1986. The sale consideration was fixed at Rs 1,01,000 per acre. An amount of Rs 40,000 was paid as earnest money. As per the terms of the agreement, one year was stipulated for completion of the sale by executing an absolute sale deed. Additionally, the agreement stipulated that the seller has to conduct a survey for the identification of the boundaries of the suit schedule property. As the said condition was not complied with by the seller, the buyer issued a notice dated 26-9-1987 calling upon the seller to comply with the stipulated obligation without any further delay. Confronted by continuous denials by the seller, the buyer having left with no option, has filed the instant suit seeking specific performance of the agreement of sale dated 10-12-1986.

10. The seller had agreed for conducting a survey of the scheduled property at their own cost and also agreed to demarcate the boundaries by affixing stones. Additionally, the sale consideration was agreed to be calculated according to the extent of land found in the survey. On the other hand, the buyer had agreed to pay the entire sale consideration within six months from the date of the contract. It is to be noted that the seller had agreed to rectify any hindrance which might occur in selling of the land other than those related to the Government, the panchayat, and the Housing Board and to extend the period of the agreement on happening of such hindrances. Moreover, the schedule of the property mentions the extent of property to be 1.87¾ acres.

11. Perusal of various conditions stipulated in the agreement makes it clear that the reciprocal promises were dependent on each other and must be determined on the true construction of the contract in the order which the nature of transaction requires. The view taken by the High Court, regarding the interpretation of the contract wherein the execution of the contract was independent of the payment obligation, is erroneous and cannot be sustained in the eye of the law as the contract needs to be read as a whole and not in a piecemeal approach as undertaken by the High Court. Therefore, the buyer's payment obligation and the obligation to execute the contract, was dependent upon the measurement to be conducted by the seller.

12. The factual aspect which was supposed to be considered was whether the survey was conducted by the seller or not. It is on record that DW 1 and DW 2 have stated that the survey was conducted subsequent to the execution of the agreement, but no documents were marked on behalf of the seller evidencing the fact that survey was undertaken. When both the courts below took a view that evidence of the witness was not believable on detailed consideration of their cross-examination and non-availability of documentary evidence to prove that survey was conducted, then the High Court should not have interfered with such factual findings by taking into consideration the oral evidence of witnesses without there being any documentary evidence. The crucial fact that the survey was not conducted had attained finality by the earlier judgment of the High Court in CRP No. 2195 of 1989. Therefore, once the trial court and the first appellate court which are the fact-finding courts have come to the specific conclusion that the plaintiff is entitled for specific

performance of the agreement of sale, the High Court on reappreciation of evidence could not have upset the factual findings in second appeal.

13. It was not appropriate for the High Court to embark upon the task of reappreciation of evidence in the second appeal and disturb the concurrent findings of fact of the courts below which are the fact-finding courts. At this juncture, for better appreciation, we deem it appropriate to extract Sections 100 and 103 CPC, which reads as follows:

"**100.** ***Second appeal.***--(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

***

103. ***Power of High Court to determine issues of fact.***-- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal--

(a) which has not been determined by the lower appellate court or both by the court of first instance and the lower appellate court, or

(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."

14.A clear reading of Sections 100 and 103 CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the High Court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a second appeal is a substantial question of law involved in the case which has to be adjudicated by the High Court. It is the intention of the legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to Section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact-finding court. However, it is not an absolute rule that the High Court cannot interfere in a second appeal on a question of fact. Section 103 CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, the court is empowered to interfere on a question of fact as well. Unless and until there is

absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible; in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.

83. On the basis of exposition of law propounded by the Apex Court, the exposition of law relied upon by learned counsel for appellant does not extend any benefit to the appellant and these are not applicable to the facts and circumstances of this case.

84. The impugned judgment and order dated 26.3.2010 cannot be termed as perverse or against the evidence available on record.

85. On the basis of above discussions, present second appeal lacks merits, impugned judgment and order dated 26.3.2010 is liable to be upheld and it is upheld.

86. A copy of judgment along with record of first appellate court as well as trial court be transmitted to the trial court for information and further action/compliance.

(2020)03-05ILR A1415
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2020

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 187 of 2017

Sahab Deen ...Appellant

Versus

Keshav Prasasd & Ors. ...Respondents

Counsel for the Appellant:
Angrej Nath Shukla

Counsel for the Respondent:
Mohammad Aslam Khan, Ram Dev Tiwari

A. Civil Law-Civil Procedure Code – Order XIV, Rule 1(1) and 1(6) – Framing of Issue – Need – Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other party and in case the defendant makes no defence the court need not frame and record issues – Suit may be decided without framing issues, if the case comes under exception, but it cannot be decided without considering the evidence. (Para 15 and 16)

B. Civil Law-Civil Procedure Code – Order VIII, Rule 10 – Written Statement – Failure to file within time – Court's proceeding – Need of consideration of Evidence – Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him – If the trial court was of the view that the judgment could not be pronounced and ex-parte evidence was filed, then it should have considered the evidence adduced before it for making such order in relation to the suit as it thinks fit. (Para 20 and 22)

C. Contract Law- Indian Contract Act, 1872 – Section 13, 14, 16 and 19 – Free Consent – Undue Influence – Effect on validity of contract – A contract, made by undue influence without free consent and consideration, is voidable at the option of the party whose consent was so caused. (Para 27)

Appeal allowed (E-1)

Cases relied on :-

1. Sham Lal (Dead) By Lrs. Vs. Atme Nand Jain Sabha (Regd.) Dal Bazar; (1987) 1 SCC 222

2. Alka Gupta Vs. Narendra Kumar Gupta; (2010) 10 SCC 14

3. Balraj Taneja & anr. Vs. Sunil Madan & anr., (1999) 8 SCC 396

4. ShantiLal Gulabchand Mutha Vs. Tata Engineering and Locomotive Company Ltd. & anr., (2013) 4 SCC 396

5. Alka Gupta Vs. Narender Kumar Gupta, (2010) 10 SCC 141

6. Ishwar Dass Jain (Dead) Through LR's Vs. Sohan Lal (Dead) By LR's; (2000) 1 SCC 434

7. Thulasidhara & anr. Vs. Narayanappa & ors., (2019) 6 SCC 409

8. T. Ramalingeswara Rao (Dead) Vs. N. Madhava Rao; 2019 (37) LCD 1664

9. St. of U.P. & ors. Vs. Ashok Kumar and Others; 2014 SCC Online All 12789

10. Arjan Singh Vs. Punit Ahluwalia & ors., (2008) 8 SCC 348

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

1. Heard, Shri Angrej Nath Shukla, learned counsel for the appellant and Shri Mohammad Arif khan, learned Senior Advocate assisted by Shri Ram Dev Tiwari, learned counsel for the respondents.

2. This second appeal has been filed for setting aside the judgment and decree dated 27.01.2017 passed in Regular Civil Appeal No.27 of 2014 by the learned Additional District Judge / Special Judge (A.P.) CBI, Lucknow as well as the judgment and decree dated 18.10.2002 passed in Regular Suit No.64 of 1999 (Sahab Deen Vs. Keshav Prasad and Others) by the learned Civil Judge, (J.D), Hawali, Lucknow

3. The brief facts of the case are that the land in question i.e. gata no.216 having an area of 9 Bigha, 12 Biswa, 9 Biswansi situated in Village- Bhaisora, Pargana, Tehsil and District- Lucknow was purchased by the appellant / plaintiff from his father-in-law on 21.02.1998. Thereafter he instituted a case for mutation before the Tehsil. His father-in-law, under the influence of his other son-in-laws, demanded additional money. When the appellant / plaintiff showed his inability to pay the additional money, the brother-in-laws of the appellant / plaintiff i.e. the son-in-laws of his father-in-law namely Ram Nath, Juggi Lal and Suresh filed a forged objection putting his thumb impression. The respondent / defendants no.1 and 2 had also filed objection in the court of Naib Tehsildar on the ground that the father-in-law of the appellant / plaintiff has entered into an agreement for sale with them. The appellant / plaintiff has no knowledge about the alleged agreement. The father-in-law of the appellant / plaintiff, who is a member of scheduled tribes, also could not sell the land in question to the respondent / defendants no.1 and 2 who are not member of scheduled tribes under Section 157 (B) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950. The respondent / defendants no.1 and 2 had also filed a Regular Suit No.828 of 1998 in the court of Civil Judge, Junior Division-Hawali against the father-in-law of the appellant / plaintiff for cancellation of sale deed.

4. The appellant / plaintiff had filed a regular suit no.64 of 1999 for cancellation of sale deed dated 23.11.1998 executed in favour of the respondent / defendant no.4 namely Sarju on the ground that the respondent / defendants had kidnapped the appellant / plaintiff and Shri Raghunandan Prasad, the witness of the sale deed on 21.11.1998 and kept them in their custody, beaten, threatened and asked them to execute the sale deed and in case of default

they would be implicated in a false criminal case. They had taken to the appellant / plaintiff and Raghunandan Prasad to the office of the Sub Registrar and got the sale deed executed while the appellant / plaintiff and Raghunandan Prasad were under duress which was registered in the office of Sub Registrar at Sl. No.4516 part 97/98 PU.73/84 on 23.11.1998. The appellant / plaintiff and the witness were released by the defendants after execution of the sale deed without paying the sale consideration and threatening of implicating in a false case in case they tell to anybody. On coming back he came to know that his wife had given information of his kidnapping to the State Authorities and had also gone to the Police Station- Gosainganj but no action was taken. On receipt of copy of the sale deed the appellant / plaintiff came to know that the purchaser is Sarju S/o Sita Ram resident of Ahibaranpur. He had also given application to the higher Police officers on 26.12.1998 for his safety and lodging FIR against the accuseds but under the pressure of the respondent / defendants the FIR could be lodged on 20.01.2001 at Police Station- Gomti Nagar.

5. On issuance of the notices, the respondent / defendants had appeared in the suit but did not file any written statement therefore the suit was proceeded ex-parte. The appellant / plaintiff- Sahab Deen was examined as PW-1, Chameli W/o Shri Sahab Deen as PW-2 and Raghunandan Prasad S/o Ram Deen as PW-3. Thereafter the suit was decided ex-parte on 18.02.2002 and dismissed on the ground that the incident is of 21.11.1998 and the First Information Report has been lodged on 20.01.2001 which does not support the statements of the plaintiff because the FIR should have been lodged immediately or within some period while it has been lodged after a period of about two years. The regular civil appeal filed by the appellant / plaintiff against the judgment and decree dated 18.02.2002 was also dismissed by the judgment and decree dated 27.01.2007. Hence, the present second appeal has been filed under Section 100 of Civil Procedure code, 1908 (here-in-after referred as C.P.C.) which was admitted on the following substantial questions of law:-

"1. Whether the dispute can be decided without framing the issues in the case.

4. Whether the judgment can be passed without framing the issues if the matter relates to cancellation of sale deed.

5. Whether judgment can be passed without discussing the evidence and statement of the witnesses in the proceeding.

a. Whether without framing of issues, evidence of witnesses can be ignored in the judgment on the mere strength of probability of a fact which even does not constitute a part of cause of action."

6. An application for impleadment under order 1 Rule 10 of C.P.C. readwith Section 151 C.P.C. has also been filed to implead Managing Director of E Squire Homes as he has purchased the suit property during pendency of the suit / appeal which is bard by Section 52 of the Transfer of Property Act.

7. Submission of learned counsel for the appellant was that the appellant / plaintiff was owner of the land in dispute which was purchased by him from his father-in-law through registered sale deed dated 21.02.1998. The respondent / defendants had kidnapped the appellant /

plaintiff and got the sale deed executed after beating and threatening and this evidence was also given by the marginal witness. A telegram was also sent in regard to kidnapping of appellant / plaintiff by the wife of the appellant / plaintiff. The appellant / plaintiff was released by the respondent / defendants after threatening him for implicating in a false criminal case. After release the appellant / plaintiff had also informed to the higher Police officer but under the pressure of the respondent / defendants the FIR could be lodged in regard to the occurrence on 28.01.2001. The appellant / plaintiff had specifically pleaded about his kidnapping, beating and threatening and execution of sale deed under duress and the evidence to this effect was also adduced before the trial court during the suit proceedings. The respondent / defendants though appeared but did not file any written statement therefore the suit proceeded ex-parte and the trial court without framing issues and considering and appreciating the evidence adduced before it dismissed the suit merely on the ground of delay in lodging the FIR and the appeal has also been dismissed which could not have been done by the trial court as well as by the appellate court without considering and appreciating the evidence on record and recording any finding on the basis of the evidence.

8. It was also submitted that since no written statement was filed the averments of the plaint stands admitted therefore the suit should have been allowed on this ground alone. The coercion and unlawful influence under which the sale deed was got executed without any sale consideration was proved before the trial court on which the contract can be set aside under Section 19(A) of the Indian Contract Act but without considering it the learned trial court as well as appellate court dismissed the suit and the appeal respectively, which is not sustainable in the eyes of law.

9. Per contra, learned counsel for the respondent / defendants had submitted that as alleged by the appellant / plaintiff, plaintiff and the witness were kidnapped on 21.11.1998 and the sale deed was executed on 23.11.1998 thereafter they were released forthwith. But no effort was made for lodging the FIR after the release and highly belated FIR was lodged on 21.01.2001. He had also submitted that the kidnapped witness can not be made witness and Section 68 of the Indian Evidence Act deals with proof of wills. He had also submitted that there is no proof of coercion etc. which is clear from the demeanor of witnesses of the plaintiff. Since no written statement was filed therefore there was no need of framing issues. The suit was dismissed in default and it was restored without notice therefore no written statement could be filed but the appellant / plaintiff had to prove his case even if no written statement was filed. But he failed to do so. The appeal was decided complying the provisions of Order 41 Rule 31. He had also submitted that there is no documentary evidence to show coercion and signature of Sub Registrar on the registered sale deed itself is a presumption of execution of valid sale deed under Section 70 of the Indian Evidence Act. Lastly, it was submitted that the concurrent findings of the facts can not be interfered by re-appreciating the evidence and substituting findings. Accordingly, the present second appeal, being misconceived, is liable to be dismissed with cost.

10. In regard to the application for impleadment he had submitted that Sahab Deen had executed the sale deed on

23.11.1998 to Sarju i.e. the respondent / defendant no.4. He had executed the sale deed to Rajeshwari Mishra on 11.10.2001. Rajeshwari Mishra executed various sale deeds; one on 15.12.2004 to Arvind Singh Sisodiya for an area of 1-10-0, on 18.05.2016 an area of 1.10 in favour of E Squire Homes but the application for impleadment has been filed only to implead the Managing Director of E Squire Homes who has purchased only a part of the land therefore the same is liable to be dismissed.

11. I have considered the submissions of learned counsel for the parties and perused the record.

12. The land in dispute was purchased by the appellant / plaintiff from his father-in-law on 21.02.1998. Thereafter he had filed a case for mutation before the Tehsil, in which the objections were filed. It appears that a suit for cancellation of sale deed was filed by the respondent / defendants no.1 and 2 on the ground that the father-in-law of the appellant / plaintiff had entered into an agreement for sale with them but the same was dismissed as informed.

13. It appears that the appellant / plaintiff alongwith Raghunandan Prasad was kidnapped on 21.11.1998. An information in this regard was sent by his wife on 22.11.1998. On 23.11.1998 a sale deed was got executed by the appellant / plaintiff in favour of the respondent / defendant no.4 namely Sarju S/o Sita Ram. The suit was filed alleging therein that the respondent / defendants have got the sale deed executed by abducting, beating and threatening to the appellant / plaintiff without paying any consideration. Therefore, after release from the custody of the respondent / defendants, he had filed the suit for cancellation of sale deed. The respondent / defendants appeared in the suit but they did not file any written statement. However, it has been argued on their behalf that since the suit was dismissed in default and thereafter restored without notice therefore no written statement could be filed. Be that as it may, it is not disputed that no written statement was filed.

14. Order XIV provides settlement of issues and determination of suit on issues of law or on issues agreed upon. Rule 1(1) provides issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Rule 1 (6) provides that nothing in this rule requires the court to frame and record issues where the defendant at the first hearing of the suit makes no defence. Rule 3 provides that the Court may frame the issues from all or any of the materials i.e. allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties; allegations made in the pleadings or in answers to interrogatories delivered in the suit and the contents of documents produced by either parties. The Hon'ble Apex Court, in the case of ***Sham Lal (Dead) By Lrs. Vs. Atme Nand Jain Sabha (Regd.) Dal Bazar; (1987) 1 SCC 222***, has held that "at the first hearing of the suit" would be the day when the Court applies its mind to the case, which may be the date of settlement of issues or the date for preliminarily examination of the parties.

15. In view of above, issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other party and in case the defendant makes no defence the court need not frame and record issues. In the present case the respondent / defendants had not filed any

written statement therefore there was no material proposition of fact or law which were affirmed by the appellant / plaintiff and denied by the respondent / defendants. Therefore, this court is of the view that the decision of the regular suit filed by the appellant / plaintiff without framing of the issues, even though it was the case of cancellation of sale deed, does not suffer from any error or illegality and the substantial question of law nos.1 and 4 are decided accordingly.

16. The Hon'ble Apex Court in the case of ***Alka Gupta Vs. Narendra Kumar Gupta; (2010) 10 SCC 14***, has held that a civil suit has to be decided after framing issues and trial permitting the parties to lead evidence on the issues, except in cases where the Code or any other law makes an exception or provides any exemption. Therefore the suit may be decided without framing issues, if the case comes under exception, but it can not be decided without considering the evidence.

17. Adverting to the substantial question of law nos.5 and (a) this court finds that the suit for cancellation of sale deed was proceeded ex-parte. Thereafter the evidence was adduced by the appellant / plaintiff. The appellant / plaintiff- Sahab Deen was examined as PW-1, Chameli his wife was examined as PW-2 and Raghunandan, the marginal witness of the sale deed in question as PW-3. Copy of the sale deed and FIR lodged on 20.01.2001 at Police Station- Gosainganj, District- Lucknow were filed.

18. The witnesses examined on behalf of the appellant / plaintiff have stated in evidence about kidnapping of the appellant / plaintiff, about the purchase of the land in dispute on 23.02.1998 by the appellant / plaintiff from his father-in-law, filing of the case for mutation, objection by the brother-in-laws by putting forged signatures of the seller, filing of regular suit no.828 of 1998 by the respondent / defendants no.1 and 2 for cancellation of sale deed in favour of the appellant / plaintiff, kidnapping of the appellant / plaintiff and Raghunandan Prasad; the marginal witness, sending information by the wife of the appellant / plaintiff to the Senior Superintendent of Police in regard to the kidnapping of the appellant / plaintiff, execution of sale deed under duress and information to the higher officers. The wife of the appellant / plaintiff has also given statement in regard to the kidnapping of the appellant / plaintiff by the respondent / defendants and about giving information to the Superintendent of Police by telegram at Police Station- Gomti Nagar. The marginal witness of the sale deed in question has also supported the evidence of the appellant / plaintiff and stated that he was also kidnapped alongwith the appellant / plaintiff and kept near Police Station- Gomti Nagar in a shop of Patra-Balli where the appellant / plaintiff was beaten and he was also threatened for doing what is being said failing which they will be thrown on railway line. It was also told to them that S.H.O., Police Station- Gosainganj is their friend and they may be implicated in NDPS case. They were taken to the Sub Registrar's Office where the thumb impression was got put by the appellant / plaintiff and signatures by the witness. No question was asked from them. They had also not seen the purchaser Sarju and no money was given to the appellant / plaintiff. After execution of the sale deed they were taken to the Khurdahi by a Maruti and released there after threatening. Thereafter their wives alongwith the others went to the Police Station. On being informed they also went to the Police

Station where the Deewan, Ram Vriksha Yadav asked to send them jail under NDPS and on being assured that they would not take any action they were released. Subsequently, the appellant / plaintiff had given application to the higher officers in which the Circle Officer- Mohanlalganj had recorded his statement. He had also stated that his statement has not been recorded in any mutation proceeding on the basis of sale deed.

19. In view of above, the witnesses examined on behalf of appellant / plaintiff have given evidence in support of the pleadings of the appellant / plaintiff. But without considering and recording any finding in regard to the evidence adduced before the trial court, the trial court dismissed the suit merely on the ground that the FIR has been lodged after about two years from which the statement of the appellant / plaintiff does not get strength and the plaintiff has failed to prove his case that as to whether the thumb impression was put by him from his free will or against his will.

20. Admittedly, no written statement was filed by the respondent / defendants. Order VIII, Rule 10 of the C.P.C. provides that where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up. Therefore in case no written statement has been filed the court shall pronounce judgment against the party who has failed to file the written statement or may make such order in relation to the suit as it thinks fit.

21. ***Balraj Taneja and Another Vs. Sunil Madan and Another; (1999) 8 SCC 396***, in which the Hon'ble Apex Court has held that there are two separate and distinct provisions under which the Court can pronounce judgment on the failure of the defendant to file Written Statement. The failure may be either under Order 8 Rule 5(2) under which the Court may either pronounce judgment on the basis of the facts set out in the plaint or require the plaintiff to prove any such fact; or the failure may be under Order 8 Rule 10 C.P.C. under which the Court is required to pronounce judgment against the defendant or to pass such order in relation to the suit as it thinks fit. It has also held that if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. It has also been held that the Court has to write a judgment which must be in conformity with the provisions of code or at least set out the reasoning by which the controversy is resolved. Therefore if the Court has proceeded to decide the case after evidence by the plaintiff then it ought to have considered the evidence adduced before it.

22. In the present case since no written statement was filed the trial court could have pronounced the judgment against the respondent / defendants admitting the suit of the plaintiff. If the trial court was of the view that the judgment could not be pronounced and ex-parte evidence was filed, then it should have considered the evidence adduced before it for making such order in relation to the suit as it thinks fit. But in the present case the

learned trial court has not considered and recorded any finding on the basis of evidence adduced before it and dismissed the suit merely on the ground of delay in lodging the FIR which does not constitute a part of cause of action. The cause of action for the suit for cancellation of sale deed was alleged execution of the sale deed under duress without payment of consideration.

23. The Hon'ble Apex Court in the case of ***ShantiLal Gulabchand Mutha Vs. Tata Engineering and Locomotive Company Limited and Another; (2013) 4 SCC 396*** has held that the court must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understood what were the facts and circumstances on the basis of which the court must proceed, and under what reasoning the suit has been decreed. The relevant paragraph-9 is extracted below:-

"9. In view of the above, it appears to be a settled legal proposition that the relief under Order VIII Rule 10 CPC is discretionary, and court has to be more cautious while exercising such power where defendant fails to file the written statement. Even in such circumstances, the court must be satisfied that there is no fact which need to be proved in spite of deemed admission by the defendant, and the court must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understood what were the facts and circumstances on the basis of which the court must proceed, and under what reasoning the suit has been decreed."

24. The Hon'ble Apex Court in the case of ***Alka Gupta Vs. Narender Kumar Gupta; (2010) 10 SCC 141*** has held that Code of civil procedure is nothing but an exhaustive compilation- cum-enumeration of the principles of natural justice with reference to a proceeding in a court of law. The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. There are no short-cuts in the trial of suits, unless they are provided by law.

25. Section 10 of the Indian Contract Act, 1872 provides that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Section 13 defines the consent of two or more persons are said to consent when they agree upon the same thing in the same sense. Section 14 defines free consent which is said to be free when it is not caused by coercion or undue influence or fraud or misrepresentation or mistake subject to the provisions of sections 20, 21 and 22. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

26. Sub Section-3 of Section 16 of the Contract Act provides that where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a

position to dominate the will of the other. Section 19 provides the voidability of agreements without free consent at the option of the party whose consent was so caused. Section 19 (A) provides the power to set-aside the contract induced by undue influence at the option of the party whose consent was so caused.

27. In view of above, a contract, made by undue influence without free consent and consideration, is voidable at the option of the party whose consent was so caused. In the present case the appellant / plaintiff has alleged that the sale deed in question has been got executed under duress by beating and threatening him and without paying any consideration. Therefore it is voidable at his option. If the opposite parties / defendants were in a position to dominate the will of plaintiff, the burden was on them to prove that the sale deed was not induced by undue influence. But the trial court, without considering even the evidence adduced by the appellant / plaintiff, dismissed the suit for cancellation of sale-deed merely on the basis of delay in lodging the FIR which could not have been done by trial court.

28. So far as the arguments of the learned counsel for the respondents in regard to the alleged concurrent findings is considered, as discussed above in fact no finding has been recorded by the learned trial court on the basis of evidence adduced before it. The learned appellate court has also, though mentioned the evidence adduced by the appellant / plaintiff but without considering and recording any finding, dismissed the appeal on the ground that the FIR has been lodged keeping in mind the subsequent events after about two years but has not disclosed any alleged subsequent events. In regard to the evidence simply it has been stated that the contents of the plaint does not strengthen from the documentary / oral evidence but no reasons have been assigned. Therefore in fact no finding of facts on the basis of evidence adduced before the trial court has been recorded by the court's below.

29. The Hon'ble Apex Court in the case of ***Ishwar Dass Jain (Dead) Through LR's Vs. Sohan Lal (Dead) By LR's; (2000) 1 SCC 434*** has held that there are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The said judgment has been relied by the Hon'ble Apex Court in the case of ***Thulasidhara and Another Vs. Narayanappa and Others; (2019) 6 SCC 409.***

30. The Hon'ble Apex Court in the case of ***T. Ramalingeswara Rao (Dead) Vs. N. Madhava Rao; 2019 (37) LCD 1664*** has held in paragraph 12 as under:-

"12. When the two Courts below have recorded concurrent findings of fact against the plaintiffs, which are based on appreciation of facts and evidence, in our view, such findings being concurrent in nature are binding on the High Court. It is only when such findings are found to be against any provision of law or against the pleading or evidence or are found to be wholly perverse, a case for interference may call for by the High Court in its second appellate jurisdiction."

31. A coordinate Bench of this Court in the case of ***State of U.P. and Others Vs. Ashok Kumar and Others; 2014 SCC Online All 12789*** has held that under

Section 107 C.P.C. the appellate court has got jurisdiction to exercise all such powers which is vested in the Courts of original jurisdiction. Virtually, the appeal is in continuation of suit.

32. In view of the aforesaid discussion this court is of the considered opinion that the suit could not have been decided without considering, appreciating and recording any finding on the basis of evidence adduced before it merely on the ground of delay in lodging the FIR. Accordingly, the substantial question of law nos.5 and (a) are decided in favour of the appellant / plaintiff and against the respondent / defendants. Therefore the judgment and decree passed in Regular Suit and the Civil Appeal are not tenable in the eyes of law and liable to be set-aside with direction to decide the Regular Suit No.64 of 1999 (Sahab Deen Vs. Keshav Prasad and Others) afresh after considering the evidence adduced before it in accordance with law.

33. So far as the application for impleadment of the appellant / plaintiff is concerned, the provisions of Section 52 of the Transfer of Property Act would be applicable on the subsequent sale deeds. However and since the second appeal is being decided considering the substantial question of laws and being remanded for fresh disposal, the application stands disposed of with liberty to the appellant / plaintiff to implead the subsequent purchasers before the trial court, if so advised.

34. The Hon'ble Apex Court in the case of ***Arjan Singh Vs. Punit Ahluwalia and Others; (2008) 8 SCC 348*** has held that execution of sale deed during pendency of the suit would be hit by the doctrine of lis pendens as adumbrated under Section 52 of the Transfer of Property Act and would not come in the Court's way in passing a decree in favour of the appellant. Its validity or otherwise would not be necessary to be considered as the appellant is not bound thereby.

35. The second appeal is, accordingly, **allowed.** The judgment and decree dated 27.01.2017 passed in Regular Civil Appeal No.27 of 2014 by the learned Additional District Judge / Special Judge (A.P.) CBI, Lucknow and judgment and decree dated 18.10.2002 passed in Regular Suit No.64 of 1999 (Sahab Deen Vs. Keshav Prasad and Others) passed by learned Civil Judge, (J.D.) Hawali, Lucknow are hereby set-aside. The matter is remanded to the trial court to decide the Regular Suit No.64 of 1999 (Sahab Deen Vs. Keshav Prasad and Others) afresh expeditiously and preferably within six months from the date of receipt of record. No orders as to costs.

36. The lower court record, alongwith a copy of this order, shall be remitted to the trial Court within two weeks from today.

(2020)03-05ILR A1424
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 460 of 1996

Chandrawati ...Appellant
Versus
Faisal Khan & Ors. ...Respondents

Counsel for the Appellant:
Sri T. Varma, No Name, Sri J.S. Pandey

Counsel for the Respondents:
Sri M. Islam, Sri Syed Ahmed Faizan

A. Civil Law- Indian Succession Act, 1925 – Section 213 (1) and (2) – Will – Need of probate to claim under it – Exception in favour of Muslim and Christian – Relevance – Sub-Section (2) is a proviso to sub-Section (1) and clearly excepts wills made by Mohmandans and Indian Christians from the teeth of the mandatory requirement about obtaining probate of a will by a legatee, before he claims under it – Even if for a moment it were to be considered that there was some doubt about the constitutionality of this provision on ground that it excepts members of two particular religious communities, there is no basis to infer that kind of a discrimination – This is so because the view of the law regarding the requirement of a compulsory probate, as interpreted by the Supreme Court and this Court, would show that there is no requirement, even for a Hindu, Buddhist, Sikh or Jain, or for that matter, anyone to obtain probate of a will in Uttar Pradesh. (Para 15)

B.Evidence Law- Indian Evidence Act, 1872 – Section 73 – Comparison of the signature – Court's power – None of the parties produced any expert in support of their plea – The Court was competent to go into the question by doing a comparison going by the clear legislative edict to that effect, carried in Section 73. (Para 21 and 24)

Appeal dismissed (E-1)

Cases relied on :-

1. Dr. Sunil Kumar vs. Chaitanya Prakash & ors., 2014 SCC OnLine All 15433: 2014 (10) ADJ 642

2. Clarence Pais Vs. U.O.I., 2001 (4) SCC 325

3. Shyam Sundar Chowkhani @ Chandan & ors. Vs.. Kajalkanti Biswas, AIR 1999 Gau 101

4. Murari Lal Vs. St. of M.P., (1980) 1 SCC 704 : AIR 1980 SC 531

5. Satya Prakash Pandey & ors. Vs. Dev Brat Mishra, 2011 (3) ADJ : 2011 SCC OnLine All 202

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a defendant's second appeal. The plaintiff-respondents (for short, "the plaintiffs') instituted O.S. No. 63 of 1983 in the Court of *Munsif*, Amroha, District Moradabad against the four defendants, seeking relief of permanent prohibitory injunction, to the effect that respondent Nos. 2 and 3 be restrained perpetually from delivering possession of the suit property to defendant Nos. 1 and 4 and to maintain status quo on the spot. The Trial Court, vide judgment and decree dated 22.02.1992 decreed the suit restraining defendant Nos. 1 and 4 from interfering with the plaintiffs' possession over the suit property. Defendant Nos. 2 and 3 were declared tenants in the said property and were ordered by the decree to attorn the plaintiffs as their landlords. A declaration was also made in those terms. The sole appellant, Smt. Chandrawati, who was defendant no. 1 to the suit, is hereinafter referred to as "the defendant'. The plaintiff-respondents, who are arrayed here as plaintiff-respondents first set, are hereinafter referred to as "the plaintiffs'. Defendant nos. 2 and 3, who are arrayed as respondent Nos. 5 and 6 in the second set, shall be hereinafter referred to as "defendant nos. 2 and 3'. The defendant No. 4 to the suit Usman Ali, Advocate here arrayed as respondent No. 7 in the second set, shall be hereinafter referred to as "defendant No. 4'.

2. Aggrieved by the aforesaid decree, the defendant carried an appeal to the District Judge, Moradabad where it was registered as Civil Appeal No. 137 of 1992. Upon assignment, it came up for determination before the Court of the 4th Additional District Judge, Moradabad, who by the impugned judgment and decree dated 12th March, 1996, dismissed the defendant's appeal with costs and affirmed the Trial Court.

3. Aggrieved, this appeal from the appellate decree has been filed.

4. This appeal was admitted to hearing on the following substantial questions of law:

1. whether the will dated 26.10.1979 alleged to have been executed by Abdul Mueed in favour of Farhan Khan was proved in accordance with law. If not its effect?

2. Whether will dated 26.10.1979 can be made the basis of the suit without getting probate for the same?

3. Whether the courts below could act as an Expert and tally the signature of the plaintiff-respondents by themselves?

4. Whether the courts below have gone beyond the relief sought and made declaration which would not have been pleaded or proved by the plaintiff-respondents?

5. The hearing in this appeal commenced on 29.01.2020 when Sri J.S. Pandey, Advocate holding brief of Sri Tarun Varma, learned counsel for the appellant addressed the Court on behalf of the appellant. No one appeared on behalf of the respondents. Accordingly, this appeal has proceeded *ex parte*. It was heard on 29.01.2020, 21.01.2020 and today. At the hearing, Sri J.S. Pandey has confined his submissions to two substantial questions of law that is to say questions Nos. 2 and 3 extracted *supra*. Now, the suit giving rise to this appeal appears to have been instituted in the Court of *Munsif*, Amroha for a permanent prohibitory injunction in terms indicated hereinbefore.

6. The plaintiffs came with a case that one Abdul Mueed Khan was owner in possession of the suit property detailed at the foot of the plaint. Abdul Mueed Khan died issueless. It was the plaintiff's case that Abdul Mueed Khan, during his lifetime, had executed a will bequeathing the suit property in favour of one Farhat Khan on 26.10.1979. Upon death of the testator, succession opened in favour of Farhat Khan in terms of the bequests and Farhat Khan thus became owner and entered possession of the suit property. After the decease of Farhat Khan, the plaintiffs became owners of the suit property by interstate succession, being his heirs under the law. Defendant Nos. 2 and 3 were claimed to be in actual physical possession of the suit property as tenants of the testator, Abdul Mueed Khan, and after his death, they were said to have become the tenants of Farhat Khan. After Farhat Khan, the tenants held on behalf of the plaintiffs' by operation of law. The cause of action in the suit arose as the plaintiffs claimed that the defendant, who had got a sale deed of the suit property executed in her favour by defendant No. 4 on 21.09.1982, in collusion with defendant Nos. 2 and 3, the plaintiffs' tenants, was proceeding to take possession of the said property along with defendant No. 4. The plaintiffs sued to prevent that eventuality and to protect their possession.

7. The defendant filed a written statement traversing the plaint allegations and asserted that the plaintiffs had no cause of action to sue. The defendant asserted that the will dated 26.10.1979 from Abdul Mueed Khan that was propounded by the plaintiffs as a bequest in favour of Farhat Khan, was a forged and bogus document that was got up in collusion with defendant No. 2. It was asserted that defendant No. 4 was owner of the suit property after Mueed Khan, being his nephew as Mueed Khan

died issueless. It was also pleaded on behalf of the defendant that the defendant No. 2 has been in occupation as a tenant at the rate of Rs. 150/- per year. There was some dispute about the payment of rent between defendant no. 2 and the original owner of the property, Mueed Khan that had led defendant no. 2 to deposit rent in Court.

8. After exchange of pleadings, issues were struck between parties in Hindi that were rendered into English by the Lower Appellate Court. The issues, six in number, and in the manner rendered into English by the lower Court, read as follows:

1. Whether Abdul Mueed Khan was the owner and in possession of the property in dispute?

2. Whether Abdul Mueed Khan had executed a will on 26.10.79 of the disputed property in favour of Farhat Khan?

3. Whether Usman Khan was the owner of the property in dispute?

4. Whether the sale deed dated 21.09.82 executed by Usman Khan in favour of defendant no. 1 is illegtal and void?

5. Whether the suit has wrongly been valued and the court fees paid is insufficient?

6. To what relief, if any, are the plaintiffs entitled?

9. Learned counsel for the appellant does not dispute the correctness of the English rendition of the issues done by the Lower Appellate Court. The parties led evidence, both documentary and oral, where four witnesses were examined on behalf of the plaintiffs and one on behalf of the defendant.

10. A reading of the judgment of the Lower Appellate Court shows that the will was proved by examining both marginal witnesses. The will was accepted to be proved on the evidence of PW-3, Buniyad Ali, who successfully established, in the opinion of the Courts below, for a fact that he had seen the testator's sign the will and himself had signed in the presence of the testator, who had seen him sign. The Lower Appellate Court concurring with the Trial Court appears to have found the will to be a plausible disposition by the testator, who has been held to be a literate person. He has also been found to be one who could understand the consequences of his actions and his best interest. The Lower Appellate Court on a reasonable view of the evidence, has excluded practice of any fraud, cheating or deception, to secure execution of the will on a plain paper, that was subsequently got signed.

11. Heard Sri J.S. Pandey, Advocate holding brief of Sri Tarun Varma, learned counsel for the appellant. No one appears on behalf of the respondents.

12. There cannot be much scope for this Court to interfere with consistent findings of fact recorded by the two Courts below about proof of the will in favour of Farhat Ali by Abdul Mueed Khan, the testator. Learned counsel for the appellant also does not canvass a case that those findings are wrong or can be re-evaluated in the present second appeal.

13. Learned Counsel for the appellant Sri Pandey, however, has emphatically submitted that the will dated 26.10.1979 propounded by Abdul Mueed Khan in favour of Farhat Ali Khan could not have been accepted by the Courts below, whatever they might have found for a fact regarding proof of the will, the logical nature of its disposition, exclusion of a case of fraud and deceit etc. He submits that the will could not have been acted upon or looked into by the Courts below because of the provisions of Section 213 of the Indian Succession Act, 1925 (for short, the Succession Act') . It is urged that Section 213 (supra) prohibit any Court of justice from accepting the right of any person as an executor or a legatee under a will, unless a Court of competent jurisdiction in India has granted probate of the will, under which the legatee claims. It is submitted here for a fact that no probate of the will dated 26.10.1979 was ever granted by a Court of competent jurisdiction, as mandated by Section 213 of the Succession Act.

14. This Court has considered the submission of the learned counsel for the appellant with reference to the substantial question of law No. 2, formulated in this appeal. For one, the issue that an unprobated will cannot be acted upon on behalf of a person who claims a right under it as a legatee, was not raised either before the Trial Court or before the Lower Appellate Court. It has been raised before this Court for the first time. As such, there is no factual foundation before this Court to act upon the plea, to the extent, that for a fact, it is not known whether probate was indeed secured or not. Assuming that a probate of the will in question was not secured, going by the practice in the State, the question is being determined on the basis of a premise that there was no probate of the will in question. The provisions of Section 213 of the Succession Act are being quoted in *extenso*:

"213. Right as executor or legatee when established.--

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in 1[India] has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

[(2) This section shall not apply in the case of Wills made by Muhammadans [or Indian Christians], or and shall only apply--

(i) in the case of Will made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of classes specified in clauses (a) and (b) of section 57; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such Wills are made within the local limits of the ordinary civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immoveable property situated within those limits.

15. A bare reading of the provisions of sub-Section (2) of Section 213 shows that sub-Section (2) is a proviso to sub-Section (1) and clearly excepts wills made by Mohmandans and Indian Christians from the teeth of the mandatory requirement about obtaining probate of a will by a legatee, before he claims under it. Even if for a moment it were to be considered that there was some doubt about

the constitutionality of this provision on ground that it excepts members of two particular religious communities from the operation of the rule in sub-Section (1) of Section 213, there is no basis to infer that kind of a discrimination, also. This is so because the view of the law regarding the requirement of a compulsory probate, as interpreted by their Lordships of the Supreme Court and this Court, would show that there is no requirement, even for a Hindu, Buddhist, Sikh or Jain, or for that matter, anyone to obtain probate of a will in Uttar Pradesh. In this regard, the decision of this Court in **Dr. Sunil Kumar vs. Chaitanya Prakash and others, 2014 SCC OnLine All 15433: 2014 (10) ADJ 642** may be referred to with profit. Paragraphs 8, 9 and 10 of the report in **Dr. Sunil Kumar** *(supra)* is relevant, where it has been held:

8. From the perusal of the aforementioned provisions, it is quite evident that a probate will not be required to be obtained by a Hindu in respect of a Will made regarding the immovable properties situate in Uttar Pradesh. The same view taken by this Court in the Case of Naubat Ram v. Gayatri Devi [1968 ALJ 69.] . Here in the present case, the parties are Hindu and the property situate in the State of Uttar Pradesh, as such, section 57 read with section 213 of the Indian Succession Act is not at all application in the present case.

9. At this juncture, it is useful to refer the observations made by the Apex Court in the case of Clarence Pais v. Union of India [2001 (43) ALR 249 (SC).] , which reads as follows:

"The scope of section 213(1) of the Act is that it prohibits recognition of rights as an executor or legatee under a Will without production of a probate and sets down a rule of evidence and forms really a part of procedural requirement of the law of forum. Section 213(2) of the Act indicates that its applicability is limited to cases of persons mentioned therein. Certain aspects will have to be borne in mind to understand the exact scope of this section. The bar that is imposed by this section is only in respect of the establishment of the right as an executor or legatee and not in respect of the establishment of the right in any other capacity. The section does not prohibit the will being looked into for purpose's other than those mentioned in the section. The bar to the establishment of the right is only for its establishment in a Court of justice and not its being referred to in other proceedings before administrative or other Tribunal. The section is a bar to everyone claiming under a Will, whether as plaintiff or defendant, if no probate or Letters of Administration is granted. The effect of section 213(2) of the Act is that the requirement of probate or other representation mentioned in sub-section (1) for the purpose of establishing the right as an executor or legatee in a Court is made inapplicable in case of a will made by Muhammadans and in the case Of wills coming under section 57(c) of the Act. Section 57(c) of the Act applies to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jain, on or after the first day of January, 1927 which does not relate to immovable property situate within the territory formerly subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary civil jurisdiction of the High Courts of Judicature at Madras and Bombay, or in respect of property within those territories. No probate is necessary in the case of Wills by Muhammadans. Now by the Indian Succession [Amendment] Act, 1962, the section has been made applicable to Wills

made by Parsi dying after the commencement of the 1962 Act. A combined reading of sections 213 and 57 of the Act would show that where the parties to the Will are Hindus or the properties in dispute are not in territories falling under section 57(a) and (b), sub-section (2) of section 213 of the Act applies and sub-section (1) has no application. As a consequence, a probate will not be required to be obtained by a Hindu in respect of a will made outside those territories or regarding the immovable properties situate outside those territories. The result is that the contention put forth on behalf of the Petitioners that section 213(1) of the Act is applicable only to Christians and not to any other religion is not correct."

10. Learned Counsel for the revisionist has relied upon the decision of the Apex Court in the case of T. Venkata Narayana v. Smt. Venkata Sub-bamma (dead) [(1995) 5 SCC 691 : 1996 (28) A.I.R. 70 (SC).] . The authority cited by the learned Counsel for the revisionist is not at all applicable in the present case. In the said case the Apex Court has not considered the implication of section 57 read with section 213 of the Indian Succession Act. However, the Apex Court in his subsequent decision in the case of Clarence Pais v. Union of India (supra) has made it clear that a probate will not be required to be obtained by a Hindu in respect of a Will made with respect to the immovable properties situate in Uttar Pradesh.

16. The substantial questions of law raised is squarely answered against the appellant by the decision of this Court in **Dr. Sunil Kumar** *(supra)* following the decision of their Lordships of the Supreme Court in **Clarence Pais v. Union of India, 2001 (4) SCC 325**, the relevant part of which has been quoted in **Dr. Sunil Kumar** *(supra)*. The position that therefore emerges is that neither a Hindu or a Mohmandan and practically all classes of persons who have been mentioned in Section 213 of the Succession Act, read with Section 57, whomsoever are required to compulsorily obtain a probate of a will under which they claim as legatee, or to be the executor thereof, in respect of a bequest made for immovable properties situate in Uttar Pradesh. Substantial question of law No. 2 pressed on behalf of the appellant is, accordingly, answered in the negative.

17. The other substantial question of law that has been pressed by Sri Pandey on behalf of the appellants is substantial question of law No. 3, hereinabove extracted. Learned counsel for the appellant submits that the will cannot be regarded as proved going by the findings recorded by the Courts below, as those Courts being Courts of fact, were under an obligation to call an expert to determine the genuineness of the signatures of the testator on the will, once the bequest was disputed by the defendant. The submission of Sri Pandey, in particular, is that there was a specific case pleaded in paragraph 3 of the written statement that the will propounded by the plaintiffs dated 26.10.1979, was absolutely a forged and bogus document. He submits that in the face of such a plea, it was imperative for the Courts below to have called in aid an expert to determine the genuineness of the testator's signatures. He has criticized the approach of the Trial Court, in going about doing a comparison of the admitted and the disputed signatures of the testator, by comparing the two specimens itself and holding that the signatures of the testator on the bequest were genuine.

18. This Court has considered the aforesaid submission keenly. It is true for a fact that the Trial Court has gone about the

exercise of doing a comparison of the admitted and the disputed signatures of the testator on the will, comparing them with certain admitted signatures, the specimen of which were available on certain documents, which are marked as Exhibits 5 to 7. The Trial Court on doing a comparison of the admitted and the disputed signatures has recorded a finding that the two signatures are attributable to one and the same person. In this regard, the Trial Court has recorded the following finding (in Hindi vernacular):

इस अभिलेख पर अब्दुल मुईद खां के लेख में लिखे गये कुछ निर्विवादपत्र प्रस्तुत किये गये। वादी के द्वारा प्रस्तुत पत्र, प्रदर्श–5 से 7 है। इन पत्रों पर अबदुल मुईद खां का लेख तथा हस्ताक्षर प्रतिवादिनी सं0 के साक्षी डी0 डब्लू0 2 सुनाउल्लाह खां ने भी स्वीकार किया। अबदुल मुईद खां के इन पर उपलब्ध हस्ताक्षर इच्छापत्र पर उपलब्ध हस्ताक्षरों से पूर्ण रपेण मिलते है। इसी प्रकार प्रतिवादिनी सं0 के द्वारा प्रस्तुत पत्र प्रदर्श क–2 से क–5 पर उपलब्ध अबदुल मुईद खां के हस्ताक्षर इच्छापत्र पर उपलब्ध हस्ताक्षरों से पूर्ण रपेण मेल खातें है

19. Now, whether the Trial Court could do this by a comparison of the admitted signatures with those disputed, without the aid of an expert, is the moot question. In this regard, the provisions of Section 73 of the Indian Evidence Act are very relevant. These are quoted *infra*:

73. Comparison of signature, writing or seal with others admitted or proved.--In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose. The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

1[This Section applies also, with any necessary modification, to finger impressions.]

1.Ins. By Act 5 of 1899, sec. 3.

20. In support of his contention learned counsel for the appellant has relied upon a decision of the Gauhati High Court in **Shyam Sundar Chowkhani alias Chandan & others vs. Kajalkanti Biswas, AIR 1999 Gau 101**, where it has been held:

"14. Since the science of identification of handwriting by comparison is not an infallable one, prudence demands that before acting on such opinion, the Court should be fully satisfied about the authorship of the admitted writing which is made the sole basis for comparison and the Courts should also be fully satisfied about the competence and credibility of the handwriting Expert. When there are conflicting opinions, it is necessary to exercise extra care and caution in evaluating their opinions before accepting the same. In no case can the Court base its finding solely on the opinion of the Handwriting Expert. It however does not mean that even if there exists numerous shrieking similarities and mannerism which tend down to identify the writer, the Court will not act on the Expert's evidence. It all depends on the character of the evidence of the Expert and the facts and circumstances of each case. The ordinary method of proving handwriting are:--

(i) By calling as a witness a person who wrote the document or saw it written or with qualified expert opinion as to the hand writing by virtue of Section 47 of the Evidence Act.

(ii) By the admission of the person against whom the document is tendered.

(iii) By comparison of handwriting as provided in section 73 of the Evidence Act. It should also be borne in mind that only where other evidence is not available and the handwriting has not been proved by independent witness to be the handwriting of a particular person that it is necessary to have recourse to the provisions of section 73 of the Evidence Act. The two paragraphs of section 73 are not mutually exclusive. They are complementary to each other, section 73 is, therefore, to be read as a whole in the light of section 45 of the Evidence Act. (See (1979) 2 SCC 158 : AIR 1979 SC 14). Section 73 read as a whole in the light of section 45 and section 47 of the Evidence Act makes it clear that the Court does not exceed its power under section 73 of the Evidence Act if in the interest of justice, it directs a person appearing before it whether it is Civil or Criminal Court to give a sample writing to enable the same to be compared by Hand Writing Expert because even in adopting such course the purpose is to enable the Court to compare the disputed writing with the admitted writing and to reach its own conclusion with assistance of the Expert.

16. First let us take up the legality of the finding arrived at by the Court regarding genuineness of the signatures of the plaintiffs in Exhibit K.A. In order to decide it again we must go back to section 73 of the Evidence Act. Although Section 73 empowers the Court to compare the disputed writing with the specimen/admitted writing shown to be genuine, prudence demands that the Court should be extremely slow in venturing an opinion on the basis of comparison, more so, when the quality of evidence in respect of specimen/admitted writing, is not of high standard (See (1992) 3 SCC 700 : AIR 1992 SC 2100). Of course that case before the Apex Court was a criminal case. As pointed out by Privy Council in 3 Indian Appeals 154 - A comparison of a hand writing by the Court with the other document not challenged as fabricated upon its own initiative and without guidance of an expert and even that it is at all times hazardous and recognizably inconclusive. It is unsafe to arrive at a decision in a case where there is a conflict of testimony between the parties as to the general character of a signature on the correct determination of the genuineness of the signature by mere comparison with the admitted signatures specially without the and in evidence of microscopic enlargement or any expert's evidence (See AIR 1928 Privy Council 277). further a signature made for the occasion post-litem-motam merely for the use at the trial ought not to be taken as a standard, as it is likely to be simulated. It may however, be compared with any genuine writing for all, that is, worth. The criteria of comparison of signature can not be a safe guide and surely can not be the sole guide. But that is, what has been done by the learned judge in this particular case. The learned Judge did not discus any other evidence on this point and based solely on his own comparison, he came to the finding that the signatures in Exhibit KA are not the signatures of the plaintiffs.....…"

21. In the present case none of the parties produced any expert in support of their plea, particularly the defendant, who

urged that the bequest was a forged document and the signatures thereon were not those of the testator. It was her burden to have examined an expert, and may be thereafter, the plaintiff would also have to examine an expert. To whatever end the experts would have opined, the Court would then avail the benefit of two expert reports before it while forming its opinion whether the signatures on the will were genuine or not. In the absence of any side, particularly the defendant examining an expert, it was always open to the Court to have done a comparison of its own, between the disputed signatures and those admitted, and recorded its own conclusions as it has done.

22. The scope, authority and duty of the Court's power to do a comparison of the disputed signature/ handwriting with that admitted fell for consideration of the Supreme Court in **Murari Lal vs. State of Madhya Pradesh**, **(1980) 1 SCC 704**, where it was held:

"12. The argument that the court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the Evidence Act expressly enables the court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which Judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and two [Vide Correction slip No. F. 3/79 (Ed.J) dt. 21-8-80] voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases, it becomes the plain duty of the court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbook and the court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence. We may mention that *Shashi Kumar v.Subodh Kumar* [AIR 1967 SC 1326 : 1967 Cri LJ 1197] and *Fakhruddin v. State of M.P.* [AIR 1967 SC 1326 : 1967 Cri LJ 1197] were cases where the Court itself compared the writings."

23. In this regard, a decision of this Court in **Satya Prakash Pandey and others vs. Dev Brat Mishra, 2011 (3) ADJ : 2011 SCC OnLine All 202** may be referred to. In **Satya Prakash Pandey and others** *(supra)* it has been held in paragraph 16, 17 and 18 of the report:

"16. The second reason given in the impugned order for entertaining and deciding a review application is that the view expressed by the earlier Presiding Officer on the genuineness of the signatures appearing on the compromise 64 Ka was erroneous. Admittedly in the present case neither of the parties have applied or furnished any report of an expert on the disputed signatures. The court in the absence of any such report has the jurisdiction to peruse the signatures and come to a prima facie finding with respect to its genuineness on comparison. Moreover the opinion of the expert is merely an opinion which generally requires corroboration. The court can decide whether the expert opinion requires corroboration at all. The expert report can

be accepted only if the court is satisfied by comparing the admitted signature with the disputed signature and then come to its own conclusion. Hence when an expert report is available on record of a case it is still the conclusion of the court that either accepts it or rejects it. The court in any event has to take the final decision. Therefore, in a case where there is no expert report on record the court has to even then give its conclusion on the dispute and that can be done by the court upon bare perusal of the two signatures.

17. The Supreme Court in *Murari Lal* (supra) held that by comparing the writing itself the court could not assume the rule (sic) in of an expert. Section 73 of the Evidence Act enables the court to compare the disputed writing with admitted or proved writing to ascertain whether the writing is of that person. The opinion of the expert is an aid to the court, but where there is no such report the court will have to seek guidance from the authoritative text book and the court's own experience and knowledge. It was held that duty is to be discharged by the court with or without expert and with or without other evidence.

18. Admittedly in the present case neither of the parties have produced or applied for report of a handwriting and fingerprint expert. The Court never refused to admit an expert opinion. In such circumstances the court was within its jurisdiction to form an opinion by comparison of the disputed and admitted signatures. That is what has been done by the court in the judgment under review. The impugned order is an order passed on a review application and such was not a ground under Order XLVII Rule 1 Code of Civil Procedure to hold that an error apparent on the face of record has been committed in comparison of the signature by the earlier Presiding Officer, and hence it can be reviewed."

24. The present case is clearly one where the Court did not refuse to admit in evidence any expert opinion produced by the parties. But, shorn on any expert assistance, the Court was competent to go into the question by doing a comparison going by the clear legislative edict to that effect, carried in Section 73 of the Indian Evidence Act. This view has the approval of their Lordships of the Supreme Court in **Murari Lal vs. State of M.P., AIR 1980 SC 531**, which has been referred to in **Satya Prakash Pandey and others** *(supra)*. It is not a case where the Court took upon itself the role of an expert, where it had guidance. It is a case where the Court discharged its duty in accordance with Section 73 where there was no expert evidence led by parties to its aid, in deciding upon the dispute regarding genuineness of the signatures, that was raised by the defendants.

25. In this view of the matter, substantial question No. 3 is answered in the manner that in the absence of an expert report being filed by either party, it is not only open to a Court but its duty to do a comparison of the admitted and disputed signatures and record its own findings. In view of the answers to substantial questions of law nos. 2 and 3, which alone were pressed, this court does not find any merit in this appeal.

26. This appeal **fails and is dismissed**. However, costs will go easy looking to the fact that the respondents have not appeared at the hearing.

27. Let a decree be drawn up, accordingly.

(2020)03-05ILR A1435
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Second Appeal No. 540 of 1991

The Union of India & Anr. ...Appellants
Versus
Sri Awadhesh Kumar Agarwal
...Respondent

Counsel for the Appellants:
Sri S.N. Agarwal, Sri Devendra Tripathi

Counsel for the Respondent:
Sri Sri Dhan Prakash, Sri Rakesh Kumar Garg

A. Civil Law-Indian Railways Act, 1890 – Section 78-B – Compensation – Service of Notice – Limitation of time – Object – Purpose of the notice is to enable the Railway authorities to make an expeditious and meticulous enquiry into the nature and bonafides of the claim for compensation – It would prevent stale claims from being raised to the detriment to the Railway authorities – A bonafide claim would also encourage resolution of disputes without recourse to frivolous litigation – There is a strong public interest element involved in this provision. (Para 22, 23 and 24)

B. Interpretation of Statute – Liberal construction – Pedantic approach – Statutory period of six month for service of notice – Held, in view of the purpose of the the enactment, the notice under Section 78B of the Indian Railways Act, 1890, has to be construed in a liberal manner and a pedantic approach has to be eschewed. (Para 26)

C. Civil Law-Indian Railways Act, 1890 – Section 140 – Mode of Service – Multiple or Exclusive – A combined reading of Sections 78B and 140, show that no exclusive mode for service of notice has been provided in the statute. The service can be made by multiple modes as described in the said provision – The phrase 'may be served' in Section 140 manifests the permissive intent of the legislature in regard to the mode of service and conferment of the option of choosing the mode of service upon the claimant – The legislature accords primacy to the fact of effective service of notice over the method of service. (Para 33, 34 and 36)

Appeal dismissed (E-1)

Cases relied on :-

1. Jetmull Bhojraj Vs. Darjeeling Himalayan Railway Co. Ltd. & ors., AIR 1962 SC 1879

2. A. Mahadeva Aiyar Vs. The South Indian Railway Company Ltd. AIR 1922 Mad 362 : 1921 SCC OnLine Mad 140,

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This second appeal arises out of the judgment and decree dated 23.11.1990 rendered in Civil Appeal No. 03 of 1987, Awadhesh Kumar Agarwal Vs. Union of India and another, by learned Special Judge, Essential Commodities Act, Etah, which reverses the judgment and decree of the learned trial court/ learned Additional Civil Judge, Etah in Original Suit No. 15 of 1984, (Awadhesh Kumar Agarwal Vs. Union of India and another), dated 05.08.1986.

2. The instant second appeal has been instituted by the defendants in the civil suit.

3. The plaintiff-respondent brought civil proceedings, registered as Original Suit No. 15 of 1984, (Awadhesh Kumar Agarwal Vs. Union of India and another), seeking compensation for damage caused to goods by the negligence of the Railway authorities. The learned trial court by judgment and decree dated 05.08.1986 had dismissed the suit of the plaintiff on the foot that the notice dated 21.07.1981 sent

by the plaintiff, under Section 78B of the Indian Railways Act, 1890, was not served upon the Railway authorities within the time stipulated under the said provision.

4. The plaintiff took the judgment and decree of the learned trial court in appeal. The appeal was registered as Civil Appeal no. 03 of 1987, Awadhesh Kumar. Vs. Union of India and another.

5. The only point formulated for determination and argued before the learned first appellate court was whether the notice under Section 78B of the Indian Railways Act was lawful and within the statutory time limit prescribed in the provision. The findings of the appellate court are set forth hereinafter.

6. The learned appellate court in its judgment took judicial notice of the fact that a telegram is delivered within 24 hours of its dispatch. If the distance between the two places, namely, place of dispatch and the point of receipt is very far, at the outside the telegram will be received by the addressee within 48 hours.

7. Admittedly, the telegram was sent by the plaintiff on 21.07.1981. Six months period from the date of delivery of the goods for carriage to the railways, were set to expire on 25.07.1981. The appellate court noticed the statement on oath given by the plaintiff in regard to timely service of the telegram and also the failure of the defendant-appellant to refute the same. The appellate court then opined that in the normal course of things, the telegram would reach its destination within 24 hours after the same was booked for dispatch by the plaintiff-respondent. There was no reason to take a different view in this case.

8. The endorsement made by the railway employees of the Gorakhpur Office of the Railways on the telegram that the same was received on 28.07.1981, was disbelieved by the learned appellate court. The learned appellate court found against the Railways (defendant-appellant), that on the basis of such endorsement, it cannot be concluded that the telegram did not reach its destination in the time.

9. Consequently, the learned appellate court found that it cannot be said that the plaintiff did not submit his claim within time.

10. The learned appellate court then delved into the legal obligations of the postal authorities, after a telegram is submitted to them for dispatch. The Posts and Telegraph Departments became responsible for timely dispatch of the telegram after the signature and deposit of prescribed expenses for telegraph services. In light of such legal obligations of the postal authorities also the plaintiff cannot be fastened with for delay on the part of the postal authorities.

11. The learned appellate court finally concluded that the date on which the letter were delivered to the postal department for dispatch, along with the prescribed expenses would be the date of service of the notice for the claim. The plaintiff-respondent had delivered telegram for dispatch after payment of prescribed expenses on 21.07.1981. Hence, it would be presumed that the claim was also submitted by the plaintiff on like date i.e.

21.07.1981, which was well within the statutory time limit for the notice.

12. The contents of the notice were also noticed by the learned appellate court. The telegraphic communication records the date and number of the Bilti. The consignment of goods was identified with full particulars in the notice. The amount of loss and the demand /claim of compensation is also stated in the communication sent by the telegram.

13. After looking to the said recitals in the telegram, the learned first appellate court found that the substance of the claim for compensation was mentioned in the telegram. In this manner, the telegram satisfied the ingredients of Section 78B of the Indian Railways Act.

14. In the wake of these enquiries, the first appellate court found that the claim sent by the plaintiff-respondent was within prescribed time and the notice conformed to the requirements of Section 78B of the Indian Railways Act, 1890.

15. The learned first appellate court allowed the appeal of the plaintiff and set aside the judgment and decree dated 05.08.1986 of the learned trial court. The suit of the plaintiff for Rs. 9,740.50/- along with costs was decreed in favour of the plaintiff-appellant by the learned appellate court.

16. Aggrieved by the judgment of the learned appellate court, the defendant-respondent, namely, Union of India, instituted the instant second appeal before this Court.

17. Shri Devendra Tripathi, learned counsel for the appellant submits that the learned first appellate court erred in law and misinterpreted the provisions of Section 78B read with Section 140 of the Indian Railways Act, 1890. Learned counsel for the appellant contended that on account of such incorrect interpretation, the notice which was ineffective and time barred was found to be valid and within time prescribed by the first appellate court.

18. Shri Rakesh Kumar Garg, learned counsel for the respondents submits that all the ingredients of Section 78B were satisfied. The contents of notice were consistent with Section 78B of the Indian Railways Act, 1890. Further the notice was within time and cannot be held to be outside the period of limitation.

19. The learned counsels for both the parties agree that the following substantial question of law arises for consideration in appeal:

"1. Whether the notice dated 21.07.1981 conformed to the requirements of Section 78B of the Indian Railways Act and was served within the time stipulated therein, and in a manner provided in the said provision read with Section 140 of the Indian Railways Act, 1890?"

20. A claim to compensation for loss caused by the Railways has to be preceded by a notice of such claim under Section 78B of the Indian Railways Act, 1890 (as amended from time to time) to the competent authorities described in the aforesaid provision. The service of such notice has to be made in the manner provided under Section 140 of the Indian Railways Act, 1890.

21. Thus, the combined reading of Section 78B and Section 140 of the Indian

Railways Act, 1890 (as amended from time to time), provides the conditions precedent and the statutory scheme for instituting and processing of claims to compensation for losses. Section 78B provides for the notice in the following terms:

"78B. Notification of claims to refunds of overcharges and to compensation for losses. *A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction, damage, deterioration or non-delivery of animals or goods delivered to be carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf*

(a) to the railway administration to which the animals or goods were delivered to be carried by railway, or

(b) to the railway administration on whose railway the destination station lies, or the loss, destruction, damage or deterioration occurred, within six months from the date of the delivery of the animals or goods for carriage by railway :

Provided that any information demanded or inquiry made in writing from, or any complaint made in writing to, any of the railway administration mentioned above by or on behalf of the person within that said period of six months regarding the non-delivery or delay in delivery of the animals or goods with particulars sufficient to identify the consignment of such animals or goods shall, for the purposes of this section, be deemed to be a claim to the refund or compensation."

22. The purpose of the notice contemplated under Section 78B of the Indian Railways Act, 1890, is to enable the Railway authorities to make an expeditious and meticulous enquiry into the nature and bonafides of the claim for compensation. This enquiry would aid the Railway authorities in determining whether the loss for which compensation is being claimed was occasioned by negligence of the Railway employees or agents of the Railways and the extent of the responsibility of the Railways to pay such compensation.

23. A specific time period prescribed in Section 78B of the Indian Railways Act, 1890, for a notice for compensation, would prevent stale claims from being raised to the detriment to the Railway authorities. The Railway authorities will be hard put to entertain claims submitted after inordinate delay as evidence would be lost to time and remembrance.

24. A bonafide claim would also encourage resolution of disputes without recourse to frivolous litigation. There is a strong public interest element involved in this provision. Fictitious claims and frivolous litigation make an unnecessary drought on the time of the courts and are a drain on the public exchequer.

25. The purpose of the notice is not to deprive a bonafide claimant of his/her legitimate claim but to assist the process of determining both the correctness and the quantum of such claim. The provision also offers a protection to the Railways against fraudulent claims.

26. In this wake, the notice under Section 78B of the Indian Railways Act, 1890, has to be construed in a liberal manner and a pedantic approach has to be eschewed. The effective service of the notice in the time period stipulated in the statute, is of course a mandatory requirement before Courts can consider the claim on its merits.

27. The fundamental ingredients of such a notice, as set out under Section 78B of the Indian Railways Act, 1890, is that the claim should be preferred in writing. The section also requires

that claim must be preferred strictly within the time period mentioned in it. The notice should contain a claim for damages. There is no requirement for a specific sum for compensation to be denoted in the notice. The notice has to be served upon the competent authority described in the provision.

28. At this stage, it is pertinent to mention here that Section 78B of the Indian Railways Act, 1890, was inserted by amending Act No. 39 of 1961 in the Indian Railways Act, 1890. The corresponding old section or precursor of Section 78B of the Indian Railways Act, 1890, was Section 77 which ran as follows:

"77. Notification of claims to refunds of overcharges and to compensation for losses. *A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction, damage, deterioration or non-delivery of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway."*

29. A perusal of amended Section 78B of the Indian Railways Act, 1890, and its precursor Section 77 of the Indian Railways Act, 1890, shows the nature of the notice in both the provisions essentially remains the same. The amendments in regard to the notice made under Section 78B of the Indian Railways Act, 1890, only provide for certain additional railway authorities to whom the notice is to be preferred and also incorporates communications which are deemed to be valid notices under Section 78B of the Indian Railways Act, 1890.

30. The scope and purpose of Section 77 of the Indian Railways Act, 1890, discussed in the preceding part of the narrative, finds support in authority of old standing. The authority can be safely applied to this case as well.

31. The Hon'ble Supreme Court in ***Jetmull Bhojraj Vs. Darjeeling Himalayan Railway Co. Ltd. and Others***, reported at ***AIR 1962 SC 1879***, considered the scope of the notice under Section 77 of the Indian Railways Act, 1890. In **Jetmull Bhojraj (supra),** the Hon'ble Supreme Court consolidated and distilled the authorities handed down by the various High Courts in regard to the requirements of a notice under Section 77 of the Indian Railways Act, 1890. Being in agreement with such authorities, adopted the same in their entirety by holding thus:

"20.The first question to which we address ourselves is whether the appellant had complied with the requirements of Section 77 of the Railways Act. The relevant portion of that section reads thus:

"A person shall not be entitled to compensation for the loss, destruction or deterioration of goods delivered to be so carried unless his claim to compensation has been perferred in writing by him or on his behalf to the Railway administration within six months from the date of the delivery of the goods for carriage by railway."

The High Courts in India have taken the view that the object of service of notice under this provision is essentially to enable the Railway administration to make

an enquiry and investigation as to whether the loss, destruction or deterioration was due to the consignor's laches or to the wilful neglect of the Railway administration and its servants and further to prevent stale and possibly dishonest claims being made when owing to delay it may be practically impossible to trace the transaction or check the allegations made by the consignor. In this connection we may refer to a few of the decisions. They are:Shamsul Huqv.Secretary of State[ILR 57 Cal 1286] ;A. Mahadeva Ayyarv.S.I. Railway[R 45 Mad 135 (FB)] ;Governor-General-in-Councilv.Gouri Shankar Mills Ltd., [ILR 28 Pat 178 FB] ;Meghaji Hirajee & Co.v.Bengal Nagpur Railway[(1939) Nag 141] . Bearing in mind the object of the section it has also been held by several High Courts that a notice under Section 77 should be liberally construed. In our opinion that would be the proper way of construing a notice under that section. In enacting the section the intention of the legislature must have been to afford only a protection to the Railway administration against fraud and not to provide a means for depriving the consignors of their legitimate claims for compensation for the loss of or damage caused to their consignments during the course of transit on the Railways."

32. The mode of service of notice on railway administration is provided under Section 140 of the Indian Railways Act, 1890. The provision being relevant to the controversy is extracted hereunder:

"140. Service of notices on railway administration. *Any notice or other document required or authorised by this Act to be served on a railway administration may be served, in the case of a railway administered by the Government, on the Manager or the Chief Commercial superintendent and, in the case of a railway administered by a railway company, on the Agent in India of the railway company--*

(a) by delivering the notice or other document to the Manager or the Chief Commercial Superintendent or Agent; or

(b) by leaving it at his office; or

(c) by forwarding it by post in a prepaid letter addressed to the Manager or the Chief Commercial Superintendent or Agent at his office and registered under the Indian Post Office Act, 1898 (VI of 1898)."

33. A combined reading of Sections 78B and 140 of the Indian Railways Act, 1890, show that no exclusive mode for service of notice has been provided in the statute. The service can be made by multiple modes as described in the said provision.

34. The phrase "may be served" in Section 140 of the Indian Railways Act, 1890, manifests the permissive intent of the legislature in regard to the mode of service and conferment of the option of choosing the mode of service upon the claimant.

35. Section 140(a) of the Indian Railways Act, 1890, contemplates service of notice "by delivering the notice" to the competent officials named therein. Section 140(b) of the Indian Railways Act, 1890, visualises service "by leaving it at his office". The amplitude of the provision allows service to be made in diverse forms. The claimant may adopt any of the methods of service according to his preference. However, the fact of effective service is an imperative requirement.

36. Clearly the legislature accords primacy to the fact of effective service of notice over the method of service.

37. The view taken by by this Court in regard to the scheme of Section 140 read

with Section 78B of the Indian Railways Act, 1890, can be reinforced by good authority.

38. A Full Bench of the Hon'ble Madras High Court in ***A. Mahadeva Aiyar Vs. The South Indian Railway Company, Limited,*** reported at ***AIR 1922 Mad 362 : 1921 SCC OnLine Mad 140,*** while considering the scope of Section 140 of the Indian Railways Act, 1890, held thus:

"12...Section 140refers to three modes by which service may be effected, namely (1) delivery of the notice to the Manager or Agent personally, (2) leaving it at his office and (3) sending it by registered post. The second and third methods are not peisonal service but a person is relieved from further liability if he leaves the notice at the Agent's office or sends it by registered post, even if the notice for some reason does not actually come into the Agent's hands.. The object of the section is to see that the company gets notice and there is no magic in the methods provided for by the section to see that it reaches him, if as a matter of fact the notice comes into his hands. Supposing the plaintiff adopts the method of sending the notice by post without registration and the Agent admits receipt of the notice which is otherwise valid, there is no reason for holding that non-registration is such a vital defect that it invalidates the notice. The Code of Civil Procedure provides for modes of service of summons and notices. I do not think it can be said that where a party without objection receives and admits receipt of the summons or notice, he can fail to appear and plead the mode by which he received the process as an excuse.

So far as notices of action are concerned the substantial point is whether they reached the person to whom the law requires notice to be given; and the method by which he received it is a matter which is of comparative unimportance and a deviation from the methods prescribed in the section will in my opinion be only an irregularity."

39. The plaintiff chose the mode of service of notice by sending a telegraph. Notices or communications sent by telegraph, are covered under the Indian Telegraph Act, 1885, as well as the Indian Evidence Act, 1872. This mode of service clearly comes within the ambit of Section 140(a) and 140(b) of the Indian Railways Act, 1890.

40. The mode of service adopted by the plaintiff-respondent to serve the notice upon the appellant-respondent/railway authorities, was a lawful mode as contemplated under the Indian Railways Act,1890.

41. The learned appellate court has found that the notice contemplated under Section 78B of the Indian Railways Act, 1890, was served upon the competent authority on 21.07.1981. The last date of service of notice in terms of Section 78B of the Indian Railways Act, 1890, was 25.07.1981. The contents of the notice as recorded by the learned appellate court have been noticed earlier.

42. The above findings of fact returned by the learned first appellate court have been extracted in extenso in the earlier part of the narrative. The findings of fact are beyond reproach and are based upon material and the evidence in the record. These findings of fact are also supported with cogent reasons.

43. Applying the aforesaid findings of fact to the statutory scheme explained hereinabove, this Court finds that the notice for claim under Section 78B of the Indian Railways Act, 1890, was served upon the competent railway authority within the statutory period of six months from the date of the delivery of the consignment. The notice contained the demand for compensation as contemplated in the provision. The notice clearly identifies the goods with sufficient particulars to enable the railway authorities to undertake any necessary enquiry in that regard.

44. In this manner, the service of the notice upon the Railway authorities was valid and within the time period prescribed under Section 78B of the Indian Railways Act,1890. Further, the ingredients of a notice as required under Section 78B of the Indian Railways Act, 1890, are satisfied by the notice dated 21.07.1981 sent by the plaintiff-respondent.

45. The service of such a valid notice with the stipulated time period is a precondition for success of any claim for compensation. The service of a valid notice in the manner prescribed by law, has been established. The claim of the plaintiff-respondent for compensation is liable to be allowed and was rightly granted by the learned first appellate court.

46. The substantial question of law is answered as follows.

"The notice under Section 78B of the Indian Railways Act, 1890, contained the necessary ingredients in a valid notice for compensation and was also served in a lawful manner and within the time frame prescribed in Section 78B of the Indian Railways Act, 1890. The notice was fully consistent with the requirements of Section 78B read with Section 140 of the Indian Railways Act, 1890, and cannot be faulted in any manner."

47. The substantial question of law having been answered in favour of the plaintiff-respondent and against the appellant, the judgment and decree of the learned first appellate court is liable to be upheld.

48. The judgment and decree dated 23.11.1990 rendered by the learned Special Judge, Essential Commodities Act, Etah, in Civil Appeal No. 03 of 1987 (Awadhesh Kumar Agarwal Vs. Union of India and another) is affirmed.

49. The second appeal is dismissed.

(2020)03-05ILR A1442
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2020

BEFORE

THE HON'BLE VIPIN CHANDRA DIXIT, J.

FAFO No. 860 of 1996
connected with
FAFO No. 3375 of 2009

Netrapal Singh ...Appellant
Versus
U.P.S.R.T.C. & Anr. ...Respondents

Counsel for the Appellant:
Sri Yogendra Pal Singh

Counsel for the Respondents:
Sanjeev Kumar Yadav

A. Civil Law-Motor Vehicle Act, 1988 – Contributory Negligence – Comparative Liability of heavy and light motor – Held, the liability of the heavy vehicle is more. (Para 12)

B. Motor Vehicle Act, 1988 – IInd Schedule – Determination of Compensation – Multiplier – Multiplier Table is provided by Apex Court in Smt. Sarla Verma's case – Tribunal had committed wrong in applying the multiplier of 18 accepting the age of the claimant as 28 years – The Hon'ble Apex Court has provided the multiplier of 17 for the age group of 26 to 30 years and as such the appropriate multiplier in the present case would be 17. (Para 16 and 18)

Appeal disposed off (E-1)

Cases relied on :-

1. FAFO No. 1818 of 2012; Bajaj Allianz General Insurance Co. Ltd. Vs. Smt. Renu Singh & ors. decided by Allahabad High Court on 19.7.2016

2. Raj Kumar Vs. Ajay Kumar; 2011 (1) TAC 785

3. Smt. Sarla Verma Vs. Delhi Road Transport Corporation; 2009(2) TAC 677

4. National Insurance Company Ltd. Vs. Pranay Sethi; 2017(4) T.A.C. 673

(Delivered by Hon'ble Vipin Chandra Dixit, J.)

1. Both the First Appeals From Orders have been filed under Section 173 of Motor Vehicle Act, 1988(hereinafter referred as 'Act, 1988') against the judgment and award dated 13.9.1996 passed by Motor Accident Claims Tribunal/Vth Additional District Judge, Bulandshahr(hereinafter referred as 'Tribunal') in Motor Accident Claim Petition No. 88 of 1992 by which compensation of Rs.2,02,000/- alongwith 12% interest had been awarded to the claimant Netrapal Singh on account of injuries received by him in a road accident. Both the appeals were connected and with the consent of counsel for the parties are being decided by common judgment.

2. Brief facts of the case are that the claimant Netrapal Singh had filed claim petition under section 140 and 166 of Act, 1988 claiming compensation of Rs.9,75,000/- alongwith 18% interest on account of injuries received by him in a road accident which had occurred on 16.1.1992. It is alleged in the claim petition that the claimant is owner and driver of mini bus bearing no. DL-5C-4895 and was going to Meerut from village Pittobans, District Bulandshahr and about 6:30- 7:00 a.m. on 16.1.1992 when he reached near 'pullia' of village Kaithala at Bulandshahr-Gulawathi road, all of a sudden Roadways bus bearing no. UGE-705 driven by its driver rashly and negligently came from the opposite direction (Gulawathi side) and dashed the mini bus of claimant who received grievous injuries in the accident. It is also alleged in the claim petition that on account of injuries the claimant has become permanent disabled and as per disability certificate issued by Chief Medical Officer, Meerut he has become permanent disabled to the extent of 58%. The FIR was lodged on 17.1.1992 at 10 A.M. regarding the accident at Gulawathi Police Station. The age of the claimant was 26 years at the time of accident and his income was Rs.6000/- per month from transport business but on account of disability he is unable to do anything.

3. The opposite party/U.P. State Road Transport Corporation(hereinafter referred as "Corporation") had put in appearance and filed its written statement denying the claim allegations and it was pleaded in the written statement that there was fog in the morning and the claimant who was driving mini bus came from wrong side without blowing light and collided with the bus and there was no negligence on the part of driver of the Corporation and the accident was occurred on account of sole negligence of the claimant himself. It was also pleaded

that owner and insurance company of mini bus was not impleaded as a party.

4. The Tribunal had framed five issues for determination regarding negligence of the driver of the Corporation, contributory negligence of the claimant, non-impleadment of necessary parties as well as quantum of compensation. The claimant himself had appeared as P.W.-1 and had also produced one eye witness Narendra Singh as P.W.2, Dharamveer Singh(father of the claimant) as P.W.-3, Vijay Daleep, General Manager of Priya Hospital as P.W.-4 and Naveen Kumar, Junior Clerk of C.M.O. office Meerut as P.W.-5,whereas the driver of the Corporation had appeared as D.W.-1 and Narendra Mohan Sharma, Junior Station Incharge of Bulandshahr Depo had appeared as D.W.-2.

5. The Tribunal had recorded the finding while deciding issue nos. 1 and 2 that both the vehicles were coming from opposite directions and both the drivers were driving their vehicles rashly and negligently and were responsible for the accident and hold 40% negligence of claimant who was driving the mini bus and 60% negligence of the driver of the Corporation. The issue no.3 regarding non impleadment of parties was decided against the claimant holding that owner and insurance company of mini bus were necessary parties and since they are not impleaded as a party in the claim petition, the claimant is not entitled for 40% amount of compensation.

6. While deciding issue nos. 4 & 5 regarding quantum of compensation, the Tribunal had disbelieved the income of Rs.6000/- per month as alleged by the claimant and it was accepted as Rs.3000/- per month and deducting 1/3rd towards personal expenses and the multiplier of 18 was applied accepting the age of claimant as 28 years. The future loss of earning was accepted as 58% of the income accepting 58% permanent disability discloses in the disability certificate and assessed the amount of compensation as Rs.3,36,560 including medical expenses and other non pecuniary damages. The amount of compensation was reduced to the extent of 40% on account of 40% contributory negligence and compensation of Rs.2,02,000/- alongwith 12 % interest was awarded vide judgment and award dated 13.9.1996 which is impugned in both the appeals.

7. FAFO No. 860 of 1996 was filed by the claimant for enhancement of compensation on the ground that 40% amount has wrongly been deducted towards contributory negligence, the amount of compensation granted for the pain and agony suffered by the claimant is too low, the income of the claimant has wrongly been assessed as Rs.3000/- per month in place of Rs.6000/- per month and Tribunal has also erred in accepting 58% loss of earning capacity on account of 58% disability whereas on account of disability the claimant/appellant has become unfit for any job and there is 100% loss of earning.

8. FAFO No. 3375 of 2009(Old Defective No. 56 of 1997) has been filed by the Corporation against the same award on the ground that the accident occurred on account of rash and negligent driving of the claimant himself who was driving the mini bus and there was no negligence on the part of driver of the Corporation and 60% liability has wrongly been imposed upon the Corporation holding 60% negligence of driver of Corporation and a very excessive

amount of compensation has been awarded and the rate of interest as 12 % is also on higher side.

9. Heard Sri Yogendra Pal Singh, learned counsel for claimant Netrapal Singh and Sri Sanjeev Kumar Yadav, learned counsel for U.P. State Road Transport Corporation and perused the record.

10. The factum of accident has not been disputed by the parties but only the rash and negligence has been disputed by both the parties. The Tribunal had decided the issue of negligence holding that the drivers of both the vehicles were negligent and responsible for the accident and 60% liability has been fixed upon Corporation holding 60% negligence of driver of Corporation and 40% of the claimant holding his contributory negligence. The learned counsel for the Corporation has submitted that the accident had occurred on account of sole negligence of claimant and there was no negligence of Corporation driver. On the other hand, the learned counsel for claimant has submitted that the driver of Corporation was sole negligent and responsible for the accident.

11. The principles for deciding negligence and contributory negligence had been discussed by the Division Bench of this Court in **FAFO No. 1818 of 2012 Bajaj Allianz General Insurance Co. Ltd. vs. Smt. Renu Singh and others** decided on 19.7.2016. The relevant paragraph nos. 16,19,22 and 25 are reproduced herein below:-

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330****. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was

being driven with reasonable care or that there is equal negligence on the part of driver of another vehicle.

25. Truck is a very big vehicle where as a car is relatively a very small vehicle. The driver of truck should have taken proper care which he has not taken and therefore, it cannot be said that the driver of truck was not solely negligent. We find no reason to accept the submission of learned counsel for appellant that driver of truck was not solely negligent."

12. In view of the ratio of the above decision, obviously the liability of the heavy vehicle appears to be more. The Tribunal is not justified in confining it to 60%. Taking into account of the entire evidence on record and the fact that the bus of the corporation had hit the mini bus from front slightly on the wrong side, the interest of justice would require the apportionment of negligence in the ratio of 70% and 30% respectively.

13. So far as quantum of compensation is concerned, the claimant had not produced any authentic evidence regarding his income and no income tax return was filed and even he had failed to produce any document regarding ownership of the mini bus and as such the Claims Tribunal has rightly accepted the notional income of the claimant as Rs.3000/- per month.

14. It is further submitted by the counsel for the claimant that the Claims Tribunal had erred in accepting 58% loss of earning on the basis of 58% permanent disability mentioned in the disability certificate issued by Chief Medical Officer whereas there was 100% loss of earning capacity. On the other hand, learned counsel for the Corporation has submitted that the loss of earning was accepted on higher side without recording any finding towards functional disability of whole body.

15. The Hon'ble Apex Court in **Raj Kumar vs. Ajay Kumar** reported in **2011 (1) TAC 785** has laid down the law in respect of assessment of future loss of income in the case of injury. The relevant paragraphs 8 and 18 are reproduced herein below:-

"8. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a

percentage of the income, it has to be quantified in terns of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in ***Arvind Kumar Mishra v. New India Assurance Co. Ltd.- 2010(10) SCALE 298*** *and* ***Yadava Kumar v. D.M. National Insurance Co. Ltd. - 2010 (8) SCALE 567).***

18. The Tribunal has proceeded on the basis that the permanent disability of the injured-claimant was 45% and the loss of his future earning capacity was also 45%. The Tribunal overlooked the fact that the disability certificate referred to 45% disability with reference to left lower limb and not in regard to the entire body. The said extent of permanent disability of the limb could not be considered to be the functional disability of the body nor could it be assumed to result in a corresponding extent of loss of earning capacity, as the disability would not have prevented him from carrying on his avocation as a cheese vendor, though it might impede in his smooth functioning. Normally, the absence of clear and sufficient evidence would have necessitated remand of the case for further evidence on this aspect. However, instead of remanding the matter for a finding on this issue, at this distance of time after nearly two decades, on the facts and circumstances, to do complete justice, we propose to assess the permanent functional disability of the body as 25% and the loss of future earning capacity as 20%."

16. The Claims Tribunal while assessing the loss of earning capacity has failed to consider the actual functional disability and had erred in accepting 58% loss of earning capacity whereas on account of evidence adduced by the claimant the functional disability is accepted as 45% and loss of future earning capacity as 40%. While assessing the just compensation I found that the Tribunal had committed wrong in applying the multiplier of 18 accepting the age of the claimant as 28 years as the Hon'ble Apex Court in the case of **Smt. Sarla Verma vs. Delhi Road Transport Corporation** reported in 2009(2) TAC 677 has held that there are discrepancies/errors in the multiplier scale given in the second schedule and provided multiplier table. Para 21 is reproduced herein below:-

"21. We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

17. The multiplier table provided in the above decision was also affirmed by the Constitutional Bench of Hon'ble Apex

Court in the case of **National Insurance Company Ltd. vs. Pranay Sethi** reported in **2017(4) T.A.C. 673.**

18. The Hon'ble Apex Court has provided the multiplier of 17 for the age group of 26 to 30 years and as such the appropriate multiplier in the present case would be 17.

19. The Claims Tribunal had also erred in deducting 1/3rd towards personal expenses, which is applicable only in the case of death, as held by Hon'ble Apex Court in the case of **Raj Kumar**(supra). The paragraph 20 is reproduced herein below:-

"20. In the case of an injured claimant with a disability, what is calculated is the future loss of earning of the claimant, payable to claimant, (as contrasted from loss of dependency calculated in a fatal accident, where the dependent family members of the deceased are the claimants). Therefore there is no need to deduct one-third or any other percentage from out of the income, towards the personal and living expenses."

20. The claims Tribunal had not awarded any amount towards future prospects, whereas the claimant is also entitled 40% future prospects in view of law laid down by the Constitutional Bench of Hon'ble Apex Court in the case of **National Insurance Company Ltd. vs. Pranay Sethi** reported in **2017(4) T.A.C. 673.**

21. In view of aforesaid discussion, the quantum of compensation has been reassessed as follows:-

1) Monthly income Rs.3000/-

2) Annual income Rs.3000/- X 12 = Rs. 36,000/-

3) Future prospects 40% = Rs.14,400/-

4) Total annual income = Rs.36000/- + Rs.14,400 =Rs.50,400/-

5) Loss of earning capacity 40% = Rs.20,160/-

6) Multiplier applicable -17 =Rs.20,160 x 17 = 3,42,720/-

7) Medical expenses Rs.60,000/-

8) Non-pecuniary damages Rs.25,000/-

Total Rs. 3,42,720/- + Rs.60,000/- + Rs.25,000/- =Rs.4,27,720/-

22. Since the claimant himself was found negligent to the extent of 30%; as such the amount of compensation is reduced to 30%(Rs. 4,27,720/- minus Rs.1,28,316/- =2,99,404/-). It is taken in round figure as Rs.3,00,000/-. The rate of interest as 12% is also on higher side. The Hon'ble Apex Court in a latest decision **Civil Appeal No.242/243 of 2020 National Insurance Company Ltd. vs. Birender and others** has awarded 9% interest.

23. In view of aforesaid discussion, both the appeals are hereby disposed off and award of the Tribunal is modified and compensation awarded by the Tribunal is enhanced from Rs.2,02,000/- to Rs.3,00,000/- with interest at the rate of 9% from the date of filing of claim petition. The corporation is directed to pay enhanced amount within two months.

24. No order as to costs.

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(2020)03-05ILR A1448
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2020

BEFORE

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

FAFO No. 1519 of 2017

Uttar Haryana Bijli Vitran Nigam Ltd., Panchkula, Haryana ...Appellant
Versus
M/s P.M. Electronics Ltd., Greater Noida ...Respondent

Counsel for the Appellant:
Sri Vivek Ratan Agrawal, Sri Anil Kumr Srivastava, Sri Baleshwar Chaturvedi, Sri Ashutosh Srivastava, Sri H.N. Singh, Sri M.C. Chaturvedi

Counsel for the Respondent:
Sri Alok Kumar Yadav

A. Civil Law-Arbitration and Conciliation Act, 1996 – Section 34 – Amendment Act, 2016 – Arbitral Award – Parameter to set aside – Term 'Public Policy' explained – The application for setting aside an arbitral award restricted on the ground of public policy and to apply only when award was persuaded or affected by fraud or corruption, or was against the fundamental policy of Indian law or in contravention with the most basic notions of morality. (Para 54, 55 and 56)

B. Civil law-Arbitration and Conciliation Act, 1996 – Section 34 – Jurisdiction of Civil Court to decide Objection – Where High Court and District Court have jurisdiction to decide objections under Section 34 of Act, then in that eventuality challenge to award shall lie only before High Court otherwise it shall lie before District Court being Principal Civil Court of original jurisdiction. (Para 34 and 61)

C. Court Proceeding – Decision on merit – D. Micro and Small and Medium Enterprises Development Act, 2006 – Section 2(n) and 8 – Term 'Supplier' – Meaning – Requirement of filing of Memorandum within 180 days – Court below relied upon the notification bearing No. 2/311123007-MSNE POL (PL) to arrive at conclusion that it is not mandatory for an Industrial undertaking to file its Industrial Entrepreneur's Memorandum – Since this was the only ground relied upon by Uttar Pradesh State Micro and Small Industrial Facilitation Council, Kanpur, the finding so recorded by Council was rightly set aside by Court below – In the absence of any such materials to establish that filing of Industrial Entrepreneur's Memorandum is mandatory, the finding recorded by the Court below upheld. (Para 83)

Appeal dismissed (E-1)

Cases relied on :-

1. Executive Engineer, Road Development Division No.III, Panvel & anr. V. Atlanta Ltd., 2014 (11) SCC 619

2. Bharat Aluminum Company Vs. Kaisar Aluminum Technical Services & ors., 2012 (9) SCC 552

3. M/s Shakti Tubes Ltd. through Director Vs. St. of Bihar & ors., 2009 (1) SCC 786

4. Assam State Electricity Boards and Others Vs. Trusses and Towers Pvt. Ltd.; AIR 2002 Assam 49

5. M/s. Shakti Tubes Ltd. Through Director v. St. of Bihar & ors., 2009 (1) SCC 786

6. Purvanchal Cabels and Conductors Pvt. Ltd. Vs. Assam State Electricity Board & ors., 2012 (7) SCC 462

7. Mcdermott International Inc. Vs. Burn Standard Co. Ltd. & ors., 2006 (11) SCC 181

8. Bharat Cooking Coal Ltd. Vs. L.K. Ahuja Company Ltd.; 2001 (4) SCC 86

9. Maharashtra State Electricity Board Vs. Sterilite Industries (India) & anr., 2001 (8) SCC 482

10. Renusagar Power Co. Ltd. Vs. General Electric Company, 1994 SCC Supl. (1) 644

11. Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd., 2003 (5) SCC 705

12. Mcdermott International Incorporation Vs. Burn Standard Co. Ltd. & ors., 2006 (11) SCC 181

13. Associate Builders Vs. D.D.A.; 2015 (3) SCC 49

14. Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI); 2019 SCC Online SCC 677

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

1. This First Appeal From Order under Section 37 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act, 1996) has been filed by Respondent-Appellant challenging judgement and order dated 08.09.2015 passed by District Judge, Kanpur Nagar in Misc. Case No. 100/74 of 2010 (M/s P.M. Electronics Limited Vs. Uttar Haryana Bijli Vitran Nigam Ltd. (UHBVNL) under Section 34 of Act, 1996, whereby Court below has set aside award dated 22.02.2010 delivered by U.P. State Micro and Small Industrial Facilitation Council Kanpur and remanded the matter before aforesaid Council Kanpur for decision a fresh on merits after giving notice and opportunity of hearing to the parties.

2. We have heard Mr. H. N. Singh, learned Senior Counsel assisted by Mr. Ashutosh Srivastava, Advocate alongwith Mr. M.C. Chaturvedi, learned Senior Counsel assisted by Mr. Baleshwar Chaturvedi. Learned counsel for Respondent-Appellant and Mr. Alok Kumar Yadav, learned counsel representing Claimant-Opposite Party.

3. Respondent-appellant Uttar Haryana Bijli Vitran Nigam Ltd. (hereinafter referred to as UHBVNL) is a Government of Haryana undertaking having its registered office at Shakti Bhavan Sector-6 Panchkula, Haryana (hereinafter referred to as 'Appellant'). Appellant is engaged in distribution of electricity.

4. Claimant-Opposite Party M/S P. M. Electronics Ltd. is a Company duly incorporated under the Companies Act, 1956 (hereinafter referred to as Claimant-Opposite Party). Claimant-Opposite Party is engaged in manufacturing and marketing of power and distribution transformers of various KVA ratings.

5. Appellant awarded various purchase orders to Claimant-Opposite Party during the period 1991 to 2000. Things were going on smoothly and bills of Claimant-Opposite Party were being paid regularly. However, in the year 1997, it appears that there was some delay in payment of principal amount. Accordingly, Claimant-Opposite Party filed CMWP No. 7916 of 1997 before Punjab and Haryana High Court claiming payment of interest on principal amount for the period of delayed payment. During pendency of above mentioned writ petition, Claimant-Opposite Party filed a Civil Misc. Application in the aforesaid writ petition praying therein that directions be issued to Government of Haryana to establish Industrial Facilitation Council (hereinafter referred to as 'IFC') as contemplated under Sections 7A and 7B of Interest on Delayed Payment to Small Scale Ancillary Industrial Undertaking Act, 1993 (hereinafter referred to as Act, 1993) within a period of three months.

6. It transpires from record that by and large contract awarded to Claimant-Opposite Party was performed smoothly by him. However, in the year 2000, Claimant-

Opposite Party is alleged to have failed in completing purchase orders resulting in immense loss to UHBVNL. Consequently, in view of above and in accordance with conditions of contract, UHBVNL encashed bank guarantee submitted by Claimant-Opposite Party.

7. It is further gathered from record that Claimant-Opposite Party filed an Original Suit in Civil Court at Panchkula, Haryana, but neither plaint of aforesaid suit nor any other document has been brought on record to show the relief claimed in aforesaid suit or what has ultimately happened in that suit.

8. Subsequently, Chief Engineer UHBVNL, Panchkula Haryana passed an order dated 3.10.2006, blacklisting Claimant-Opposite party, but there is nothing on record to show that aforesaid order dated 3.10.2006 was challenged by Claimant-Opposite party.

9. Punjab and Haryana High Court did not examine the merits of claim raised by petitioner i.e. Claimant-Opposite Party herein in CMWP No. 7916 of 1997 but disposed of the said writ petition finally vide order dated 13.02.2002.

10. Perusal of order dated 13.02.2002 goes to show that aforesaid writ petition was disposed of finally on the undertaking given by counsel for State of Haryana. For ready reference order dated 13.02.2002 referred to above is reproduced herein-below:

" In pursuant to order dated December 20, 2001, Mrs. Meenaxi Anand Chaudhary, Principal Secretary, to government of Haryana, Department of Power is present in Court. She has stated that the Government shall constitute the requisite council as provided under Section 7A of the Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakes (Amendment) Act, 1958. She has further stated that in fact is the Small Scale Industries Department, which is directly concerned with this matter. However, she has stated for and on behalf of the Government of Haryana that Council shall be constituted within a period of three months from today.

In this view of the matter, the application has been rendered instructions and the same is disposed of accordingly.

Dasti on payment."

11. Pursuant to aforesaid order dated 07.05.2002 passed by Punjab and Haryana High Court, Government of Haryana established IFC at Chandigarh. Accordingly, Claimant-Opposite Party filed his claim before IFC (Haryana) under Act 1993, vide claim dated 31.07.2002 claiming a sum of Rs.12,70,89,049/- alongwith pendente-lite and future interest as well as cost of claim petition.

12. Perusal of Claim Petition dated 31.07.2002 filed by claimant-opposite party goes to show that Claimant-Opposite Party in support of of it's claim of Rs.12,70,89,049/- pleaded that claimant-opposite party is a small scale industrial unit having permanent registration certificate. Claimant-Opposite party supplied various goods under different purchase orders to appellant. However, appellant failed to make timely payment i.e. within the time period prescribed by Act 1993. It was then pleaded that claimant-opposite party falls within the category of 'Supplier' as defined under section 2 (f) of Act 1993. Respondent-appellant is a 'Buyer' and therefore, liable

under the statute i.e. Act 1993 to make payment on or before period prescribed under Act 1993. As appellants have failed to make payment on or before due date, as envisaged under section 3 of Act 1993, they are liable to pay interest for the period of delayed payment as per the rates prescribed is Sections 4 and 5 of Act 1993. Aforesaid provisions cast a statutory duty upon Purchaser to pay interest for the period of delayed payment.

13. During pendency of aforesaid Claim Petition dated 31.07.2002 filed by claimant-opposite party before IFC, Haryana Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as Act, 2006) came into force on 02.10.2006. By reason of Section 32 of Act 2006, old Act of 1993 stood repealed.

14. Consequently, after coming into force of Act, 2006, IFC (Haryana) losts its existence. As a result of aforesaid, dispute of parties pending before IFC Haryana came to be stayed and thereafter adjourned as IFC (Haryana) now had no jurisdiction to decide claim of Claimant-Opposite Party. Under the new Act 2006, jurisdiction to decide claim of Claimant-Opposite Party now vested with Micro and Small Industrial Facilitation Council Haryana or Micro and Small Industrial Facilitation Council, Uttar Pradesh which were established at Chandigarh and Kanpur respectively as per Section 20 read with Section 21 of Act, 2006.

15. Claimant-Opposite Party filed an application dated 21.03.2007 before Director of Industries Haryana-Cum-Chairman Industries Facilitation Council Haryana praying therein that original file pertaining to claim submitted by claimant-opposite party be sent to U.P. State Micro & Small Industrial Facilitation Council, Directorate of Industries (U.P.) Kanpur. Thereafter, Claimant-Opposite Party filed reminders dated 27.11.2006, 08.12.2006, 22.12.2006, 07.02.2007 and 07.04.2007 in continuation of transfer application dated 21.3.2007 earlier filed by him.

16. However, as no consequential action was taken on aforesaid applications/representations submitted by claimant-opposite party, they submitted a new claim dated 19.06.2007 before U.P. State Micro and Small Industrial Facilitation Council which was constituted under Act, 2006. Claimant-Opposite Party now revised its claim to Rs.42,19,02,100/-. The break up of same is as follows:

"Interest due as per Section 16 and 17 of Act i.e. Rs. 40,74,54,079/-

Cost of goods supplied Rs. 43,50,817/-

Cost of recoveries made illegally through encahsment of Bank Guarantee and the cost of material supplied Rs.1,00,97,204/-"

17. Subsequently, Haryana State Micro and Small Industrial Facilitation Council passed an order dated 02.04.2008 directing Claimant-Opposite Party to approach Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur as Claimant-Opposite Party is registered in Uttar Pradesh. For ready reference order dated 02.04.2008 is reproduced herein-below:-

" Regd. No. TS/IFC/22/2006-07

From

The Director of Industries & Commerce, Haryana-cum-Chairman-Haryana Micro and Small Enterprises

Facilitation Council 30 Bays Building, Ist Floor, Section 17, Chandigarh.

To

M/s P.M. Electronics Ltd.,

B-10 & 11, Surajpur Site-C, Greater Noida,

Distt. Gautam Budh Nagar,

Dated Chandigarh, the

Subject: Ist Meeting of Haryana Micro and Small Enterprises Facilitation Council fixed for 22.01.2008 at 11-00 AM under the Chairmanship of Shri D.R.Dhingra, IAS, Director of Industries & Commerce, Haryana-Cum-Chairman , HMSEFC.

Sir,

Reference this office letter No. TS/HMSEFC/Ist meeting/392-A dated 8.1.2008 on the subject cited above.

2. The Ist meeting of Ist Meeting of Haryana Micro and Small Enterprises Facilitation Council fixed for 22.01.2008 at 11-00 AM under the Chairmanship of the undersigned. The decision of the Council is reproduced below:

"M/s P.M. Electronics Pvt. Ltd. Noida has submitted an applicati0on for transfer of their case to Micro & Small Enterprises Facilitation Council set up by the U.P. State, since HMSEFC under the Micro, Small & Medium Development Act, 2006 does not have jurisdiction to proceed further in their case. To this effect the claimant has submitted various representations dated 21.3.07,7.4.07, 29.10.07 and 22.1.2008 respectively.

On the request of the Claimant, the Council decided to dispose of the case since the unit of the claimant is registered in U.P. Sate with the direction to claimant to approach MSEFC set up by the U.P. Govt. if they so desire"

This is for your kind information.

(D.R. Dhingra)

Director of Industries & Commerce,

Haryana- Cum-Chairman, HMSEFC"

18. It is pursuant to aforesaid order that claim of Claimant-Opposite Party submitted on 19.6.2007, came to be considered by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur.

19. Notices were issued to opposite party, i.e. Appellant herein by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. Accordingly, Appellant filed objections dated 22.12.2008 before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. According to Appellant, claim raised by Claimant-Opposite Party is not tenable as Claimant-Opposite Party had originally filed a claim of Rs.12,70,89,049.00, which was pending before Haryana Industrial Facilitation Council and later on before Haryana Micro and Small Enterprises Facilitation Council, Chandigarh. Aforesaid claim was transferred to U.P. Micro and Small Enterprises Facilitation Council (UPMSME), vide order dated 22.01.2008. Therefore, filing of a fresh claim without disclosing pendency of previous pending claim amounts to concealment of fact and therefore, claim is liable to be dismissed on aforesaid ground. Apart from above, fresh claim as filed by claimant opposite party is barred by limitation and therefore liable to be dismissed.

20. It may be noted that proceedings before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur were to be conducted as per provisions of Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996').

21. Ultimately, Uttar Pradesh Micro and Small Industries Facilitation Council, Kanpur gave arbitral award dated 22.02.2010, whereby claim of Claimant-Opposite Party M/S P.M. Electronics Ltd. was rejected.

22. Perusal of award dated 22.02.2010 passed by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur goes to show that Council has rejected claim of Claimant-Opposite Party by formulating two points of consideration;

A. Whether Claimant can file petition for interest being treated to be a supplier as defined in Section 2(n) of the Act.

B. Whether Claimant can claim interest on due interest when principal amount has already been received by him.

23. While considering the first point of consideration as to whether claimant is to be treated as 'Supplier' as defined in Section 2(n) of Act, 2006, Council considered meaning of the term 'Supplier', as defined in Section 2(n) read with Section 8 of Micro and Small and Medium Enterprises Development Act, 2006, to ascertain whether claimant i.e. opposite party herein, is covered within the meaning of term "Supplier' as defined in Section 2(n) of Act, 2006. For ready reference Section 2 (n) and Section 8 of Micro and Small and Medium Enterprises Development Act, 2006 relied upon by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur, are reproduced herein-below:-

*"**Section 2(n).** "Supplier" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,-*

(i) The National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956)

(ii) The Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956)

(iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises;

***Section 8.** Memorandum of micro, small and medium enterprises-(1) Any person who intends to establish-*

(a) A micro or small enterprise, may, at his discretion, or

(b) A medium enterprise engaged in providing or rendering of services may, at his discretion; or

(c) A medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951) shall file the memorandum of micro, small, or as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Provided that any person who, before the commencement of this Act, established-

(a) a small scale industry and obtained a registration certificate, may, at his discretion; and

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the

First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O.477(E) dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum, shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.

(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after obtaining the recommendations of the Advisory Committee in this behalf.

(3) The authority with which the memorandum shall be filed by a medium enterprise shall be such as may be specified by notification, by the Central Government.

(4) The State Government shall, by notification, specify the authority with which a micro or small enterprise may file the memorandum.

(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purposes of this section, the procedure notified by the Central Government under sub-section (2)."

24. Upon consideration of Section 2 (n) read-with Section 8 of Act, 2006, Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur concluded that though it is not obligatory for every Micro Small and Medium Enterprise to file a memorandum but only those Enterprises who have filed memorandum can be treated to be 'Supplier' as per Section 2(n) of Act, 2006. It was further observed that as per Section 8 of Act, 2006 such memorandum is required to be filed within 180 days from the date of enforcement of Act, 2006. Since there is nothing on record to show that Claimant-Opposite Party ever filed memorandum before competent authority, as required under Section 8 of Act 2006, he cannot be treated as 'Supplier' as defined under Section 2 (n) of Act, 2006. Consequently, Council concluded that as Claimant-Opposite Party does not fall within the meaning of the term 'Supplier' as defined in Section 2(n) of Act, 2006, its claim cannot be considered. With regard to second point of consideration regarding claim of interest on due interest when Claimant Opposite Party has already received principal amount, Council concluded that claim was barred by limitation.

25. Feeling aggrieved by award dated 22.02.2010, Claimant-Opposite Party filed objections against the same before District Judge, Kanpur in terms of Section 34 of Act, 1996. Same came to be registered as Misc. Case No. 100/74 of 2010 (M/s P.M. Electronics Limited Vs. Uttar Haryana Bijli Vitran Nigam Ltd. (UHBVNL).

26. Perusal of objection under Section 34 of Act, 1996 filed by Claimant-opposite party no.2 goes to show that award dated 22.02.2010 rendered by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur was challenged by Claimant-Opposite Party on the grounds that finding recorded by Council to the effect that Claimant-Opposite Party does not fall within the meaning of term supplier as defined under Section 2 (n) of Act, 2006 is incorrect. It was further alleged that at the time of presentation of claim in October 2002, Act 2006 relied upon by Uttar Pradesh Micro and Small Industrial

Facilitation Council, Kanpur was not in existence and therefore, claim of Claimant-Opposite Party could not be rejected on the aforesaid ground. Under the Provisions of Act 1993, Claimant-Opposite Party was covered within the definition of term "Supplier" as defined in Section 2 (F) of Act, 1993. Company is not under legal obligation to submit its memorandum as per Section 8(1) (A) of Act, 2006. Thus, Section 8 of Act, 2006 has wrongly been relied upon in case of Claimant-Opposite Party. It was next urged that Section 8 of Act, 2006 grants freedom to Small Scale Industries to present or not to present their memorandum. Therefore, Section 2(n) of Act, 2006 is not to be read alongwith Section 8 of Act, 2006 but independent of the same. It was then contended that finding has been recorded by Council that some dues are pending payment in the hands of purchaser but in spite of the same claim of payment of interest for the period of delayed payment was denied. In elaboration of aforesaid, it was urged that Gauhati High Court in its decision reported in **2002 (1) GLT 947** has held that Act, 1993 creates a statutory liability under the aforesaid Act upon purchaser and he cannot be relieved of his liability to pay interest on delayed payment. Claimant-Opposite Party has raised its claim regarding delayed payment and for that purpose has submitted separate bills which are liable to be paid by Appellant. It was also alleged that Section 3 of Act, 1993 defines statutory obligation of purchaser. The purchaser is bound to make payment of goods received on or before agreed date and in case the purchaser fails to make payment as aforesaid, he shall be liable to pay interest. According to Claimant-Opposite Party, his claim was rejected by Council on the ground that it was barred by limitation as 'Supplies' were made 7 to 10 years before. View taken by the Council is contrary to mandate of Section 14 of Limitation Act, 1963 inasmuch as the period spent in pursuing a wrong legal remedy is liable to be excluded. Admittedly, Claimant-Opposite Party filed CMWP No. 7916 of 1997 in Punjab and Haryana High Court, which was disposed of finally vide order dated 07.05.2002. Upon exclusion of aforesaid period, it cannot be said that claim of Claimant-Opposite Party is barred by limitation. Award rendered by Council is against Public Policy of India and therefore, liable to be set aside under Section 34 (2) (B) (II) of Act, 1996. It was also pleaded that Council did not give equal opportunity to parties which is contrary to mandate of Section 18 of Act, 1996. Award has been passed against Claimant-Opposite Party on non-existent grounds. No objection was ever raised before Council that Claimant-Opposite Party is not a 'Supplier' within the meaning of aforesaid term as defined under Section 2 (n) of Act, 2006. Thus Council has erroneously interpreted Section 8 (1) of Act, 1996. The award has been rendered after a period of 90 days which is in gross violation of Section 8 (1) of Act, 1996. On aforesaid factual and legal premise, claimant-opposite party prayed that award itself is liable to be set aside.

27. Appellant contested the objections filed by Claimant-Opposite Party by filing reply. A preliminary objection was raised on behalf of Appellant that objections under Section 34 of Act, 1996 filed by Claimant-Opposite Party are not maintainable being barred by provisions of Code of Civil Procedure as well as relevant provisions of Act, 1996 in respect of territorial jurisdiction of Court. On merits of the claim, it was pleaded that grounds raised by Claimant-Opposite Party for

setting aside award do not fall within ambit and scope of Section 34 of Act, 1996. Claim Petition filed by Claimant-Opposite Party in the year 2008 is hopelessly barred by limitation. It was also contended that Claimant-Opposite Party is not a 'Supplier' within the meaning of term "Supplier" as defined in Section 2 (n) of Act, 2006. Section 2 (n) of Act, 2006 deals with such 'Supplier', who has filed memorandum before authority mentioned in Section 8 of Act, 2006, which is nominated by State Government. Claimant-Opposite Party has failed to establish itself as a 'Supplier' within the meaning of Act, 2006. The pendency of Claim Petition before Haryana **MSMEFC** was not disclosed in fresh Claim Petition filed by Claimant-Opposite Party.

28. District Judge, Kanpur upon consideration of pleadings of parties, the provisions of Act, 1993, Act, 1996 as also Act, 2006 passed judgement and order dated 08.09.2015 whereby award dated 22.02.2010 passed byUttar Pradesh Micro and Small Industries Facilitation Council, Kanpur was set aside and matter remanded to aforesaid Council to decide same on mertis a fresh after giving notice and opportunity of hearing to parties.

29. Court below concluded that Principal Civil Court, Kanpur has jurisdiction to hear objections under section 34 of Act 1996 filed by claimant-opposite party. In support of aforesaid conclusion reliance was placed upon judgment of Supreme Court in **Executive Engineer, Road Development Division No.III, Panvel and another V. Atlanta Limited, 2014 (11) SCC 619**, wherein it has been held that where High Court and District Court have jurisdiction to decide objections under Section 34 of Act, 1996 then in that eventuality challenge to award shall lie only before High Court otherwise it shall lie before District Court being Principal Civil Court of original jurisdiction. Reliance was also placed upon Constitution Bench judgement in **Bharat Aluminum Company Vs. Kaisar Aluminum Technical Services and Others, 2012 (9) SCC 552**, wherein it has been held that the Court having jurisdiction over place where arbitration took place will have jurisdiction to hear objections under sections 34 of Act 1996. Since award dated 22.02.2010 was rendered by Uttar Pradesh Micro and Small Industrial Facilitation Council at Kanpur and arbitral proceedings were conducted by Council at Kanpur as per provisions of Act 1996, therefore, Principal Civil Court Kanpur shall have jurisdiction to decide objections under section 34 filed by claimant-opposite party.

30. On the issue of parallel remedies being availed by claimant-opposite party, inasmuch as, an original suit has been filed before civil Court at Panchkula, Haryana and during pendency of aforesaid civil suit, claim regarding payment of interest for the period of delayed payment has been raised, Court below concluded that from record it appears that original suit was in respect of purchase order nos. 23 and 24. However, it is not clear whether the claim raised in original suit is the subject matter of present proceeding. In the absence of material regarding above being brought on record, Court below opined that the cause of action pleaded in original suit as well as present proceedings are different.

31. In respect of finding recorded by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur in the impugned award dated 22.2.2010 that claim raised by claimant respondent is barred by

limitation, Court below set aside the same. Reference was made to section 32 of Act 2006 which provides that any proceedings initiated under the Repeal Act shall be deemed to have been filed and pending under the new Act of 2006. For ready reference, Section 32 of Act 2006 relied upon by Court below is reproduced herein under:

"32. Repeal of Act.-- (1) The interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (32 of 1993) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Act so repealed under sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of this Act."

32. Furthermore, after coming into force of Act 2006, IFC (Haryana) had no jurisdiction to hear claim of claimant-opposite party. Consequently, vide order dated 2.4.2008 IFC (Haryana) refused to hear the claim of claimant-respondent and transferred record to Medium and Small Enterprises, Faciliation Council, U.P. As such, by virtue of section 18 (4) of Act 2006, Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur acquired jurisdiction to decide the claim.

33. Lastly, Court below concluded that new claim was filed to avoid delay as IFC (Haryana) had no jurisdiction to decide the claim. This fact has been noted in the order dated 22.1.2008, passed by the Director of Industy/Chairman, Haryana Micro and Small Enterprises Facilitation Council. As the new claim presented by claimant-opposite party is in continuation of their old claim, it cannot be said to be barred by time. To butress aforesaid conclusion, Court below relied upon judgement of Apex Court in **M/s Shakti Tubes Ltd. through Director Vs. State of Bihar and Others, 2009 (1) SCC 786**, wherein it has been held that period spend in bonafide pursuing a wrong legal remedy should be excluded. In the light of aforesaid judgement, claim presented before IFC (Haryana) will have to be excluded and consequently, the claim of claimant-opposite party cannot be said to be barred by limitation.

34. Court below also considered the question, "whether claimant-opposite party falls within the meaning of term 'Supplier' as defined under section 2 (n) of Act 2006." For this purpose, Court below referred to section 2 (n) and section 8 (1) of Act 1996. Thereafter, Court below referred to a notification bearing No. 2/311123007-MSNE POL (PL) Government of India, whereby filing of Industrial Entrepreneur's Memorandum was made discretionary. Court below further held that above mentioned notification was not placed by Claimant-Opposite party before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur, which is a bonafide mistake. Claimants have also filed copy of certificate showing that claimant is registered as a Small Scale Industry. It thus concluded that claimant-opposite party falls within the meaning of the term "Supplier" as defined in section 2 (n) of Act 2006.

35. Another issue that was considered by Court below was that Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur by placing reliance upon judgement of **Assam High Court in Assam State Electricity Boards and Others Vs. Trusses and Towers Pvt. Ltd., AIR 2002 Assam 49**, rejected claim

petition filed by claimant opposite party on the ground that claim for payment of interest alone was not maintainable. Aforesaid finding was reversed by Court below, by referring to the case of **M/s. Shakti Tubes Ltd. Through. Director v. State of Bihar & Ors, reported in 2009 (1) SCC 786**, wherein it has been held that period spent in pursuing a writ petition before High Court should be excluded in reckoning limitation period. Reference was also made to **Purvanchal Cabels and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and Others, 2012 (7) SCC 462**, wherein it has been held that under scheme of Act, 2006, payment of interest on delayed payment is a statutory liability which must be discharged. Applying ratio of aforesaid judgment, Court below concluded that a claim petition can be filed only for claiming interest also. As such, conclusion drawn by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur is illegal. Court below strengthened its aforesaid conclusion by observing that supplies were made during the period 1990 to 1996. The payment in respect of aforesaid supplies were made with delay and therefore, claimant is entitled to seek payment of interest for period of delayed payment. Admittedly, claimant-opposite party had filed its claim under section 6 of Act 1993. IFC (Haryana) i.e. the body required to be constituted as per sections 7 (a) and 7 (b) of Act 1993 but was constituted only in the year 2001. Thereafter, claimant filed its claim before aforesaid council in the year 2002. During pendency of claim, Act 2006 came into force and thereafter, Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur was established on 11.6.2007 and claim was presented by claimant opposite party before aforesaid council on 19.6.2007. Thereafter, IFC (Haryana) vide order dated 2.4.2008 disposed of case of claimant-opposite party with direction to approach Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. In view of aforesaid, Court below concluded that claim filed by claimant-opposite party is not barred by limitation and therefore maintainable.

36. As objections were filed under section 34 of Act 1996, it was obligatory upon Court below to examine, whether objections filed by claimant-opposite party fulfill any of the parameters provided for in section 34 of Act 1996 itself for challenging an award. Court below referred to judgements of Apex Court wherein the provisions of sections 34 of Act 1996 have been interpreted. Reference was made to the judgement in **Mcdermott International Inc. Vs. Burn Standard Co. Ltd. and Others, 2006 (11) SCC 181**, wherein following has been observed:

" The arbitral award can be set aside if if is contrary to (a) fundamental policy of Indian law; (b) the interests of India; (c) justice of morality; or (d) if it is patently illegal or arbitrary. Such patent illegality however, must go to the root of the matter. The public policy violation, indisputably should be so unfair and unreasonable as to shock the conscience of the court. Lastly, where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of section 34 of Act"

37. Reference was also made to the case of **Bharat Cooking Coal Ltd. Vs. L.K. Ahuja Company Ltd. 2001 (4) SCC 86**, wherein Court has observed that where there is an error apparent on the face of

award, same is liable to be set aside. Then reliance was placed upon **Maharashtra State Electricity Board Vs. Sterilite Industries (India) and Another, 2001 (8) SCC 482**, wherein it has been held that where an error of law is apparent on the face of award, the same is liable to be set aside. Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur while passing impugned award has recorded certain findings to conclude that claim filed by claimant-opposite party is not maintainable. Findings recorded by council are illegal and perverse and consequently, award dated 22.2.2010 rendered by council was set aside, vide judgement and order dated 08.09.2015.

38. Feeling aggrieved by aforesaid order dated 08.09.2015 passed by District Judge, Kanpur, Respondent-UHBVNL has now approached this Court by means of present First Appeal From Order preferred under Section 37 of Act, 1996.

39. Mr. H. N. Singh, learned Senior Counsel for Appellant in challenge to impugned judgement and order submits that impugned judgement and order passed by Court below is not only illegal but also without jurisdiction, hence same is liable to be set aside by this Court. Elaborating his arguments, he contends that proceedings under section 34 of Act 1996 is not like an appeal. An award can be set aside only if any of the conditions enumerated in section 34 of Act 1996 which provide the grounds for setting aside an award are satisfied. As none of the grounds provided for in Section 34 of Act 1996 is attracted in present case therefore, Court below committed an illegality in setting aside award dated 22.2.2010, passed by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur.

40. It is next contended that claim filed by claimant-opposite party was not maintainable as claimant-opposite party cannot be allowed to avail parallel remedies for the same relief. It is an undisputed fact that claimant-opposite party filed original suit in Civil Court at Panchkula, Haryana, which is still pending. During pendency of aforesaid suit, no claim petition under section 6 of Act 1993 was maintainable on behalf of claimant-opposite party.

41. Giving impetus to the challenge made, learned Senior Counsel further contends that claimant-opposite party has filed a time barred claim before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. Finding to the contrary recorded by Court below is not only illegal, but also perverse and erroneous.

42. He lastly contended that claimant-opposite party does not fall within the meaning of term 'Supplier' as defined under section 2 (n) of Act 2006 and hence no claim petition could be filed by claimant-opposite party under section 18 of Act 2006. On the aforesaid factual and legal premise, learned Senior Counsel vehemently urged before us that impugned judgement and order passed by Court below is liable to be set aside by this Court.

43. Mr. Alok Kumar Yadav, learned counsel for claimant-opposite party has supported the impugned judgement and order on the strength of the submissions made by him in support of impugned judgement and order passed by Court below and also the observations/findings made in the impugned judgement and order. According to learned counsel for claimant-opposite party, impugned

judgement and order passed by Court below is perfectly just and legal. Court below upon consideration of entire gamut of facts and circumstances and law as applicable has opined to remand the matter before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur for decision afresh after giving notice and opportunity of hearing to the parties. Order of remand passed by Court below is an innocuous order and parties will have adequate opportunity to address Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur on the merits/ demerits of claim raised by claimant-opposite party. As such, present appeal is liable to be dismissed. It is then contended that learned Senior Counsel appearing for appellant could not point out any illegality in the order of remand. Law of remand has now been crystalized and no remand, which is vague, can be sustained. It is also well settled that remand cannot be made to fill up the lacuna in evidence or for the purpose of rehearing. No such situation could be pointed out in impugned order making the same illegal. He thus submits that impugned order of remand passed by Court below is not liable to be interfered with.

44. On the merits of claim submitted by claimant-opposite party, he submits that Court below has recorded a categorical finding that subject matter of original suit filed in civil Court at Panchkula, Haryana and the subject matter of claim filed by claimant-opposite party before IFC (Haryana), vide claim petition dated 31.7.2002 are different. The finding so recorded by Court below has not been specifically challenged as no ground challenging the said finding has been raised in the grounds of appeal nor a question of law to that effect has been framed. Apart from above, no factual foundation has been laid in the affidavit filed in support of stay application disputing correctness of the said finding.

45. He also submits that finding recorded by Court below that claim filed by claimant-opposite party is not barred by limitation is perfectly just and legal. In justification of aforesaid finding, he submits that Claimant-Opposite party had initially filed C.MW.P. No. 7916 of 1997 for payment of interest on principal amount for the period of delayed payment. In the aforesaid writ petition, an application was filed with the prayer that directions be issued to Government of Haryana for establishing Industrial Facilitation Council (IFC) Haryana as per sections 7 (A) and 7 (B) of Act 1993. Aforesaid writ petition was disposed of finally vide order dated 13.2.2002, on the undertaking submitted by the Counsel for Government of Haryana that IFC shall be established. Pursuant to order dated 13.2.2002, IFC (Haryana) was constituted in the year 2002 and consequently claim was filed before IFC (Haryana), vide claim petition dated 31.7.2002. During pendency of aforesaid claim petition, Act, 2006 came into force on 2.10.2006. By reason of Section 32 of aforesaid Act, old Act of 1993 stood repealed. Consequently, Claimant-Opposite Party filed an application dated 21.03.2007 before Director of Industries, Haryana-Cum-Chairman Industries Facilitation Council Haryana praying therein that original file pertaining to claim submitted by claimant-opposite party be sent to U.P. Industry Facilitation Council, Directorate of Industries (U.P.) Kanpur. Thereafter, Claimant-Opposite Party filed reminders dated 27.11.2006, 08.12.2006, 22.12.2006, 07.02.2007 and 07.04.2007 in continuation of transfer application dated 21.3.2007 earlier filed by him. As no action was taken

claimant-opposite party submitted its claim dated 19.6.2007 under section 18 of Act 2006 before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. It may be noted that Act 2006 came into force on 02.10.2006. Thereafter, under the Act 2006 Haryana Micro and Small Industrial Facilitation Council, Chandigarh was established on 5.9.2007. The Council disposed of claim petition filed by claimant-opposite party vide order dated 2.4.2008 and the record was sent by Haryana Council on 16.4.2008. On the aforesaid facts, he submits that reliance placed by Court below upon Section 14 of Limitation Act to extend benefit of limitation to claimant-opposite party, cannot be said to be illegal. Claimant opposite party was bonafide perusing its remedy and therefore, clearly entitled to benefit of section 14 of Limitation Act. It is not the case of appellant that claimant opposite party was not bonafidely pursuing its remedy. As such Court below has not concluded any illegality in granting benefit of Section 14 of Limitation Act of claimant-opposite party.

46. The impugned order was further defended on the submission that Court below has rightly concluded that claim petition filed by claimant-opposite party was maintainable. Referring to section 32 of Act 2006, it was urged that as per mandate of aforesaid section any proceedings initiated under Act 1993 or pending under Act 1993, would be deemed to be initiated under new Act and also pending under new Act. Secondly, he submits that inspite of provisions of Section 32 of Act 2006, Director of Industries/Chairman, Haryana Micro and Small Industrial Facilitation Council passed order dated 2.4.2008, whereby the claim petition filed by claimant-opposite party was disposed of with liberty to approach Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur as claimant-opposite party is registed in State of U.P. and therefore, Haryana Council has no jurisdiction to adjudicate upon its claim. As no orders transferring pending claim petition were being passed on earlier claim petition dated 31.7.2002 filed by claimant opposite party and further to avoid delay claim petition dated 19.6.2007 was filed before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. In view of above, conclusion drawn by Court below holding claim petition filed by claimant-opposite party to be maintainable is perfectly just and legal.

47. Mr. Alok Yadav, in support of impugned judgement and order dated 8.9.2015, passed by Court below further submits that finding recorded by Court below that claimant-opposite party is covered within the meaning of term 'Supplier' as defined in section 2 (A) read with section 8 of Act 1996 is perfectly justified. He contends that Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur while considering the aforesaid issue had concluded that since there is nothing on record to show that claimant has filed its Industrial Entrepreneur's Memorandum within a period of 180 days from the date Act 1996 came into force as per mandate of section 8 (1) proviso, it cannot be treated as 'Supplier'. However, before Court below notification No. 2/311123007-MSNE POL (PL) Government of India was brought on record, whereby filing of Industrial Entrepreneur's Memorandum has been made discretionary. It is on the strength of aforesaid document that Court below has held claimant-opposite party to be a 'Supplier'.

48. From the arguments/counter arguments raised by learned counsel for parties, following issues arise for determination.

Points of Determination

(i) Whether the objection filed by Claimant-opposite party satisfied the parameters of Section 34 of Act, 1996.

(ii) Whether the Claimant-opposite party has availed paralled remedies in asmuch as it has filed Original Suit at District Court-Panchuula Haryana and also raised an arbitral dispute.

(iii) Whether the claim of Claimant-opposite party is barred by limitation.

(iv) Whether Claimant-opposite party is covered within the meaning of term "supplier" as defined in Section 2 (n) of Act, 2006.

49. We take up the first point first. An award rendered by arbitral Tribunal can be set aside under section 34 of Act 1996. However, Section 34 of Act 1996 itself provides that award can be set aside only on the grounds enumerated under section 34 of Act 1996. Therefore, what has to be examined by us is, whether any of the parameters provided in section 34 of Act 1996 for setting aside an award are satisfied in the present case and on that account the award dated 22.2.2020 passed by Uttar Pradesh Micro and Small Industrial Facilitation Council could be set aside.

50. Before we take up the aforesaid exercise, it would be prudent to note that Act, 1996 was amended vide Act No. 3 of 2016 with retrospective effect from 23.10.2015. Accordingly, unamended section 34 of Act, 1996 as well as amended section 34 of Act 1996 are reproduced herein-under:

Unamended

"Section 34 Application for setting aside arbitral award. –

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation. --Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

Amended

34 Application for setting aside arbitral award.

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation1.- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]

51. The term "Public Policy" of India was considered in relation to execution of Foreign Award, for the first time in **Renusagar Power Co. Ltd. Vs. General Electric Company, 1994 SCC Supl. (1) 644** wherein following has been observed in paragraph 66:

"66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b)of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article

1(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. ***Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."***

52. Act, 1996 came into force on 22.08.1996 and old Arbitration Act, 1940 was repealed. Scope of Section 34 of Act, 1996 which deals with challenge to award came to be considered exhaustively in **Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd., 2003 (5) SCC 705**, and Court observed as follows in paragraph 31:

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. ***Hence, in our view in addition to narrower meaning given to the term "public policy" inRenusagar case[1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be -- award could be set aside if it is contrary to:***

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Su*ch award is opposed to public policy and is required to be adjudged void."*

53. Law laid down by Apex Court in Oil and Natural Gas Corporation Ltd. (Supra) was consistently followed and came to be reiterated in **Mcdermott International Incorporation Vs. Burn Standard Co. Ltd. and Others, 2006 (11) SCC 181**, wherein Court considered previous judgements on the ambit and scope of Section 34 and held in paragraphs 58, 59, 60, 62 and 63 as follows:

"58.InRenusagar Power Co. Ltd.v.General Electric Co.[1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of

Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression "public policy" was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court inONGC Ltd.v.Saw Pipes Ltd.[(2003) 5 SCC 705] (for short "ONGC"). This Court therein referred to an earlier decision of this Court inCentral Inland Water Transport Corpn. Ltd.v.Brojo Nath Ganguly[(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. *This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act.* ***In ONGC[(2003) 5 SCC 705] this Court, apart from the three grounds stated inRenusagar[1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.***

59.Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60.What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. *(SeeState of Rajasthanv.Basant Nahata[(2005) 12 SCC 77] .)*

62. We are not unmindful that the decision of this Court in ONGC [(2003) 5 SCC 705] had invited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. ***The said decision is binding on us. The said decision has been followed in a large number of cases.*** *(See The Law and Practice of Arbitration and Conciliation by O.P. Malhotra, 2nd Edn., p. 1174.)*

63. Before us, the correctness or otherwise of the aforesaid decision of this Court is not in question. The learned counsel for both the parties referred to the said decision in extenso."

54. However, Law commission in its 246th Report made suggestions so as to make the application for setting aside an arbitral award restricted on the ground of public policy and to apply only when award was persuaded or affected by fraud or corruption, or was against the fundamental policy of Indian law or in contravention with the most basic notions of morality.

55. It is in the light of above that Section 34 of Act, 1996 came to be amended by Act, No. 3 of 2016 with retrospective effect from 23.10.2015. We have already referred to the amended provisions of Section 34 of Act, 1996.

56. Subsequently Section 34 of Act, 1996 again came up for consideration in **Associate Builders Vs. Delhi Development Authority, 2015 (3) SCC 49**, wherein Court again elaborately considered the ambit and scope of Section 34 of Act, 1996 and further crystallized law on the subject after considering **Renusagar (Supra), ONGC (supra), Mcdermott International Incorporation (supra)** and other judgements which occupied the field. For ready reference paragraphs 13,15,16,17,18,19,20,21,22,23,24,25,26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, which are relevant for the controversy in hand, are reproduced herein below:

"13. Inasmuch as serious objections have been taken to the Division Bench judgment [DDA v. Associate Builders, 2012 SCC OnLine Del 769] on the ground that it has ignored the parameters laid down in a series of judgments by this Court as to the limitations which a Judge hearing objections to an arbitral award under Section 34 is subject to, we deem it necessary to state the law on the subject.

15. This section in conjunction with Section 5 makes it clear that an arbitration award that is governed by Part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Sections 34(2) and (3), and not otherwise. Section 5 reads as follows:

*"5.**Extent of judicial intervention.**--Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

16. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimise the supervisory roles of courts in the arbitral process.

17.It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.

18.InRenusagar Power Co. Ltd.v.General Electric Co.[Renusagar Power Co. Ltd.v.General Electric Co., 1994 Supp (1) SCC 644] , the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

*"7. **Conditions for enforcement of foreign awards**.--(1) A foreign award may not be enforced under this Act--*

(b) if the Court dealing with the case is satisfied that--

(ii) the enforcement of the award will be contrary to the public policy."

In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

(i) The fundamental policy of Indian law,

(ii) The interest of India,

(iii) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (seeSCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (seeSCC pp. 689 & 693, paras 85 & 95).

19. When it came to construing the expression "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court inONGC Ltd.v.Saw Pipes Ltd.[(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)

"31. Therefore, in our view, the phrase "public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy' inRenusagar case[Renusagar Power Co. Ltd.v.General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be--award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on

matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

20.The judgment inONGC Ltd.v.Saw Pipes Ltd.[(2003) 5 SCC 705 : AIR 2003 SC 2629] has been consistently followed till date.

21.InHindustan Zinc Ltd.v.Friends Coal Carbonisation[(2006) 4 SCC 445] , this Court held: (SCC p. 451, para 14)

"14. The High Court did not have the benefit of the principles laid down inSaw Pipes[(2003) 5 SCC 705 : AIR 2003 SC 2629] , and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of

the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court inSaw Pipes[(2003) 5 SCC 705 : AIR 2003 SC 2629] has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

22.InMcDermott International Inc.v.Burn Standard Co. Ltd.[McDermott International Inc.v.Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held: (SCC pp. 209-10, paras 58-60)

"58. InRenusagar Power Co. Ltd.v.General Electric Co.[Renusagar Power Co. Ltd.v.General Electric Co., 1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression "public policy' was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court inONGC Ltd.v.Saw Pipes Ltd.[(2003) 5 SCC 705 : AIR 2003 SC 2629] (for short "ONGC'). This Court therein referred to an earlier decision of this Court inCentral Inland Water Transport Corpn. Ltd.v.Brojo Nath Ganguly[(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression "public policy' on the touchstone of Section 23 of the Contract Act, 1872 and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Contract Act, 1872. InONGC[(2003) 5 SCC 705 : AIR 2003 SC 2629] this Court, apart from the three grounds stated inRenusagar[Renusagar Power Co. Ltd.v.General Electric Co., 1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. 60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (SeeState of Rajasthanv.Basant Nahata.)"

23.InCentrotrade Minerals & Metals Inc.v.Hindustan Copper Ltd.[(2006) 11 SCC 245] , Sinha, J., held: (SCC p. 284, paras 103-04)

"103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be

unfair and unreasonable so as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act.

104. What would be a public policy would be a matter which would again depend upon the nature of transaction and the nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept of what was a public good or public interest or what would otherwise be injurious to the public good at the relevant point as contradistinguished by the policy of a particular Government. (SeeState of Rajasthanv.Basant Nahata.)"

24.InDDAv.R.S. Sharma and Co.[(2008) 13 SCC 80] , the Court summarised the law thus: (SCC pp. 91-92, para 21)

"21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

25.J.G. Engineers (P) Ltd.v.Union of India[(2011) 5 SCC 758 : (2011) 3 SCC (Civ) 128] held: (SCC p. 775, para 27)

"27. Interpreting the said provisions, this Court inONGC Ltd.v.Saw Pipes Ltd.[(2003) 5 SCC 705 : AIR 2003 SC 2629] held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."

26.Union of Indiav.Col. L.S.N. Murthy[(2012) 1 SCC 718 : (2012) 1 SCC (Civ) 368] held: (SCC p. 724, para 22)

"22. InONGC Ltd.v.Saw Pipes Ltd.[(2003) 5 SCC 705 : AIR 2003 SC

2629] this Court after examining the grounds on which an award of the arbitrator can be set aside under Section 34 of the Act has said: (SCC p. 727, para 31)

"31. ... However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" inRenusagar case[Renusagar Power Co. Ltd.v.General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal'."

Fundamental Policy of Indian Law

27.Coming to each of the heads contained inSaw Pipes[(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen fromRenusagar[Renusagar Power Co. Ltd.v.General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

28.In a recent judgment,ONGC Ltd.v.Western Geco International Ltd.[(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)

"35. What then would constitute the "fundamental policy of Indian law' is the question. The decision inONGC[(2003) 5 SCC 705 : AIR 2003 SC 2629] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. Thefirst and foremostis the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebratedaudi alteram partemrule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone ofWednesbury[Associated Provincial Picture Houses Ltd.v.Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

29.It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30.The audi alteram partemprinciple which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:

*"18.**Equal treatment of parties.**--The parties shall be treated with equality and each party shall be given a full opportunity to present his case.*

*34.**Application for setting aside arbitral award.**--(1)*

(2) An arbitral award may be set aside by the court only if--

(a) the party making the application furnishes proof that--

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the

arbitral proceedings or was otherwise unable to present his case;"

31.The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32.A good working test of perversity is contained in two judgments. InExcise and Taxation Officer-cum-Assessing Authorityv.Gopi Nath & Sons[1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)

"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

InKuldeep Singhv.Commr. of Police[(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33.It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:"General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. InP.R. Shah, Shares & Stock Brokers (P) Ltd.v.B.H.H. Securities (P) Ltd.[(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged

only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

34.It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.

Interest of India

35.The next ground on which an award may be set aside is that it is contrary to the interest of India. Obviously, this concerns itself with India as a member of the world community in its relations with foreign powers. As at present advised, we need not dilate on this aspect as this ground may need to evolve on a case-by-case basis.

36.The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice"

Morality

37.The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Contract Act, 1872 so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality":

"(j)A, who isB's Mukhtar, promises to exercise his influence, as such, withBin favour ofC, andCpromises to pay 1000 rupees toA. The agreement is void, because it is immoral.

(k)Aagrees to let her daughter to hire toBfor concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code, 1860."

38.InGherulal Parakhv.Mahadeodas Maiya[1959 Supp (2) SCR 406 : AIR 1959 SC 781] , this Court explained the concept of "morality" thus: (SCR pp. 445-46 : AIR pp. 797-98)

"Re. Point 3 -- Immorality: The argument under this head is rather broadly stated by the learned counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu law considers to be immoral in that context may appropriately be applied to a case under Section 23 of the Contract Act. Neither any

authority is cited nor any legal basis is suggested for importing the doctrine of Hindu law into the domain of contracts. Section 23 of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English law than to the Hindu law texts dealing with a different matter. Anson in hisLaw of Contractsstates at p. 222 thus:

"The only aspect of immorality with which courts of law have dealt is sexual immorality.…'

Halsbury in hisLaws of England, 3rd Edn., Vol. 8, makes a similar statement, at p. 138:

"A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality.'

In theLaw of Contractby Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:

"Although Lord Mansfield laid it down that a contractcontra bonos moresis illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible.'

In the book on theIndian Contract Actby Pollock and Mulla it is stated at p. 157:

"The epithet "immoral" points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment.'

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by courts. The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances: settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

The word "immoral' is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilisation of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of Section 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative textbook writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, "the court regards it as immoral', brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognised and settled by courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual

immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold."

39.This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience.

Patent Illegality

40.We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Denning, L.J. inR.v.Northumberland Compensation Appeal Tribunal, ex p Shaw[(1952) 1 All ER 122 : (1952) 1 KB 338 (CA)] : (All ER p. 130 D-E : KB p. 351)

"Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means (seeStatutes 9 and 10 Will. III, C. 15). At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held inKentv.Elstob[(1802) 3 East 18 : 102 ER 502] , that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., inHodgkinsonv.Fernie[(1857) 3 CB (NS) 189 : 140 ER 712] , but is now well established."

41.This, in turn, led to the famous principle laid down inChampsey Bhara Co.v.Jivraj Balloo Spg. and Wvg. Co. Ltd.[AIR 1923 PC 66 : (1922-23) 50 IA 324 : 1923 AC 480 : 1923 All ER Rep 235 (PC)] , where the Privy Council referred toHodgkinson[(1857) 3 CB (NS) 189 : 140 ER 712] and then laid down: (IA pp. 330-32)

"The law on the subject has never been more clearly stated than by Williams, J. inHodgkinsonv.Fernie[(1857) 3 CB (NS) 189 : 140 ER 712] : [CB(NS) p. 202 : ER p. 717]

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact. ... The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think firmly established viz. where the question of law necessarily arises on the face of the

award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.'

Now the regret expressed by Williams, J. inHodgkinsonv.Fernie[(1857) 3 CB (NS) 189 : 140 ER 712] has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying: "Inasmuch as the arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52.' But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, Their Lordships think that the judgment of Pratt, J. was right and the conclusion of the learned Judges of the Court of Appeal [Jivraj Baloo Spg. and Wvg. Co. Ltd.v.Champsey Bhara and Co., ILR (1920) 44 Bom 780. The judgment of Pratt, J. may be referred to at ILR p. 787.] erroneous."

This judgment has been consistently followed in India to test awards under Section 30 of the Arbitration Act, 1940.

42.In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1.(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

*"28.**Rules applicable to substance of dispute.**--(1) Where the place of arbitration is situated in India--*

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2.(b) A contravention of the Arbitration Act itself would be regarded as a patent illegality -- for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3.(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

*"28.**Rules***

***applicable to substance of dispute.**--(1)-(2)*

(3) In all cases, the Arbitral Tribunal shall decide in accordance with

the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43.InMcDermott International Inc.v.Burn Standard Co. Ltd.[McDermott International Inc.v.Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held as under: (SCC pp. 225-26, paras 112-13)

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [SeePure Helium India (P) Ltd.v.Oil and Natural Gas Commission[(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] andD.D. Sharmav.Union of India[(2004) 5 SCC 325] .]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44.InMSK Projects (I) (JV) Ltd.v.State of Rajasthan[(2011) 10 SCC 573 : (2012) 3 SCC (Civ) 818] , the Court held: (SCC pp. 581-82, para 17)

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (SeeGobardhan Dasv.Lachhmi Ram[AIR 1954 SC 689] ,Thawardas Pherumalv.Union of India[AIR 1955 SC 468] ,Union of Indiav.Kishorilal Gupta & Bros.[AIR 1959 SC 1362] ,Alopi Parshad & Sons Ltd.v.Union of India[AIR 1960 SC 588] ,Jivarajbhai Ujamshi Shethv.Chintamanrao Balaji[AIR 1965 SC 214] andRenusagar Power Co. Ltd.v.General Electric Co.[(1984) 4 SCC 679 : AIR 1985 SC 1156])"

45.InRashtriya Ispat Nigam Ltd.v.Dewan Chand Ram Saran[(2012) 5 SCC 306] , the Court held: (SCC pp. 320-21, paras 43-45)

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that

the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court inSAILv.Gupta Brother Steel Tubes Ltd.[(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later inSumitomo Heavy Industries Ltd.v.ONGC Ltd.[(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case[(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

"43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court inKwality Mfg. Corpn.v.Central Warehousing Corpn.[(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.'"

46.Applying the tests laid down by this Court, we have to examine whether the Division Bench has exceeded its jurisdiction in setting aside the arbitral award impugned before it."

57. Recently in **Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI), 2019 SCC Online SCC 677**, Court has considered effect of Section 2A incorporated in Section 34 of Act 1996 and held as under in paragraphs 35, 36, 37, 38, 39, 40, 41, 42, 70 and 76:

"35. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 ofAssociate Builders(supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in

paragraph 30 of Associate Builders (supra).

36. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so thatWestern Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

39. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

40. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

41. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 inAssociate Builders(supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A).

42. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision

would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

70. The expression "most basic notions of ... justice" finds mention in Explanation 1 to sub-clause (iii) to Section 34(2)(b). Here again, what is referred to is, substantively or procedurally, some fundamental principle of justice which has been breached, and which shocks the conscience of the Court. Thus, in Parsons (supra), it was held:

"7. Article V(2)(b) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse enforcement, on the defendant's motion or sua sponte, if "enforcement of the award would be contrary to the public policy of (the forum) country.' The legislative history of the provision offers no certain guidelines to its construction. Its precursors in the Geneva Convention and the 1958 Convention's ad hoc committee draft extended the public policy exception to, respectively, awards contrary to "principles of the law' and awards violative of "fundamental principles of the law.' In one commentator's view, the Convention's failure to include similar language signifies a narrowing of the defense [Contini, International Commercial Arbitration, 8 Am.J.Comp.L. 283, 304]. On the other hand, another noted authority in the field has seized upon this omission as indicative of an intention to broaden the defense [Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1070-71 (1961)].

8. Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. [See Straus, Arbitration of Disputes between Multinational Corporations, in New Strategies for Peaceful Resolution of International Business Disputes 114-15 (1971); Digest of Proceedings of International Business Disputes Conference, April 14, 1971, at 191 (remarks of Professor W. Reese)]. Additionally, considerations of reciprocity - considerations given express recognition in the Convention itself - counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

9. We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.[Restatement Second of the Conflict of Laws 117, comment c, at 340 (1971); Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198 (1918)]."

However, when it comes to the public policy of India argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February, 2013 -in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in

the base indices from 1993-94 to 2004-05. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula de hors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any Court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34of the 1996 Act, as has been noted earlier in this judgment."

58. Having referred to the ambit and scope of Section 34 of Act, 1996 as crystallized by Apex Court, we proceed to examine first point of consideration i.e. whether in the facts and circumstances of case objections under section 34 of Act, 1996 filed by claimant-opposite party satisfied any of the parameters of Section 34 of Act, 1996 as noted herein above for setting aside the impugned award.

59. Admittedly, claim of claimant-opposite party was rejected by U.P. Micro and Small Industrial Facilitation Council, Kanpur, vide award dated 22.2.2010. Council concluded that claimant opposite party does not fall within the meaning of the term 'Supplier' as defined in section 2(n) of Act, 2006 and secondly, claim filed by opposite party No.2 was barred by limitation. We fail to understand how Council could on the one hand reject claim being barred by limitation and simultaneously hold that claim filed by opposite party is not maintainable as claimant opposite party is not covered within the meaning of the term 'Supplier' as defined in Section 2(n) of Act, 1996. It is well settled that if claim is barred by limitation, then merits cannot be looked into.

60. Consequently, in view of contradictory findings recorded by Council in support of it's conclusion to reject claim of opposite party No. 2, issues which emerge for consideration before Court below were on the merits of the claim i.e. whether the claimant-opposite party No. 2 falls within the meaning of term 'Supplier' as defined under section 2(n) of Act, 1996 and secondly, whether Council was correct in concluding that claim raised by opposite party No.2 is barred by limitation.

61. We shall separately deal with the issue, whether claimant-opposite party

No.2 falls within the meaning of term 'Supplier' as defined under section 2(n) of Act, 1996 in the later part of this judgement. At this stage, we are only concerned, whether the question referred to above, relating to the status of claimant-opposite party No.2 was an issue which went to the root of the matter or not. Similarly, question of limitation raised by appellant before council was a substantial issue or not as it is by now well settled that if a claim is barred by limitation then it cannot be considered.

62. We have already referred to the entire gamut of case law regarding the ambit and scope of Section 34 of Act, 1996 and we are of the view that both the aforesaid issues were substantial issues which went to the root of the matter and therefore, claimant-opposite party was clearly justified in approaching the District Judge, under Section 34 of Act, 1996. Thus, we conclude by observing that in the facts and circumstances of the case, Court below was justified in entertaining objections filed by opposite party as the same were in conformity with the law laid down in **Associate Builders (Supra)**.

63. Second issue arises for consideration is whether claimant-opposite has availed parallel remedy by approaching the Civil Court at Panchkula Haryana and also raised an earlier dispute. The maintainability of claim filed by claimant-opposite party was challenged before Court below also on the aforesaid ground. However, Court below upon consideration of record observed that the cause of action pleaded in original suit and in the claim petition are different.

64. Learned Senior Counsel, Mr. H.N. Singh has again raised this issue before us by submitting that once claimant-opposite party had already approached Civil Court at Panchkula, District Haryana for redressal of its grievance, it cannot simultaneously raise an arbitral dispute.

65. Countering the submissions urged by learned Senior Counsel, Mr. Alok Kumar Yadav, learned counsel representing claimant-opposite party submits that Court below after considering the record has recorded a specific finding that subject matter of original suit filed before Civil Court, Panchukla, Haryana, and the subject matter of claim raised by claimant-opposite party are different. The findings so recorded by Court below has not been specifically challenged as neither any ground to that effect has been raised in the memo of present appeal nor a question of law to that effect has been framed. He further submits that apart from above, no factual foundation has been laid for challenging aforesaid finding recorded by Court below. The affidavit filed in support of stay application appended along with memo of appeal is completely silent on this point. Extending his arguments, he further contends that the appellants have not brought on record even the copy of the plaint of origianl suit filed by claimant-opposite party before Civil Court at Panchkula on the basis of which a parallel could be drawn regarding the cause of action pleaded and the relief claimed in Original Suit and the claim raised before the Council at Kanpur.

66. We find force in the arguments raised by learned counsel for claimant-opposite party. It is true that no ground has been formulated in the grounds of appeal nor any question of law to that effect has been framed regarding correctness of findings recorded by Court below on the

issue of parallel remedies. We further find that no factual foundation has been laid in the affidavit filed in support of Stay Application appended along with memo of appeal regarding illegality/perversity in the findings recorded by Court below on the aforesaid issue. Moreover, neither the plaint nor any other document has been brought on record along with the memo of appeal or by means of additional evidence to plead and establish that the cause of action pleaded in the plaint as well as the relief claimed by means of above noted claim petition are similar. Thus, we have no hesitation to conclude that aforesaid objection raised by the learned counsel for appellant to the claim raised by claimant-opposite party is an half hearted attempt to challenge impugned judgement and order. Accordingly, we reject the aforesaid contentions.

67. On the issue of limitation, we find that appellant raised an objection regarding maintainability of claim filed by opposite party No. 2 before the Council on the ground of limitation. Objections so raised by appellant before Council were accepted and Council concluded that claim raised by opposite party No. 2 is barred by limitation.

68. It is an undisputed fact that Appellant awarded various purchase orders to Claimant-Opposite Party during the period 1991 to 2000. Things were going on smoothly and bills of Claimant-Opposite Party were being paid regularly. However, in 1997, some delay occurred in payment of principal amount. Accordingly Claimant-Opposite Party filed CMWP No. 7916 of 1997 before Punjab and Haryana High Court claiming payment of interest on principal amount for the period of delayed payment. During pendency of above mentioned writ petition Claimant-Opposite Party filed a Civil Misc. Application in the aforesaid writ petition praying therein that directions be issued to Government of Haryana to establish Industrial Facilitation Council (hereinafter referred to as 'IFC') as contemplated under Sections 7A and 7B of Act, 1993 within a period of three months.

69. Punjab and Haryana High Court did not examine merits of claim raised by petitioner i.e. Claimant-Opposite Party herein in CMWP No. 7916 of 1997 but disposed of said writ petition finally, vide order dated 13.02.2002 on the undertaking scheduled by counsel for State of Haryana. For ready reference order dated 13.02.2002 is reproduced herein-below:

" In pursuant to order dated December 20, 2001, Mrs. Meenaxi Anand Chaudhary, Principal Secretary, to government of Haryana, Department of Power is present in Court. She has stated that the Government shall constitute the requisite council as provided under Section 7A of the Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakes (Amendment) Act, 1958. She has further stated that infact is the Small Scale Industries Department, which is directly concerned with this matter. However, she has stated for and on behalf of the Government of Haryana that Council shall be constituted within a period of three months from today.

In this view of the matter, the application has been rendered instructions and the same is disposed of accordingly.

Dasti on payment."

70. Pursuant to aforesaid order dated 13.2.2002, Government of Haryana, constituted Industrial Facilitation Council Haryana at Chandigarh in the year 2002. Thereafter, claimant-opposite party filed it's

claim before IFC, Haryana, vide claim dated 31.7.2002, claiming a sum of Rs. 12,70,89,049/- alongwith pendente-lite and future interest as well as cost of claim petition.

71. During pendency of aforesaid Claim Petition dated 31.07.2002 filed by claimant-opposite party before IFC, Haryana Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as Act, 2006) came into force on 02.10.2006. By reason of Section 32 of Act 2006, old Act of 1993 stood repealed.

72. Consequently, after coming into force of Act, 2006, IFC (Haryana) losts its existence. As a result of aforesaid, dispute of parties pending before IFC Haryana came to be stayed and thereafter adjourned as IFC (Haryana) now had no jurisdiction to decide claim of Claimant-Opposite Party. Under the new Act 2006, Jurisdiction to decide claim of Claimant-Opposite Party now vested with Micro and Small Industrial Facilitation Council Haryana or Micro and Small Industrial Facilitation Council, Uttar Pradesh which were established at Chandigarh and Kanpur, respectively, as per Section 20 read with Section 21 of Act, 2006.

73. Claimant-Opposite Party filed an application dated 21.03.2007 before Director of Industries, Haryana-Cum-Chairman Industries Facilitation Council, Haryana, praying therein that original file pertaining to claim submitted by claimant-opposite party be sent to U.P. State Micro & Small Industrial Facilitation Council, Directorate of Industries (U.P.) Kanpur. Thereafter, Claimant-Opposite Party filed reminders dated 27.11.2006, 08.12.2006, 22.12.2006, 07.02.2007 and 07.04.2007 in continuation of transfer application dated 21.3.2007 earlier filed by him.

74. However, as no consequential action was taken on the aforesaid applications/representations submitted by claimant-opposite party, it submitted a new claim dated 19.06.2007 before U.P. State Micro and Small Industrial Facilitation Council which was constituted under Act, 2006. Claimant-Opposite Party now revised its claim to Rs.42,19,02,100/-. The break up of same is as follows:

"Interest due as per Section 16 and 17 of Act i.e. Rs. 40,74,54,079/-

Cost of goods supplied Rs. 43,50,817/-

Cost of recoveries made illegally through encahsment of Bank Guarantee and the cost of material supplied Rs.1,00,97,204/-"

75. Subsequently, Haryana State Micro and Small Industrial Facilitation Council passed an order dated 02.04.2008 directing Claimant-Opposite Party to approach Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur as Claimant-Opposite Party is registered in Uttar Pradesh. For ready reference order dated 02.04.2008 is reporduced herein-below:-

" Regd.No. TS/IFC/22/2006-07

From

The Director of Industries & Commerce, Haryana-cum-Chairman-Haryana Micro and Small Enterprises Facilitation Council 30 Bays Building, Ist Floor, Section 17, Chandigarh.

To

M/s P.M. Electronics Ltd.,

B-10 & 11, Surajpur Site-C, Greater Noida,

Distt. Gautam Budh Nagar,
Dated Chandigarh, the

Subject: Ist Meeting of Haryana Micro and Small Enterprises Facilitation Council fixed for 22.01.2008 at 11-00 AM under the Chairmanship of Shri D.R.Dhingra, IAS, Director of Industries & Commerce, Haryana-Cum-Chairman , HMSEFC.

Sir,

Reference this office letter No. TS/HMSEFC/Ist meeting/392-A dated 8.1.2008 on the subject cited above.

2. The Ist meeting of Ist Meeting of Haryana Micro and Small Enterprises Facilitation Council fixed for 22.01.2008 at 11-00 AM under the Chairmanship of the undersigned. The decision of the Council is reproduced below:

"M/s P.M. Electronics Pvt. Ltd. Noida has submitted an applicati0on for transfer of their case to Micro & Small Enterprises Facilitation Council set up by the U.P. State, since HMSEFC under the Micro, Small & Medium Development Act, 2006 does not have jurisdiction to proceed further in their case. To this effect the claimant has submitted various representations dated 21.3.07,7.4.07, 29.10.07 and 22.1.2008 respectively.

On the request of the Claimant, the Council decided to dispose of the case since the unit of the claimant is registered in U.P. Sate with the direction to claimant to approach MSEFC set up by the U.P. Govt. if they so desire"

This is for your kind information.
(D.R. Dhingra)
Director of Industries & Commerce,
Haryana- Cum-Chairman, HMSEFC"

76. It is pursuant to aforesaid order that claim of Claimant-Opposite Party submitted on 19.6.2007, came to be considered by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. The Council rejected the claim of claimant-opposite party, vide award dated 22.2.2010.

73. Mr. Alok Yadav, learned counsel for claimant-opposite party submits that from the facts as noted above, it cannot be said that claimant-opposite party was not conscious of its rights. Right from inception, claimant-opposite party has been agitating its claim before the forum as available. Apart from above, Section 32 of Act, 2006 clearly provides that an action taken under the Act so repealed, shall be deemed to have been done or taken under the corresponding provision of this Act. Therefore, what is sought to be urged is that by virtue of Section 32 of Act, 2006, claim of claimant-opposite party shall be deemed to have been filed under Act, 1993 and therefore, same cannot be rejected on the ground of limitation.

77. He further contents that in case the objections raised by appellant is accepted then claimant-opposite party shall be rendered remedy less as claim presented under the Act, 1993 has been disposed of on the ground that the counsel at Haryana has no jurisdiction on account of Act, 2006, and the claim cannot be considered under Act, 2006 on account of it being barred by limitation.

78. It was in order to avoid aforesaid anomaly that Section 32 has been incorporated in Act, 2006. Therefore, claim of claimant-opposite party shall be deemed to have been filed under Act, 1993 and therefore, the same cannot be rejected on the ground of limitation.

79. We find considerable force in the submissions urged by Mr. Alok Yadav,

learned counsel for claimant-opposite party. It is an undisputed fact that claimant-opposite party had first approached High Court of Punjab and Haryana by means of a writ petition. Thereafter, pursuant to an order passed in the writ petition filed by claimant-opposite party, IFC Haryana was constituted in the year 2002. Accordingly, claimant-opposite party filed a claim petition dated 31.7.2002 before IFC Haryana. During pendency of aforesaid claim petition, Act, 2006 came into force. Consequently, IFC Haryana, had no jurisdiction to decide the claim of claimant-opposite party. It was in aforesaid circumstances that claimant-opposite party submitted an application dated 21.3.2007 to transfer claim petition filed by claimant-opposite party to U.P. State Micro and Small Industrial Facilitation Council, Directorate of Industries (U.P) Kanpour. As no consequential action was taken on aforesaid transfer application, claimant-opposite party filed reminders dated 27.11.2006, 8.12.2006, 22.12.2006, 7.2.2007 and 7.4.2007. However, in spite of aforesaid, no action was taken by IFC, Haryana to transfer claim petitions filed by claimant-opposite party to U.P., Claimant-Opposite Party filed its new claim dated 19.6.2007 before U.P. State Micro and Small Industrial Facilitation Council, Directorate of Industries (U.P) Kanpur. It is, thereafter, IFC Haryana passed the order dated 2.4.2008 whereby claim filed by claimant-opposite party was disposed of with direction to claimant opposite party to approach N.E.F.C. set up by Government of U.P. Therefore, on the facts as noted above, it cannot be said that claimant-opposite party has raised its claim for the first time in the year 2007. Consequently, in the facts and circumstances of case, we do not find that the claim filed by claimant-opposite party can be said to be barred by limitation. However, this conclusion arrived at by us, will not preclude the appellant herein to raise an objection with regard to validity of amended claim filed by claimant-opposite party in the year 2007.

80. This brings us to the last question involved in the present appeal, whether claimant-opposite party is covered within the meaning of term 'Supplier' as defined under Section 2 (n) of Act, 2006. As already noted above, according to Mr. H.N. Singh, learned Senior Counsel appearing for the appellant, claimant-opposite party is not covered within the meaning of term 'Supplier' as defined in Section 2 (n) of Act, 2006. Since the claimant-opposite party is not covered within the meaning of term 'Supplier', therefore, claimant-opposite party could not have filed any claim petition in terms of Section 18 of Act, 2006.

81. Submission urged by learned Senior Counsel is founded on the proposition that claimant-opposite party did not submit memorandum which is required to be filed within 180 days from the date of enforcement of Act, 2006. Since there is nothing on record to show that claimant-opposite party ever filed its memorandum before competent authority as per Section 8 of Act, 2006, it cannot be treated as 'Supplier' within the meaning of section 2(n) of Act, 2006.

82. Mr. Alok Kumar Yadav on the other hand submits that at the time of presentation of claim in October, 2006, Act, 2006 relied upon by Uttar Pradesh State Micro and Small Industrial Facilitation Council, Kanpur, was not in existence. Furthermore, company is not under a legal obligation to submit

memorandum before competent authority as per section 8 (i)(a) of Act, 2006. Thus, Section 8 of Act, 2006 has wrongly been relied upon in case of Claimant-Opposite Party. It was next submitted that Section 8 of Act, 2006 grants freedom to Small Scale Industries to present or not to present their memorandum. Therefore, Section 2(n) of Act, 2006 is not to be read alongwith Section 8 of Act, 2006 but independent of the same. Apart from above, Government of India has issued notification bearing No. 2/311123007-MSNE POL (PL), whereby filing of Industrial Entrepreneur's Memorandum has been made discretionary. Therefore, in veiw of above, it cannot be said that claimant-opposite party was not under a legal obligation to file Industrial Enterpreneur's Memorandum before the Competent Authority as per mandate of Section 8 of Act, 2006. Consequently, claimant-opposite party is a supplier within the meaning of section 2 (n) of Act, 2006.

83. We have carefully analyzed the submissions urged by learned counsel for parties. It is an undisputed fact that Court below has relied upon the notification bearing No. 2/311123007-MSNE POL (PL) to arrive at conclusion that it is not mandatory for an Industrial undertaking to file its Industrial Entrepreneur's Memorandum. Since this was the only ground relied upon by Uttar Pradesh State Micro and Small Industrial Facilitation Council, Kanpur, the finding so recorded by Council was rightly set aside by Court below. In the absence of any such materials to establish that filing of Industrial Entrepreneur's Memorandum is mandatory, we uphold the finding recorded by the Court below.

84. For all the reasons given herein above, we do not find any good ground to interfere with the judgement and order impugned in present First Appeal from Order. Court below by means of impugned judgement and award has set aside award and remitted the matter before Arbitral Tribunal for adjudication afresh, which is perfectly in accordance with law. Court while deciding objections under section 34 of Act, 1996, cannot substitute the award by its own judgement. Since the matter has been remanded to Micro and Small Industrial Facilitation Council, Uttar Pradesh for decision afresh, we have it open to appellant to raise all objections regarding merits of claim raised by claimant-opposite party, except the plea of limitation that the claim as a whole is barred by limitation and secondly, that claimant-opposite party is not covered within the meaning of term 'Supplier' as defined under section 2 (n) of Act, 2006.

85. In view of above, present appeal fails and is liable to be dismissed . It is, accordingly, dismissed with cost which we quantify at Rs. 50,000/- payable by appellant to claimant-opposite party within a period of one month from today.

(2020)03-05ILR A1490
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2020

BEFORE

THE HON'BLE VIVEK AGARWAL, J.

FAFO No. 2434 of 2018

Shriram General Insurance Co. Ltd., Jaipur (Rajasthan) ...Appellant

Versus

Asif & Ors. ...Respondents

Counsel for the Appellant:

Sri Pawan Kumar Singh

Counsel for the Respondents:
Sri Ram Singh

A.Civil Law- Motor Vehicle Act, 1988 – Section 163-A – Future Prospects – Compensation in terms of a claim under Section 163-A will not include future prospects – For the purpose of computation of the total amount of compensation under Section 163-A of the Motor Vehicles Act, the future prospects may not be of much relevance – Compensation is to be awarded on structured formula basis. (Para 23)

Appeal disposed off (E-1)

Cases relied on :-

1. Deepal Girishbhai Soni & ors. Vs. United India Insurance Co. Ltd., Baroada; AIR 2004 SC 2107

2. M.A.C. Appeal No. 898 of 2006; United India Insurance Co. Ltd. Vs. Kaushalya Devi & ors. decided by High Court of Delhi on 14.03.2007;

3. United Indian Insurance Co. Ltd. Vs. Sunil Kumar & ors. 2018 (1) TAC 3 (SC);

4. Magma General Insurance Co. Ltd. Vs. Nanu Ram @ Chuhru Ram & ors. as reported in 2019 (132) ALR 745 (SC);

5. National Insurance Company Ltd. Vs. Smt. Gayatri Devi & ors. 2015 (1) AICC 580;

6. Oriental Insurance Company Ltd. Vs. Sadhna & ors. 2015 (2) AICC 1089;

7. R.K. Malik and another Vs. Kiran Pal & ors. 2009 TAC (3) 1 (SC);

8. Ramkhiladi & ors. Vs. United India Insurance Co. Ltd. & ors. AIR 2020 SC 527;

9. M.A. No. 476 of 2012; United India Insurance Co. Ltd. vs. Rajkumari & ors. s decided by Madhya Pradesh High Court on 25.02.2019

(Delivered by Hon'ble Vivek Agarwal, J.)

1. Heard Sri Pawan Kumar Singh, learned counsel for the appellant and Sri Ram Singh, learned counsel for the respondents.

2. This appeal has been filed by the insurance company being aggrieved by award dated 21.08.2014 passed by learned Motor Accident Claims Tribunal/Additional District Judge, Court No. 1, Aligarh on the following grounds namely:-

(i) That claim petition was filed under the provisions of Section 163-A of the Motor Vehicles Act and therefore, tribunal was bound to follow the provisions contained in schedule 2 of the Act.

(ii) That learned claims tribunal arbitrarily made a deduction of 1/5th from the income of the deceased whereas as per the second schedule only 1/3rd deduction is permissible.

(iii) That learned claims tribunal has added 50% towards future prospects whereas no future prospect could have been awarded in a case filed under Section 163-A.

3. Learned counsel for the appellant-insurance company has place reliance on the judgment of the Hon'ble Supreme Court in case of***Deepal Girishbhai Soni and others vs. United India Insurance Co. Ltd., Baroada***as reported in***AIR 2004 SC 2107***wherein it has been held that by reason of Section 163-A, compensation is required to be determined on the basis of a structured formula whereas in terms of Section 140, only a fixed amount is to be given.It has been further held that a provision of law providing for compensation is presumed to be final in nature unless a contra is indicated, in the statutes either expressly or by necessary implication. Similarly, reliance has been placed on the judgment of***United India Insurance Co. Ltd. vs. Kaushalya Devi and others***decided by High Court of Delhi in M.A.C. Appeal No. 898 of 2006 decided on 14.03.2007 and as reproduced from MANU/DE/7345/2007 wherein it has been

held that the tribunal cannot assess compensation in excess of annual income of Rs. 40,000/- as stipulated in the second schedule to the Motor Vehicles Act, 1988. Reliance is also placed on the judgment of Hon'ble Supreme Court in case of***United Indian Insurance Co. Ltd. vs. Sunil Kumar and others***as reported in***2018 (1) TAC 3 (SC)***wherein it has been held that grant of compensation under Section 163-A on the basis of structured formula is in nature of final award and adjudication thereunder is required to be made without any requirement of any proof of negligence of driver/owner of vehicle involved.

4. Sri Ram Singh, learned counsel for the respondent-claimants, on the other hand, submits that he is not pressing para-1 of his cross-objection, but in the light of the law laid down in case ofMagma General Insurance Co. Ltd. vs. Nanu Ram @ Chuhru Ram and othersasreported in2019 (132) ALR 745 (SC), each of the claimants is entitled to loss of consortium and learned claims tribunal has erred in not awarding consortium to each of the claimants. It is also submitted that claims tribunal erred in reducing the income from Rs. 3,500/- per month to Rs. 3,000/- per month and in fact, it should have restricted the income to Rs. 40,000/- because even if minimum wages are taken into consideration on the date of the accident i.e., 28.01.2012, then for a truck driver, minimum wages were to the tune of more than Rs. 4,000/- per month. He supports remaining award and submits that no further indulgence is required. He further submits that even in a claim petition under Section 163-A, future prospects can be awarded and in support of his contention, he places reliance on Division Bench's judgment of this Hon'ble Court in case of***National Insurance Company Ltd. vs. Smt. Gayatri Devi and others***as reported in***2015 (1) AICC 580***, wherein Insurance Company had challenged the award, wherein Division bench of this Court held that even in a claim under Section 163-A, future prospects can be awarded in as much as it is open to the tribunal to consider granting compensation under other heads as specified under Rule 220-A of the U.P. Rules, 1998.

5. Similarly, reliance has been placed on another Division Bench judgment of this Court in case of the ***Oriental Insurance Company Ltd. vs. Sadhna and others*** as reported in ***2015 (2) AICC 1089*** where Hon'ble Division Bench of this High Court held that schedule was amended more than two decades ago and tribunal has determined monthly income to be Rs. 4,000/- which is justified in holding that there is no scope for interference and dismissed the appeal. Referring to the judgment of Hon'ble Supreme Court in case of ***R.K. Malik and another vs. Kiran Pal and others*** as reported in ***2009 TAC (3) 1 (SC)*** which is a case of 29 school children dying in an accident. It is held that it is appropriate to grant Rs. 75,000/- to each of the claimants as compensation for future prospect of the children over and above awarded by the High Court.

6. A perusal of judgment in case of *R.K. Malik (supra)* noted that compensation has been awarded by the tribunal as well as the High Court on the basis of second schedule and relevant multiplier under the Act. Thereafter, Supreme Court noted that as far as non-pecuniary damages are concerned, the tribunal had not awarded any compensation under the head of non-pecuniary damages, however, in appeal, High Court elaborately discussed this aspect of the matter and awarded non-pecuniary damages of Rs. 75,000/-.

However, in para 16, it is observed as under:-

".....16. Then, how does one calculate pecuniary compensation for loss of future earnings and loss of dependency of the parents, grand parents etc. in the case of non-working student? Under the Second Schedule of the Act in case of a non earning person, his income is notionally estimated at Rs. 15,000/- per annum. The Second Schedule is applicable to claim petitions filed under Section 163 A of the Act. The Second Schedule provides for the multiplier to be applied in cases where the age of the victim was less than 15 years and between 15 years but not exceeding 20 years. Even when compensation is payable under Section 166 read with 168 of the Act, deviation from the structured formula as provided in the Second Schedule is not ordinarily permissible, except in exceptional cases. [see Abati Bezbaruah v. Dy. Director General, Geological Survey of India, (2003) 3 SCC 148); 2003 (2) T.A.C. 18; United India Insurance Company Ltd. vs. Patricia Jean Mahajan, (2002) 6 SCC 281: 2002 (2) T.A.C. 335 and U.P. State Road Transport Corp. v. Trilok Chandra, (1996) 4 SCC 362 : 1996 (2) T.A.C. 286.

7. In First Appeal From Order No. 199 of 2017, ***National Insurance Co. Ltd., Lucknow vs. Luvkush and others***, the Division Bench of this Hon'ble High Court has visited the aspect of rule making wherein Rule 220-A of U.P. Rules, 1998 too has been discussed.

8. Relying on different sections of the Motor Vehicles Act, it has been pointed out that each of the section of the Motor Vehicles Act confers power of making rules upon State Government for the purpose of carrying into effect provisions of particular chapter/ chapters. In this regard, Section 28 confers power of making rules upon State Government for the purpose of carrying into effect provisions of Chapter II other than the matters specified in Section 27. Chapter II, contemplates provisions of licensing of drivers of motor vehicles. In sub-section (2) of Section 28 certain specific subjects are mentioned but the same are also in the context of licensing of connected matters therewith.

9. Similarly, Section 38 confers power upon State Government to make rules for the purpose of carrying into effect provisions of Chapter III. Sub-section (2) specifies certain subjects which also relates to matters concerned with Chapter III which deals with provisions of licensing of conductors of stage carriages.

10. Then comes Section 65 which confers similar power upon State Government for framing rules for carrying into effect the provisions of Chapter IV relating to registration of motor vehicles.

11. Next is Section 95 which confers power upon State Government to frame rules as to Stage Carriages and Contract Carriages and conduct of passengers in such vehicles. This Section 95 is part of Chapter V which contains provisions relating to control of transport vehicles.

12. Section 96 confers power upon State Government to frame rules for the purpose of carrying into effect, provisions of Chapter V.

13. Section 107 confers power to frame rule for carrying into effect the provisions of Chapter VI which deals with special provisions relating to State transport undertakings.

14. Section 111 confers power upon State Government to frame rules regulating

construction, equipment and maintenance of motor vehicles and Trailers, with respect to all matters other than the matters specified in sub-section (1) of Section 110. This Section 111 is part of Chapter VII which contains provisions of construction, equipment and maintenance of motor vehicles.

15. Section 138 confers power to frame rules upon State Government for the purpose of carrying into effect the provisions of Chapter VIII which contains provisions relating to control of traffic.

16. Section 176 is the only relevant provision which takes into its ambit Sections 165 to 174 which are part of Chapter XII relating to Claims Tribunal. Section 176 reads as under:

"176. Power of State Government to make rules.--A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:-

(a) the form of application for claims for compensation and the particulars it may contain, and the fees, if any, to be paid in respect of such applications;

(b) the procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;

(c) the powers vested in a Civil Court which may be exercised by a Claims Tribunal;

(d) the form and the manner in which and the fees (if any) on payment of which an appeal may by preferred against an award of a Claims Tribunal; and

(e) any other matter which is to be, or may be, prescribed."

17. Lastly, it is Section 213 which is part of Chapter XIV, i.e., "Miscellaneous". Section 213 confers power upon State Government to establish a Motor Vehicles Department and appoint officers therefor as it thinks fit.

18. Thereafter, Para 82, 83 and 84 reads as under:-

".....82. A delegated/ subordinate legislation neither can create substantive rights and obligations nor can enhance efficacy or reduce normal functional ambit of principal legislation. A Full Bench of this Court in Chandra Kumar Sah and another Vs. The District Judge and others, AIR 1976 All 328 held that when a rule framing power is conferred upon State Government to make rules to carry out the purposes of this Act, it does not give carte blanche to enact independent legislation. The expression "to carry out the purposes of the Act" means to enable its provisions to be effectively administered. They connote that rules are to be confined to the same field of operation as that marked out by Act itself. Court further observed in para 11 as under:

"11. .... This power will authorise the provision of subsidiary means of carrying into effect what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends Shanahan v. Scott (96 Com WLR 245). In other words a subordinate law cannot substantially modify the scheme or policy of the Act."

(emphasis added)

83. In Global Energy Limited and another Vs. Central Electricity Regulatory

Commission, 2009(15) SCC 570, Court in para 25 of judgment, with regard to power of delegated legislation, said as under:

"25. It is now a well settled principle of law that the rule making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act." (emphasis added)

84. In Kunj Behari Lal Butail vs. State of H.P., 2000(3) SCC 40, a three Judge Bench of Court, said:

"14. We are also of the opinion that a delegated power to legislate by making rules "for carrying out the purposes of the Act" is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself."

19. Therefore, it is apparent that Rule 220-A of the U.P. Motor Vehicles Rules, 1998 has been framed under Section 176 of the Motor Vehicles Act.

20. Section 176 of the Motor Vehicles Act deals with the Power of State Government to make rules for the purpose of carrying into effect the provisions of Sections 165 to 174. Thus, Section 163(A), which is part of Chapter 11 has not been included in the ambit of rule making under Section 176 and therefore, Rule 220-A will not be applicable to the statutory provisions contained in Section 163-A of the Motor Vehicles Act which specifically provides for special provisions as to payment of compensation on structured formula basis. It clearly provides that compensation as indicated in the second schedule is to be paid.

21. Recently, vide Ministry of Road and Transport notification dated May 22nd, 2018, Second Schedule under Section 163-A of the Motor Vehicles Act, 1988 has been amended and it has held as under:-

"1. ***(a) Fatal Accidents:***

Compensation payable in case of Death shall be five lakh rupees.

(b) Accidents resulting in permanent disability:

Compensation payable shall be = [Rs. 5,00,000/- × percentage disability as per Schedule I of the Employee's Compensation Act, 1923 (8 of 1923)] :

Provided that the minimum compensation in case of permanent disability of any kind shall not be less than fifty thousand rupees.

(c) Accidents resulting in minor injury:

A fixed compensation of twenty five thousand rupees shall be payable:

2. On and from the date of 1st day of January, 2019 the amount of compensation specified in the clauses (a) to (c) of paragraph (1) shall stand increased by 5 per cent annually".

3. This notification shall come into form on the date of its publication in the Official Gazette."

22. Recently, Hon'ble Supreme Court in case of Civil Appeal No. 9393 of 2019, ***Ramkhiladi and others vs. United India Insurance Co. Ltd. and others*** decided on 07.01.2020 ***(AIR 2020 SC 527)*** wherein it has been held that this amendment in second schedule is prospective and not retrospective.

23. In view of such facts, it is apparent that compensation in terms of a claim under Section 163-A will not include future prospects and this aspect of the matter as to the applicability of Rule 220-A has not been considered in case of *National Insurance Co. Ltd. vs. Gayatri Devi and others* as well as in case of *Oriental Insurance Co. Ltd. vs. Sadhna and others*. As far as judgment of Hon'ble Supreme Court is concerned, R.K. Mailik is not a case decided in reference to Section 163-A. In fact, Hon'ble Supreme Court in case of ***Raj Rani and others vs. Oriental Insurance Co. Ltd. and others*** as reported in ***MACD 2009 SC 345*** in para-12 has observed that the counsel may be correct to some extent that for the purpose of computation of the total amount of compensation under Section 163-A of the Motor Vehicles Act, the future prospects may not be of much relevance. Same is the ratio of the law laid down by Madhya Pradesh High Court in case of ***United India Insurance Co. Ltd. vs. Rajkumari and others*** as decided in M.A. No. 476 of 2012 on 25.02.2019. This when read in terms of para 16 of the judgment of Hon'ble Supreme Court in case of R.K. Malik vs. Kiran Pal, then it is crystal clear that Supreme Court has also observed that in a claim under Section 163(A) of the Motor Vehicles Act, 1988, compensation is to be awarded on structured formula basis.

24. In view of such facts, this Court is of the opinion that arguments put-forth by the learned counsel for the respondent in support of their entitlement to payment of compensation in deviation of the provisions contained in second schedule is not sustainable, it deserves to be rejected and is rejected.

25. As far as the contention of the counsel for the claimants that each of the claimant is entitled to loss of consortium in the light of the law laid down by Hon'ble Supreme Court in case of*Magma General Insurance Co. Ltd. vs. Nanu Ram @ Chuhru Ram and others(supra)*is concerned, ratio of that judgment will not be applicable to the facts of the present case inasmuch as that was a case under the provisions of Sections 166, 168 and 173 of the Motor Vehicles Act and not under Section 163-A of the Motor Vehicles Act.

26. In view of such legal pronouncements, I have no hesitation to hold that tribunal erred in passing the impugned award by adopting incorrect and faulty methodology of making 1/5th deduction and adding 50% towards future prospects. Similarly, it erred in arbitrarily treating the income of the deceased at Rs. 3,000/-per month against the submission of the appellant that the income of the deceased was to the tune of Rs. 3,500-4,000/- per month. Therefore, as per the provisions contained in schedule 2 of the Motor Vehicles Act, compensation will be recomputed as under; annual income Rs. 40,000/-, 1/3rd to be deducted towards personal expenses, therefore, dependency will come out to Rs.26,667/- on which a multiplier of 16 will be applicable as the victim was between the age of 35-40 years, taking total compensation to Rs. 4,26,672/-. Over and above, other claimants are entitled to a sum of Rs. 2,000/- under the head of funeral expenses, a sum of Rs. 5,000/- under the head of loss of consortiumas one of the beneficiary is wife of the deceased and Rs. 2,500/- towards the loss of estate. Besides this, claimants are entitled to a sum of Rs. 10,556/- towards the amount spent by them on treatment of the deceased as has been awarded by learned claims tribunal. Thus, total compensation will come out to Rs. 4,46,728/- in place of Rs. 7,21,756/- (seven

lakhs twenty one thousand seven hundred and fifty six rupees) awarded by learned claims tribunal.

27. This amount will be appropriated in the same ratio as has been directedby learned claims tribunal. The claim amount will carry interest @ 7% from the date of filing of the claim petition till the date of actual payment.

28. In above terms appeal is ***disposed off.***

(2020)03-05ILR A1497
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

FAFO No. 4430 of 2012

Poonam Agarwal & Anr. ...Appellants
Versus
The United India Insurance Company Limited & Anr. ...Respondents

Counsel for the Appellants:
Sri Abhijit Banerjee, Sri Sudeep Agarwal

Counsel for the Respondents:
Sri Vibhuti Narain, Sri Vishesh Kumar Gupta, Sri Hemant Kumar

A. Civil Law- Motor Vehicle Act, 1988 – Norms to determine Compensation – Consideration of only Basic pay and D.A. not Medical Allowance and others, while computing the income of salaried person – Legality – Held, Computation of income of the deceased for the purposes of determination of compensation shall include the basic pay, dearness allowance, medical allowance, transport allowance and annual bonus and the deduction could be only of professional tax as well as the income tax – However, it is to be borne in mind that there may be several allowances awarded in a salary of a particular month which might have been awarded due but all such allowances may not constitute monthly salary otherwise. (Para 10)

Appeal allowed (E-1)

Cases relied on :-

1. Sunil Sharma vs. Bachinder Pal, 2011 LAWS SC 2 73

2. National Insurance Company ltd. vs. Indira Srivastava 2007 LAWS SC 12

3. Laxmi Devi & ors. v. Mohammad Tabbar & anr., (2008)

12 SCC 165

4. Sarla Verma & ors. v. Delhi Tranpsort Corporation & anr. (2009) 6 SCC 121

5. National Insurance Company Ltd.. vs. Pranay Sethi & ors. (2017) 16 SCC 680

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

1. Heard Sri Sudeep Agarwal, learned counsel for the appellants, Sri Vibhuti Narain, learned counsel for respondent no. 1, Sri Hemant Kumar, Advocate holding brief of Sri V.K. Gupta, learned counsel for respondent no. 2 and perused the record.

2. This first appeal from order is directed against the award dated 29th September, 2012 passed by the Claim Tribunal/District Judge, Azamgarh allowing the claim petition of the claimants bearing no. 840 of 2009 for a compensation of Rs. 6,89,336/- @ 7% simple interest per annum, for the purposes of enhancement.

3. Assailing the award on the issue of computation of compensation, it has been argued that while making the assessment of income of the deceased son of the

claimants, the tribunal has manifestly erred in taking into consideration only the basic pay and the dearness allowance and then deducting the tax from that. He submits that in view of the authority pronounced by the Supreme Court in the case of **Sunil Sharma vs. Bachinder Pal, 2011 LAWS SC 2 73**, the house rent allowance, city compensatory allowance and the medical allowance are also to be added towards the computation of the income. He has also placed reliance upon another authority of the Supreme Court in the case of **National Insurance Company Limited vs. Indira Srivastava 2007 LAWS SC 12 95.**

4. On the question of multiplier, it has been argued that multiplier of 12 has wrongly been applied whereas the multiplier of 17 should have been applied as per the IInd schedule of the The Motor Vehicles Act, 1989 and the Rules. It is also argued that on count of future prospects nothing has been added nor, any amount has been paid towards the loss of consortium even towards the funeral expenses only a meager amount has been directed to be paid. He has also placed reliance upon the judgment of the Apex Court in the case of Laxmi Devi & others v. Mohammad Tabbar & Another (2008) 12 SCC 165 and Sarla Verma & Ors. v. Delhi Tranpsort Corporation & Anr. (2009) 6 SCC 121 and also finally in the case of National Insurance Company Limited. vs. Pranay Sethi and others (2017) 16 SCC 680 and this is how it has been claimed that the amount of compensation awarded by the tribunal needed to be enhanced.

5. Learned counsel appearing for the respondent-Insurance Company though has sought to defend the order of the tribunal for the reasons assigned therein and has thus defended the compensation awarded.

6. Having heard learned counsel for the parties and their arguments across the bar, we now proceed to examine the correctness of assessment of income of the deceased by the tribunal and consequential determination of compensation. In the matter of assessment of income of salaried or non-salaried person, the legal position has now come to be settled by the decisions of the Apex Court of this country in a series of its judgment and, therefore, it is proper to examine the award in question, in the light of the authorities on this aspect of the Apex Court.

7. The Apex Court in the case of Sunil Sharma Sharma v. Bachitar Singh, 2011-LAWS (SC)-2-73 vide paragraphs 8 and 9 has held thus:-

"8 In the case of National Insurance Co. Ltd. v. Indira Srivstava and Ors. [AIR 2008 SC 845], SB. Sinha, J. has observed that "The term 'income' has different connotations for different purposes. A Court of law, having regard to the change in societal conditions must consider the question not only having regard t pay packet the employee carries home at the end of the month but also other perks which are beneficial to the members of the entire family. Loss cause to the family on a deth of a near and dear one can hardly be compensated on monitory terms." His Lordship also stated that if some facilities were being provided whereby the entire family stood to benefit, the same must be held to be relevant for the purpose of computation of total income on the basis of which the amount of compensation payable for the death of the kith and kin of the applicants was required to be determined. This Court held that superannuation benefits, contributions towards gratuity, insurance of medical

policy for self and family and education scholarship were beneficial to the members of the family. This Court clarified that by opining that 'just compensation' must be determined having regard to the facts and circumstances of each case. The basis for considering the entire pay packet is what the dependents have lost in view of death of the deceased. It is in the nature of compensation for future loss towards the family income" and that **" the amounts therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contra-distinguished to the ones which were for his benefit.** We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must deducted."

9. In Raghuvir Singh Matolys and Ors. v. Hari Singh Malviya and Ors. [JT 2009 (7) SC 597: 2009 (15) SCC 363], this Court has observed that dearness allowance and house rent allowance should be included for computation of income of the deceased."

8. In National Insurance Company Ltd. vs. Indira (supra) the Apex Court vide paragraphs 17 to 20 has held thus:-

17. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted.

18. The term 'income' in P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Ed.) has been defined as under :

"The value of any benefit or perquisite whether convertible into money or not, obtained from a company either by a director or a person who has substantial interest in the company, and any sum paid by such company in respect of any obligation, which but for such payment would have been payable by the director or other person aforesaid, occurring or arising to a person within the State from any profession, trade or calling other than agriculture."

It has also been stated :

'INCOME' signifies 'what comes in' (per Selborne, C., Jones v. Ogle, 42 LJ Ch.336). 'It is as large a word as can be used' to denote a person's receipts '(per Jessel, M.R. Re Huggins, 51 LJ Ch.938.) income is not confined to receipts from business only and means periodical receipts from one's work, lands, investments, etc. AIR 1921 Mad 427 (SB). Ref. 124 IC 511 : 1930 MWN 29 : 31 MLW 438 AIR 1930 Mad 626 : 58 MLJ

337."

19. If the dictionary meaning of the word 'income' is taken to its logical conclusion, it should include those benefits, either in terms of money or otherwise, which are taken into consideration for the purpose of payment of income-tax or profession tax although some elements thereof may or may not be taxable or would have been otherwise taxable but for the exemption conferred thereupon under the statute.

20. In N. Sivammal & Ors. v. Managing Director, Pandian Roadways Corporation & Ors. [(1985) 1 SCC 18], this Court took into consideration the pay packet of the deceased.

(Emphasis added)

9. This above issue has come to be discussed in Pranay Sethi's case *(supra)* vide paras-30, 31, 32 and 33 thus.

30. While adverting to the addition of income for future prospects, it stated thus:-

"24. In Susamma Thomas this Court increased the income by nearly 100%, in Sarla Dixit the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. **(Where the annual income is in the taxable range, the words "actual salary" should be read as "actual salary less tax").** The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardise the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

31. Though we have devoted some space in analyzing the precedential value of the judgments, that is not the thrust of the controversy. We are required to keenly dwell upon the heart of the issue that emerges for consideration. The seminal controversy before us relates to the issue where the deceased was self-employed or was a person on fixed salary without provision for annual increment, etc., what should be the addition as regards the future prospects. In Sarla Verma, the Court has made it as a rule that 50% of actual salary could be added if the deceased had a permanent job and if the age of the deceased is between 40 - 50 years and no addition to be made if the deceased was more than 50 years. It is further ruled that where deceased was self-employed or had a fixed salary (without provision for annual increment, etc.) the Courts will usually take only the actual income at the time of death and the departure is permissible only in rare and exceptional cases involving special circumstances.

32. First, we shall deal with the reasoning of straitjacket demarcation between the permanent employed persons within the taxable range and the other category where deceased was self-employed or **employed on fixed salary sans annual increments,** etc.

33. The submission, as has been advanced on behalf of the insurers, is that the distinction between the stable jobs at one end of the spectrum and self-employed at the other end of the spectrum with the benefit of future prospects being extended to the legal representatives of the deceased having a permanent job is not difficult to visualize, for a comparison between the two categories is a necessary ground reality. It is contended that guaranteed/definite income every month has to be treated with a different parameter than the person who is self-employed inasmuch as the income does not remain constant and is likely to oscillate from time to time. Emphasis has been laid on the date of expected superannuation and certainty in permanent job in contradistinction to the

uncertainty on the part of a self- employed person. Additionally, it is contended that the permanent jobs are generally stable and for an assessment the entity or the establishment where the deceased worked is identifiable since they do not suffer from the inconsistencies and vagaries of self-employed persons. It is canvassed that it may not be possible to introduce an element of standardization as submitted by the claimants because there are many a category in which a person can be self-employed and it is extremely difficult to assimilate entire range of self-employed categories or professionals in one compartment. It is also asserted that in certain professions addition of future prospects to the income as a part of multiplicand would be totally an unacceptable concept. Examples are cited in respect of categories of professionals who are surgeons, sports persons, masons and carpenters, etc. It is also highlighted that the range of self-employed persons can include unskilled labourer to a skilled person and hence, they cannot be put in a holistic whole. That apart, it is propounded that experience of certain professionals brings in disparity in income and, therefore, the view expressed in Sarla Verma (supra) that has been concurred with Reshma Kumari (supra) should not be disturbed.

(emphasis added)

9. Learned counsel appearing for the respondent-Insurance Company could not give any explanation as to why in computing the income of the deceased, who was a salaried person, only basic pay and the dearness allowance have been considered.

10. In the light of the aforesaid authorities which could not be disputed by learned counsel for the respondents, we are of the considered opinion that the computation of income of the deceased for the purposes of determination of compensation shall include the basic pay, dearness allowance, medical allowance, transport allowance and annual bonus and the deduction could be only of professional tax as well as the income tax. However, it is to be borne in mind that there may be several allowances awarded in a salary of a particular month which might have been awarded due but all such allowances may not constitute monthly salary otherwise. In the case in hand, we find following salary details that were provided by the claimant vide salary slip of the period 01.04.2009 to 30.04.2009:-

Earnings	Deductions
Basic salary 7,140.00	PF 989.00
Dearness Allowance 1,100.00	Professional Tax 200.00
House Rent Allowance 4,196.00	Income Tax 723.00
Medical Allowance 2,623.00	Infosys Welfare Trust 100.00
Transport Allowance 1,048.00	GYM facilities 300.00
Leave Travel Allowance 2,623.00	Hostel Rent Recovery 2,750.00
Annual Bonus/Ex-gratia 353.00	Membership fee 150.00
TPI Incentive 2,720.00	
Bonus Ex-Gratia Advance Pmt.	

1,566.00	
Salary Arrears 11,496.00	
Total 34,865.00	Total 5,212.00

In the above details leave travel allowance, TPI incentive and Bonus ex-gratia advance payment can not be treated as part of regular monthly salary. Training Period Incentive (TPI) is normally given by the companies in the very first month of after training especially in case of Infosys Solution Pvt. Ltd. Further salary arrears are given annually for fixation of dearness allowance/increments and so that will not form part of regular monthly salary. The increment will automatically enhance the basic salary and arrears only indicate dating it back to the date and time with effect from which such increment has been awarded and so the arrears got accumulated. With the increment/award of Dearness Allowance the basic salary and/or plus Dearness Allowance stands mentioned in the salary slip and that should be taken into account. The hostel rent is charged for the period when the trainee is under training and for that he has to compulsorily stay in the hostel and, therefore, deduction is shown in regular monthly salary but once the training period is over and the Training Period Incentive (TPI) is finally paid, there can be no further deductions towards hostel rent. And so also Infosys Welfare Trust amount and Gym facilities charges and membership fee are all not liable to be deducted as the employee, in the case in hand had passed away.

11. Thus, considering the admitted position of salary as discussed above following will be the actual income to be taken into account for computation of compensation:

Earning		Deductions	
Basic Pay	7,140/-	Professional Tax	200.00
D.A.	1,100/-	Income Tax	723.00
H.R.A.	4,196/-		
Medical Allowance	2,623/-		
Transport Allowance	1,048/-		
Total	16107	Total	923/-

Net Pay Rs. 15184/-

12. Coming to the question of multiplier now we refer to paragraphs 42 and 44 of Pranay Sethi's judgment *(supra)* that run as under:-

42. As far as the multiplier is concerned, the claims tribunal and the Courts shall be guided by Step 2 that finds place in paragraph 19 of Sarla Verma read with paragraph 42 of the said judgment. For the sake of completeness, paragraph 42 is extracted below :-

"42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M- 16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is,

M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

44. At this stage, we must immediately say that insofar as the aforesaid multiplicand/multiplier is concerned, it has to be accepted on the basis of income established by the legal representatives of the deceased. Future prospects are to be added to the sum on the percentage basis and "income" means actual income less than the tax paid. **The multiplier has already been fixed in Sarla Verma which has been approved in Reshma Kumari with which we concur.**

(emphasis added)

13. Learned counsel appearing for the Insurance Company could also not give any satisfactory reply to the arguments advanced by learned counsel for the appellants that the two judgments of the Supreme Court in Lalita Devi and Sarla Verma *(supra)* still hold the field as these judgments have not been overruled. These judgments have found approval of the Constitution Bench in Pranay Sethi's case *(supra)* as well.

14. In view of the above and by applying the rule laid down in Sarla Verma's case, in our considered opinion, the multiplier of 18 would be applicable as the deceased was 24 years' of age at the time of accident.

15. The legal position towards conventional head of future prospects has been summarized in the case of Pranay Sethi *(supra)* vide paragraph-59.3 thus:-

"59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax."

(Emphasis added)

16. So now, so far as future prospects are concerned, the claimants are entitled to 50% of the income assessed on the basis of the principles laid down in Pranay Shetty's case *(supra).* Again for loss of state, we determine the amount as Rs. 15,000 and also Rs. 10,000 towards funeral expenses.

17. In view of the above, we direct that the appellants shall be entitled to the compensation as per the following computation.

Income from salary	15184/- p.m.	Rs. 1,82,208/- p.a.
Future Prospects	50% of Rs. 1,82,208/-	Rs. 91,104/-
Total Income		Rs. 2,73,312/-
Deduction towards personal expenses	1/2th of total income	Rs. 1,36,656/-
Dependency	2,73,312-1,36,656	Rs. 1,36,656/-
Multiplier		18
Compensation	1,36,656/- x 18	Rs. 24,59,808/-

Funeral Expenses	10,000/-
Loss of Estate	Rs. 15,000/-
Total Compensation	24,84,808

18. Now coming to the question of interest, we are of the opinion that in normal circumstances 6 to 7% only is admissible in motor accident claim's cases. However, no straightjacket formula can be applied and the interest shall be determined and payable on the facts and circumstances of each case. The deceased was the only issue of his parents, and was, thus only bread earner of the family and it is unfortunate that he met with fatal accident and the poor parents had to wait for 3-4 years for the award of compensation and then more than 7 years before the high court for enhancement on account of wrong assessment of income at the end of the tribunal in spite of settled legal position in the matter. In such circumstances, therefore, we find it proper to award interest @ 7 % from the date of application till date of actual payment made under the award of the tribunal and @ 9% interest on the enhanced compensation from the date of payment till enhanced payment is made under this order and also over and above the amount if has remained unpaid till date under the award of the tribunal.

19. Thus the compensation enhanced from Rs. 6,89,366/- to Rs. 24,84,808/-, i.e., by Rs. 17,95,442/- as above shall be paid @ 9% interest from the date of this judgment till actual payment is made of the enhanced compensation including the past any amount if has remained unpaid, by the respondents Insurance Company till the actual enhanced compensation coupled with unpaid amount, is paid.

18. In view of the above, this appeal stands allowed in above terms modifying the award of the Motor Accidents Claims Tribunal.

(2020)03-05ILR A1504
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.03.2017

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 5359 of 2017

Ashok Kumar & Anr. ...Petitioners
Versus
Onkar Prasad & Anr. ...Respondents

Counsel for the Petitioners:
Narendra Bahadur Singh

Counsel for the Respondents:

Civil law-Original suit filed for cancelation of registered will deed-on ground that some imposter was projected as Bahadur and thum impression is forged-Suit dismissed- Appeal filed-In appeal-Application under Order 41 Rule 27 C.P.C. filed-for opinion of fingerprint expert-as they were not aware of legal issue and their counsel never advised them for the same-lack of proper legal advice-not a substantial cause-W.P. dismissed.

Held, Admittedly, no application was moved by the petitioners before the trial Court to seek expert opinion. It cannot be said that the petitioners with due diligence could not have moved such an application to disapprove the thumb impression of Maggal over the will in question. In the instant case it was not as if the additional evidence was required by the Court to enable it to pronounce judgment and, therefore,

additional evidence was sought to be adduced for 'substantial cause' and in view of the settled legal proposition, lack of proper legal advice does not constitute a 'substantial cause' to let the petitioners bring in additional evidence at this belated stage. (Para 15) (E-9)

Cases cited:

1.K.R. Mohan Reddy v. Net Work Inc., (2007) 14 SCC 257

2. N. Kamalam v. Ayyasamy, (2001) 7 SCC 503

3. U.O.I. v. Ibrahim Uddin, (2012) 8 SCC 148

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. Heard Shri Narendra Bahadur Singh, learned counsel for the petitioners.

2. This petition under Article 227 of the Constitution of India has been filed challenging the order dated 21.2.2014 passed by the Additional District Judge, Court No. 7, Faizabad in Civil Appeal No.155 of 2011 (Ashok Kumar v. Onkar Prasad) whereby and whereunder the application on behalf of the plaintiff-petitioner herein purported to be made under Order 41 Rule 27 of the Code of Civil Procedure, 1908 (for short "the Code') has been rejected.

3. In order to appreciate the issue requiring determination a few material facts are stated as under: -

Maggal, the original plaintiff, instituted a suit against Onkar Prasad and Om Prakash, the defendants-respondents herein, for cancellation of a registered will deed dated 27.5.1982, executed by his brother Bahadur in favour of Onkar Prasad and Om Prakash, the defendants, respondents herein. It was the case of the original plaintiff that the Ram Narayan, the father of the respondents got the will deed executed in their favour by projecting some imposter as Bahadur and that the alleged thumb impression of Bahadur on the will was a forged one. The suit was contested by the defendants by filing their written statement. During the pendency of the suit, the original plaintiff died and in his place the petitioners were substituted as his legal representatives.

4. The trial Court after appreciating the evidence on record dismissed the suit by judgment and decree dated 12.8.2011. Feeling aggrieved, the petitioners filed an appeal before the Additional District Judge. In the said appeal, the petitioners on 24.9.2013 moved an application under Order 41 Rule 27 of the Code praying that the opinion of fingerprint expert be called for to establish that the thumb impression on the will deed was not that of Bahadur. It was stated that the petitioners were not well versed with the law and were totally dependent upon their counsel and that their counsel did not advice them to seek the opinion of a fingerprint expert. It was alleged that while preparing the case their counsel advised them to seek the opinion of fingerprint expert, and accordingly, the application was being moved.

5. To the said application objection was filed on behalf of the respondents to the effect that the petitioners cannot be permitted to fill any lacuna in the case and the application under Order 41 Rule 27 was moved with a view to delay the decision of the case.

6. By reason of the impugned order, the Additional District Judge has rejected the said application on the ground that the case of the petitioner was not covered

under Order 41 Rule 27 of the Code. The relevant portion of the order is extracted below: -

"प्रस्तुत केस में प्रार्थी/अपीलार्थीगण के द्वारा ऐसी कोई स्थिति नहीं बतायी गयी है जिसके द्वारा आदेश 41 नियम 27 सिविल प्रकिया संहिता के प्रावधान में निर्धारित शर्तों में से कोई भी शर्त अथवा स्थिति प्रकट या स्थापित होती हो। अवर न्यायालय के समक्ष उभय पक्षों द्वारा अपने–अपने साक्ष्य प्रस्तुत किए गए थे। साक्ष्यों के आधार पर अवर न्यायालय नें विवादित/प्रश्नगत वसीयतनामा दिनांक 27.05.1982 को सही माना, जिसमें वसीयनामा के हाशिया गवाहान द्वारा न्यायालय में साक्ष्य देकर उसे साबित कराया गया है। ऐसी स्थिति में, प्रस्तुत अपील के स्तर पर, यह कत्तई आवश्यक प्रतीत नहीं होता कि विवादित वसीयतनामा के सही होने के तथ्य के बिन्दु पर अवर न्यायालय के द्वारा अन्तिम विनिश्चयन किए जाने के उपरान्त बिना किसी औचित्य या आधार के अब वसीयतनामा पर लगे निशानी अंगूठा का मिलान निष्पादनकर्ता के किसी अन्य दस्तावेज पर बने निशानी अंगूठा से कराया जाय। अवर न्यायालय के समक्ष इस हेतु प्रार्थी/अपीलार्थीगण को पूर्ण अवसर था। यह भी स्थापित नही किया गया है कि प्रार्थी/अपीलार्थीगण ने अवर न्यायालय के समक्ष वसीयकर्ता के निशानी अंगूठा की कोई इक्सपर्ट राय मंगाए जाने का कोई प्रार्थनापत्र देकर पैरवी की गयी जिसको अवर न्यायालय ने इन्कार कर दिया रहा हो। इस प्रकार प्रस्तुत प्रार्थनापत्र विलम्बनकारी एवं निराधार प्रतीत होता है जो निरस्त होने योग्य है।"

7. Learned counsel for the petitioner has submitted that it was only on account of lack of legal advice that the petitioner did not move an application before the trial Court seeking the opinion of a fingerprint expert. He has submitted that in the interest of justice the application be allowed and the opinion of fingerprint expert be called for.

8. Under the scheme of the Code, it is the trial Court, before whom, the parties are required to adduce their evidence, oral or documentary. However, under Section 107(1)(d), additional evidence can be adduced before the appellate court in three exceptional circumstances enumerated in Rule 27 of Order 41 of the Code. Rule 27 of Order 41 reads as under:

"27. Production of additional evidence in appellate court.--(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if--

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate court may allow such evidence or document to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission."

9. Power of the appellate court to pass any order under Rule 27 of Order 41 is limited. Clauses (a), (aa) and (b) of sub-rule (1) refer to three different situations. For exercising its jurisdiction thereunder, the appellate court must arrive at a finding that one or the other conditions enumerated

thereunder is satisfied. It is clear that parties to the lis are not entitled to produce additional evidence as a matter of course. Before a party is permitted to produce additional evidence under sub-clause (aa), it has to show a good reason as to why the evidence was not produced in the trial Court. It is well settled that the parties cannot be allowed to fill the lacunae at the appellate stage.

10. In *K.R. Mohan Reddy v. Net Work Inc., (2007) 14 SCC 257* the Apex Court has held as under:

"17. It is now a trite law that the conditions precedent for application of clause (aa) of sub-rule (1) of Rule 27 of Order 41 is different from that of clause (b). *In the event the former is to be applied, it would be for the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied.* On the other hand if clause (b) to sub-rule (1) of Rule 27 of Order 41 CPC is to be taken recourse to, the appellate court is bound to consider the entire evidence on record and come to an independent finding for arriving at a just decision; adduction of additional evidence as has been prayed by the appellant was necessary.

* * *

19. *The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties.* The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction."

11. In *N. Kamalam v. Ayyasamy, (2001) 7 SCC 503* the Apex Court while interpreting Rule 27 of Order 41 of the Code, observed as under:

"19. Incidentally, *the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal -- it does not authorise any lacunae or gaps in evidence to be filled up.* The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way." (emphasis supplied)

12. In *Union of India v. Ibrahim Uddin, (2012) 8 SCC 148* after a survey of a large number of cases the Apex Court held as under:

"36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. *The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence.* Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide *K. Venkataramiah v. A. Seetharama Reddy, Municipal Corpn. of Greater Bombay v. Lala Pancham, Soonda Ram v. Rameshwarlal and Syed Abdul Khader v. Rami Reddy.*)

37. The appellate court should not ordinarily allow new evidence to be

adduced in order to enable a party to raise a new point in appeal. Similarly, *where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (*Vide *Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co.)*

* * *

39. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the *absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide State of U.P. v. Manbodhan Lal Srivastava and S. Rajagopal v. C.M. Armugam.)*

40. *The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this Rule.* The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

(emphasis supplied)

13. These are the broad principles to be kept in view while dealing with an application under Order 41 Rule 27 of the Code.

14. In the present case, the contention of the petitioners was that the will deed was not executed by Bahadur and it did not contain his thumb impression. The petitioners had ample opportunity before the trial Court to adduce evidence in support of their contention. It was open to them to call for an expert opinion but the same was not done and their suit was dismissed on the ground that the petitioners were not able to establish their case. At the appellate stage, in the application moved by the petitioners under Order 41 Rule 27 of the Code the only reason for adducing additional evidence was that they were not aware of legal issue and their counsel never advised them to call for the opinion of fingerprint expert.

15. Admittedly, no application was moved by the petitioners before the trial Court to seek expert opinion. It cannot be said that the petitioners with due diligence could not have moved such an application to disapprove the thumb impression of Maggal over the will in question. In the instant case it was not as if the additional evidence was required by the Court to enable it to pronounce judgment and, therefore, additional evidence was sought to be adduced for "substantial cause' and in view of the settled legal proposition, lack of proper legal advice does not constitute a "substantial cause' to let the petitioners bring in additional evidence at this belated stage.

16. The burden of proving that the will deed was concocted and forged was on the petitioners and they ought to have taken steps to have the document examined by a fingerprint expert, to establish that the

disputed thumb mark on the will, was different from the admitted thumb mark of Bahadur. They failed to do so. The petitioners cannot be permitted to fill in the lacuna in their case.

17. The lower appellate court has elaborately considered the factual matrix and held that the petitioners have not satisfied any of the conditions stipulated under Order 41 Rule 27 and hence they are not entitled to produce additional evidence. The Additional District Judge has rightly dismissed the application moved on behalf of the petitioners.

18. There is no infirmity or illegality in the order impugned in this petition. The petition is devoid of merit and is accordingly dismissed.

(2020)03-05ILR A1509
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.03.2020

BEFORE

THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE KARUNESH SINGH PAWAR, J.

Misc. Bench No. 6823 of 2020

Smt. Shanti Devi & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Himanshu Raghave

Counsel for the Respondents:
C.S.C., A.S.G.

Civil law-Court cannot direct the State to legislate-not even indirectly-power exclusvely conferred on the legislators-no writ can be issued-W.P. dismissed. (E-9)

Cases cited:

1. Pravasi Bhalai Sangathan Vs. U.O.I. reported in AIR 2014 SC 1591

2. U.O.I. vs Prakash P. Hinduja & anr reported in AIR 2003 SC 2692

3. Suresh Seth Vs Commissioner, Indore Municipal reported in AIR 2006 SC 767

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard Sri Himanshu Raghav, learned counsel for the petitioner, Sri Rakumar Singh, learned counsel for respondent no. 1, and Sri Manish Mishra, learned counsel for respondent no. 2 and 3.

Through this writ petition the petitioners are praying following relief:-

(i) Issue an appropriate writ, order or direction thereby holding the omission to make any provision for enabling by State Government the restoration of property of senior citizens lost in deceptive transactions, ultra vires to Sub-section (2) of Section 22 of The Maintenance and Welfare of Parents and Senior Citizens Act, 2007;

(ii) Issue a writ, order or direction in the nature of mandamus or likewise thereby directing the State Government to restore the amount of money lost in the execution of fraudulent sale deed dated 15.01.2016 (Annexure No. 3) after recovering the same from the private opposite parties.

2. Brief facts of the case are that the petitioners are couple and senior citizens. The petitioner no. 2 retired in the year 2015 as driver from Public Works Department and as such he got certain post retiral dues. One Naresh Chand sold a piece of land

measuring 0.096 hectare from gata no. 365 situated in Village Mohammadpur Kala vide registered sale deed dated 15.01.2016. Consequently, his name came to be mutated in the revenue record. Thereafter opposite party no. 2 sold a piece of land measuring 0.243 hectare from gata No. 1262 situated at Village Chunka, Pargana and Tehsil Mohmoodabad, District Lucknow vide registered sale deed dated 15.01.2016 to petitioner no. 1 and on the basis of the said sale deed name his name was mutated in the revenue record on gata no. 1262.

3. It is contended that although the petitioners got possession of land gata no. 365, they were not allowed to get possession over gata no. 1262. Later on the petitioners were told that land pertaining to gata no. 365 had already been sold to opposite party no. 9 and the petitioners have not got the land on which they have spent all their money which they got as post retiral dues on the superannuation of the petitioner no. 2.

4. Aggrieved by this, the petitioners got an first information report dated 23.04.2017 registered vide case crime No. 143, under Sections 419/420/467/468/471 I.P.C., Police Station Mahmoodabad, District Sitapur. Regarding gata no. 1262, the petitioners filed regular suit no. 16 of 2018 "Smt. Shanti Devi Vs. Ram Naresh and Others" wherein learned Civil Judge (Senior Division) has passed order dated 16.01.2018 for maintaining of status quo till the next date. Thereafter, due to the ill health and old age of the petitioners, they could not do the pairavi in the civil suit and as such the interim order lapsed and the opposite parties took forcible possession on the land.

5. Learned counsel for the petitioners further submits that the petitioners have neither possession/ownership of the land nor the money they spent for the purchase of the same. They have been defrauded and they are forced to live under sub human conditions and the paltry pension available with petitioner no. 2 is highly insufficient to cater medical expenses, fooding clothing and day to day expenses. He further submits that the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 after receiving the assent of the President on 20.03.2007 was published in the gazetted of India on 31.12.2007. Section 22 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 Act mandates the State Government to prescribe the comprehensive action plan for providing protection of life and property of senior citizens. The Section 22 of the Maintenance and Welfare of Parents and Senior Citizens Act 2007 Act reads as under:-

"22 Authorities who may be specified for implementing the provisions of this Act.

(1) The State Government may, confer such powers and impose such duties on a District Magistrate as may be necessary, to ensure that the provisions of this Act are properly carried out and the District Magistrate may specify the officer, subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer as may be prescribed.

(2) The State Government shall prescribe a comprehensive action plan for providing protection of life and property of senior citizens."

6. It is also submitted that in exercise of powers and Section 22 of tthe Maintenance and Welfare of Parents and Senior Citizens Act 2007, the U.P. Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 have been framed. It is submitted that although chapter 6 of Rules 2014, there is explicit provision which protects the senior citizens by fraudulent transfers and enabling the restoration of the property of senior citizens if it is taken by way of deception otherwise than in due process of law. It is lastly submitted that the aforesaid enactment might serve better purpose if in Section 22 of the Act, 2007, the following provision is included:-

"(3) The State Government shall enable restoration of the property of senior citizens if taken away by way of deception, otherwise than in due process of law"

7. Learned counsel for the respondents have opposed the petition submitting that the petition contained disputed question of facts and even otherwise, this Court cannot direct the State Government to legislate.

8. Having considered the arguments of learned counsel for the parties and after pursuing the record, it appears that regarding part of gata no. 365 an F.I.R. has been lodged and regarding other sale deed pertaining to gata no. 1262 bearing regular suit no. 16 of 2018 "Smt. Shanti Devi Vs. Ram Naresh and Others" has been filed which appears to be pending, although the interim order granted on 16.01.2018 has lapsed.

9. Learned counsel for the petitioners submits that although regular suit is pending regarding gata no. 1262, however, considering the fact that the petitioners are senior citizens, ailing and are incapable in doing pairavi in the aforesaid regular suit, the amount of money lost in execution of the fraudulent sale deed dated 15.01.2016 contained in Annexure No. 3, may be restored in their favour after recovering the same from the private opposite parties.

10. From the record, it is evident that regular suit in respect of gata no. 1262, is already pending and law in this regard is settled that where a civil suit is pending respect of a lis writ petition is not maintainable. Even otherwise these are disputed question of facts which are pending adjudication before the learned civil court and therefore on this ground also the writ petition is not maintainable.

11. The petitioners by way of this writ petition are seeking a writ of mandamus directing the State Government to legislate for the restoration of the property of senior citizens if taken by way of deception for fraud and otherwise even in due process of law. Law in this regard is settled and therefore, this Court cannot direct to legislate. The Apex Court in ***"Pravasi Bhalai Sangathan v. Union of India reported in AIR 2014 SC 1591"*** has held that held that the our constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislators, the Court cannot re-writ, re-cast or re-framed the legislation for a very good reason that it has not power to legislate. the power to legislate has not been conferred on the courts. Likewise the court it is not have the powers to issue any direction to the legislators to enact any law in a particular manner.

12. The Apex Court has also considered this question in ***Union Of India***

vs Prakash P. Hinduja & Anr reported in AIR 2003 SC 2692 wherein it was held as under:-

"Under our constitutional scheme the Parliament exercises sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation."

13. In ***"Suresh Seth vs Commissioner, Indore Municipal reported in AIR 2006 SC 767"*** the Apex Court held as under:-

"The Court cannot issue any direction to the Legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation."

14. In view of the above, law laid down by the Apex Court it is clear that this Court cannot issue any mandamus directing the State legislature even indirectly to legislate that power being exclusively conferred on the legislators and no writ can be issued by this Court. Apart from the above, the writ petition contains disputed question of facts which cannot be adjudicated by this Court, accordingly, the same fails and is **dismissed**.

(2020)03-05ILR A1512
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.07.2017

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 16005 of 2017

Suresh Kumar & Ors. ...Petitioners
Versus
A.D.J. Court No. 1 Lko & Ors.
...Respondents

Counsel for the Petitioners:
Anurag Srivastava

Counsel for the Respondents:

Civil Law-Agreement to execute sale deed in favour of petitioner-suit filed by Petitioner-notice issued-respondent did not appeared-sale deed executed in favour of Petitioner exparte-Application filed for setting aside the ex parte judgment and decree-along with delay condone application-delay condoned-settled proposition-sufficient cause to be liberally construed-discretion should not be readily interfered-W.P. dismissed. (E-9)
Cases cited:

1. Salil Dutta Vs. TM & MC Pvt. Ltd., (1993) 2 SCC 185

2. Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd., (2003) 2 SCC 111

3. Deputy Collector, Northern SubDivision Panajii Vs. Comunidade of Bambolim, AIR 1996 SC 148

4. Ashok v. Rajendra 4 Bhausaheb Mulak, (2012) 12 SCC 27

5. N. Balakrishnan Vs. M. Krishnamurthy, (1998) 7 SCC 123

6. Bhagmal Vs. M.P. Cooperative Marketing and Consumer Federation Ltd., (2003) 11 SCC 727

7. Sarpanch, Lonand Grampanchayat Vs. Ramgiri Gosavi, AIR 1968 SC 222

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. Heard Sri Anurag Srivastava, learned counsel for the petitioners.

2. This petition under Article 227 of the Constitution has been filed challenging the order dated 15.11.2016 passed by the Additional District Judge, Court No. 1, Lucknow in Misc. Case No. 61 of 2010, Smt. Kaushalya Devi v. Suresh Kumar and others. Through this order dated 15.11.2016, the application for condonation of delay in filing the first appeal has been allowed and the delay in filing the said appeal has been condoned. The appeal was registered as RCA No. 18 of 2017 and an order dated 27.02.2017 was passed, whereby the said appeal has been admitted and the petitioners have been directed to file their objection. This order is also under challenge.

3. Few material facts relevant to appreciate the controversy at hand are as follows. The petitioners and Ram Kumari, respondent no. 4 herein, were the co-owners of the suit property situated at Gram Kakori, Pargana Kakori, Tehsil and District Lucknow. It appears that on the basis of an agreement to sell, alleged to have been executed by respondent no. 4 in their favour, the petitioners on 31.05.2006, filed a Regular Suit No. 443 of 2006 against the respondent no.4 in the Court of Civil Judge (Jr. Div.), Lucknow. Despite notice the respondent no. 4 did not appear in the said suit and the trial Court passed a judgment and decree dated 11.12.2007 directing the respondent no. 4 to execute a sale deed in favour of the petitioners in pursuance of the agreement to sell dated 06.06.2005, within one month or else the petitioners would have the right to get the sale deed executed in their favour through Court. After the expiry of the said period, the petitioners moved an application for execution before the Civil Judge which was numbered as Misc. Case No. 9 of 2008. Once more, the respondent no. 4 did not appear before the Court, and ultimately, on 01.10.2008, a sale deed was executed in favour of the petitioners with respect to half portion of the land in question and the same was registered before the Sub Registrar, Lucknow.

4. On 04.04.2009 the respondent no. 3 filed an application under Order 9 Rule 13 CPC along with an affidavit for setting aside the ex parte judgment and decree dated 11.12.2007 passed in Regular Suit No. 443 of 2006, before the Civil Judge (Jr. Div.), South, Lucknow. The said case was registered as Misc. Case No. 11-C/09, Kaushalya Devi v. Suresh Kumar and others. Along with the said application, the respondent no. 3 also filed an application under Section 5 of the Limitation Act supported by an affidavit praying for condonation of delay in filing the said application. On receiving notice, the petitioners appeared in the said case.

5. It was thereafter that the respondent no. 3 filed first appeal before the District Judge, Lucknow under Section 96 of CPC against the ex parte judgment and decree dated 11.12.2007 passed in Regular Suit No. 43 of 2006. Along with the said appeal, the respondent no. 3 also filed an application for condoning the delay under Section 5 read with Section 14 of the Indian Limitation Act supported by an affidavit. The said matter was registered as Misc. Case No. 61 of 2010. The petitioners filed objections to the application for condonation of delay.

6. On 15.11.2016, the Additional District Judge passed an order whereby the delay in filing the appeal has been condoned and the application for condonation of delay has been allowed. The relevant portion of the order is extracted below:-

"Learned counsel of applicant submitted the argument as per averment made in the application. Learned counsel

also submitted that when an exparte decree is passed, aggrieved person has two options; one to file an appeal and another to file an application under Order 9 Rule 13 CPC. He can take re-course both the proceedings simultaneously. The learned counsel placed reliance on "Bhanu Kumar Jain vs. Archana Kumar and Anr. (2005) 1 Supreme Court Cases page-787." The learned counsel also submitted that a fraud vitiates the proceedings and a decree obtained by fraud can be challenged by any person aggrieved. The learned counsel cited Suraj Dev Vs. Board of Revenue AIR 1982, Allahabad page-23. He further contended that if a counsel wrongly pursue a remedy under wrong Act, it will be a good ground to condone the delay in pursuing remedy under the correct provision. On this point learned counsel placed reliance on "Dy. Collector Vs. Comunidav.of Dambolin" AIR 1996 Supreme Court page-48.

Learned counsel for opposite party, in addition to the averment made in the objection, submitted that a third party, who is aggrieved with a decree, is entitled to file an application under Order 9 Rule 13 CPC. There is no sufficient ground to condone the delay in filing this Misc. Civil Appeal.

Applicant, who was not a party in the original suit No.443/2006 Suresh Kumar & Anr. vs. Ram Kumari, which has been decreed exparte against the defendant, has filed a civil appeal. As per report of the Munsarim, there is a delay of 788 days, so to Condone the delay the application U/S 5 Limitation Act has been moved and the ground taken is that on the wrong advice of the counsel applicant has preferred an application under Order 9 Rule 13 CPC instead of appeal, which is more accurate remedy in this matter. At this stage what is to be seen is that there is sufficient ground to condone the delay or not, the maintainability of the appeal and other grounds as taken by the parties are to be considered at the relevant stage. While disposing the application U/S 5 Limitation Act, it is established law that liberal view should be adopted and hard and technical approach should be avoided. It is also settled principle of law that a party should not suffer due to mistake of his counsel. So considering the entire facts and circumstances of the case, there appears to be sufficient ground to condone the delay and it will be just and proper to provide the opportunity, so that the matter can be decided on merits. To compensate the opposite party, adequate costs may be imposed.

Hence, application is liable to be allowed on costs."

7. The learned counsel for the petitioners has placed heavy reliance on a judgment of the Apex Court in *Salil Dutta v. TM & MC Private Limited, (1993) 2 SCC 185* to contend that mistake of a counsel cannot be accepted as sufficient cause for condonation of delay.

8. It is a settled principle of law that the ratio of any judgment should be understood in the background of the facts of that particular case, and a little difference in facts makes a huge difference in the precedential value of a judgment. (See *Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd., (2003) 2 SCC 111*).

9. It is in this light that the judgment cited by the petitioner is to be understood. On a perusal of the judgment rendered in *Salil Dutta (supra)*, it is noticed that the party seeking condonation of delay had alleged that its counsel had advised it that it need not appear at the stage of final

arguments in the suit. The Apex Court had come to a conclusion that this stance was built up on a fabricated story and that the said party was acting with malafide intent and was guilty of non-cooperation in court proceedings. These facts are starkly different from the facts of the case at hand.

10. In condoning the delay, the impugned order relies upon the Apex Court judgment in *Deputy Collector, Northern Sub-Division Panajii v. Comunidade of Bambolim, AIR 1996 SC 148* which has been further affirmed in *Ashok v. Rajendra Bhausaheb Mulak, (2012) 12 SCC 27* wherein the Apex Court has held as under:

"Whether or not an appeal was maintainable against the impugned order was and continues to be a highly debatable issue as seen in the foregoing paragraphs. The Petitioners appear to have been advised that the orders could be challenged only by way of SLPs. That advice cannot in the circumstances of the case, be said to be a reckless piece of advice nor can the Petitioners be accused of lack of diligence in the matter when the SLPs were admittedly filed within the period of limitation stipulated for the purpose. *The decision of this Court in Deputy Collector, Northern Sub-Division Panaji v. Comunidade of Bambolim, (1995) 5 SCC 333, recognizes a bonafide mistake on the part of the counsel in pursuing a remedy as a good ground for condonation of delay in approaching the right forum in the right kind of proceedings."* (emphasis supplied)

11. In light of the judgments discussed above, the conclusion of the learned Court below cannot be said to be an arbitrary or capricious exercise of the discretion vested in it under Section 5 of the Limitation Act.

12. It is also a settled proposition of law that the term "sufficient cause' should be liberally construed and that the discretion exercised by a Court should not be readily interfered with unless it is found to have been exercised in an arbitrary, capricious or perverse manner.

13. In *N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123* the Apex Court in paragraph nos. 9, 12 and 13 has held as under:

"9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. *Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse.* But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

* * *

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. *This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain v. Kuntal Kumari and State of W.B. v. Administrator, Howrah Municipality.*

13. *It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor.* But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss." (emphasis supplied)

14. To the same effect is the decision in *Bhagmal v. M.P. Cooperative Marketing and Consumer Federation Ltd., (2003) 11 SCC 727* wherein the Apex Court held as under:-

"3. Normally the High Court would be wary in interfering with an order passed in the exercise of a discretion conferred by law particularly when such discretion was exercised to enable a party to pursue his statutory remedy of appeal. No doubt the discretion has to be exercised judicially. There is again no doubt that the delay in filing the appeal was apparently very long. Nonetheless *the High Court in exercising writ jurisdiction should have been slow to upset a benefit granted to a party in having his statutory remedy to be pursued by condoning the delay albeit its length.*

and then

5. Whether those events were not sufficient for condoning the delay or not was considered by the appellate authority in exercise of its discretion and it showed inclination to accept them for condoning the delay. *As the appellate authority had done so in its discretion it is well within the jurisdiction vested under law. In such a situation it was not proper that the High Court in exercise of its extra-ordinary jurisdiction under Article 226 or 227 of the Constitution upset such a finding granted to the appellant which only enabled him to have the statutory remedy of appeal pursued further."*

(emphasis supplied)

15. In *Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi, AIR 1968 SC 222* the Apex Court while dealing with the power of the High Courts under Artile 227 of the Constitution, opined as under:

"... the High Court is vested with the power of judicial superintendence over the tribunal under Article 227 of the Constitution. This power is not greater than the power under Article 226 and is limited to seeing that the tribunal functions within the limits of its authority, see Nagendra

Nath Bora v. Commissioner of Hills Division and Appeals, Assam. *The High Court will not review the discretion of the Authority judicially exercised, but it may interfere if the exercise of the discretion is capricious or perverse or ultra vires. In Sitaram Ramcharan, etc. v. M.N. Nagarshana* this Court held that a finding of fact by the authority under the similarly worded second proviso to Section 15(2) of the Payment of Wages Act 1936 could not be challenged in a petition under Article 227. The High Court may refuse to interfere under Article 227 unless there is grave miscarriage of justice. (emphasis supplied)

16. This Court is unable to find any valid ground for interfering with the discretion exercised by the lower Court in condoning the delay in filing the appeal, and this petition challenging the orders dated 15.11.2016 passed in Misc. Case No. 61 of 2010 and order dated 27.02.2017 passed in RCA No. 18 of 2017 is accordingly dismissed in limine. All other questions or issues on merits and maintainability remain open to be raised in the appeal.

(2020)03-05ILR A1517
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2020

BEFORE

THE HON'BLE PIYUSH AGRAWAL, J.

S.C.C. Revision No. 130 of 2019

Jaiveer Sharma ...Revisionist
Versus
Saba Ara ...Respondent

Counsel for the Revisionist:
Sri Rahul Sahai

Counsel for the Respondent:
Sri Rajesh Kumar Mishra, Sri Mohd. Arif

A. Civil Law-Eviction of Tenant – Recovery of arrears – Evidentiary value of agreement, though unregistered and inadmissible in evidence – Held, said agreement can still be read for collateral purpose for providing the nature and character of the possession of the person occupying the premises thereunder – A person, who holds over the premises in question under an unregistered agreement and continues in possession, has to pay monthly rent holding over as a 'tenant' from month-to-month. (Para 8 and 9)

SCC Revision dismissed (E-1)

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Heard Shri Rahul Sahai, learned counsel for the revisionist - defendant and Mohd. Arif, learned counsel for respondent – plaintiff.

2. The present SCC revision is directed against the judgement & order dated 30.10.2019 passed by the Additional District Judge, Court No. 13/SCC Judge, Agra in SCC Case No. 01 of 2018; whereby, the the SCC suit filed by the respondent - plaintiff - landlord for recovery of arrears of rent and eviction of the petitioner - defendant - tenant from the property in dispute has been allowed.

3. It has been averred that the the respondent - plaintiff - landlord instituted an SCC Suit for payment of arrears of rent, ejectment and *mesne* profit. The respondent - plaintiff was running a hotel in the name of "Mumtaz Bila". On account of her going to Kuwait, she let out the hotel in question to the revisionists - defendant on 01.03.2016 determining the rate of rent for the first year at Rs. 5 lacs per annum; whereafter, the same was to be paid at the

rate of Rs. 50,000/- per month. It is further averred that Rs. 1 lac was paid, in cash, for the first year and remaining Rs. 4 lacs was paid through two separate cheques, of which the said cheques were bounced on 28.10.2016, which was declined to be honoured by the revisionist – tenant.

4. Accordingly, a notice dated 15.11.2017 was sent by the respondent - landlord terminating the tenancy of the revisionist - defendant. In spite of the service of notice, the revisionist - defendant - tenant failed to file any written statement. Accordingly, the matter was directed to be proceeded *ex parte* against the revisionist - defendant vide order dated 09.05.2018. The *ex parte* order dated 09.05.2018, was recalled on 02.04.2019. Vide order dated 21.05.2019, the revisionist - defendant was non-suited under Order VIII, Rule 10 CPC, as he failed to submit the written statement. After perusal of the records, the learned Additional District Judge, vide judgement & decree dated 30.10.2019, directed ejectement of the revisionist - defendant from the property in dispute, against which, the present revision has been filed by the defendant – revisionist.

5. Learned counsel for the revisionist - defendant submits that since the agreement, on the strength of which the tenancy is claimed by the respondent - plaintiff - landlord, is for a period of 10 years, but the same is an unregistered agreement under the Indian Stamp Act, 1899 and hence, the same cannot be read in evidence. It is further submitted that as per section 35 of the Indian Stamp Act, the agreement in question is not admissible in evidence. He further submitted that there was no occasion for the court below to non-suit the revisionist - defendant by adopting a procedure under Order VIII, Rule 10 of CPC against the revisionist – defendant.

6. Learned counsel for the respondent - plaintiff - landlord has defended the impugned order by contending that the order impugned has been passed in accordance with law and after following due process of law. He further submits that the revisionist - defendant has not denied, anywhere, that he has not taken the property in question to use the same as tenant on the basis of monthly rent to be paid by him, but in spite of the said fact, no payment of rent has been paid by the revisionist - defendant. Even the cheques, which were being given to the respondent, were bounced. Therefore, the revisionist - defendant was in default in making payment of rent of the property in dispute. It is further submitted that in spite of the notice having been served upon the revisionist - defendant, no payment of outstanding rent has been made and the revisionist has failed to brought on record any material to show that he had paid the rent from 01.03.2016.

7. The Court has perused the record.

8. It is admitted to the parties that the property in dispute was being used by the revisionist - defendant. Learned counsel for the revisionist has tried to bring to the notice of this Court that the agreement was for a period of 10 years, but the same was unregistered agreement, which is inadmissible in evidence under the provisions of the Indian Stamp Act. But the said agreement can still be read for colateral purpose for providing the nature and character of the possession of the person occupying the premises thereunder. The person, who holds over the premises in question under the unregistered agreement, has to pay monthly rent holding over as a tenant from month-to-month.

9. In the instant case, the agreement was for a period exceeding one year and therefore, the agreement, being

unregistered, is inadmissible in evidence, but the revisionist - defendant - tenant has not disputed that he is occupying the premises in question. A person, who holds over under an unregistered agreement and continues in possession, has to pay monthly rent holding over as a "tenant" from month-to-month.

10. The revisionist - defendant has utterly failed to bring on record the documents showing the payment of month-to-month rent of the premises in question. Only a bald averment has been made with regard to payment of rent in cash. It has come on record that the revisionist - defendant is in occupation of the premises in question without paying rent and the same is still outstanding.

11. In view of the aforesaid facts and circumstances of the case, the impugned judgement & decree does not suffer from any illegality and hence, no interference is called for by this Court.

12. The SCC revision is, accordingly, dismissed.

(2020)03-05ILR A1519
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.01.2020

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application U/S 482/378/407 Cr.P.C. No. 61 of 2020

Virendra Goel ...Applicant
Versus
Union of India ...Opposite Party

Counsel for the Applicant:
Anuuj Taandon, Purnendu Chakravarty

Counsel for the Opposite Party:
A.S.G., Shiv P. Shukla

(A) Criminal Law- Prevention of Money Laundering Act, 2002 (PMLA) - Section 3/4 - Section 19 -Code of criminal procedure, 1973 - Sections 482 - Inherent jurisdiction - the - power to arrest - Section 44(1)(C) – offence triable by Special courts - Section 45 - Offence be cognizable and non - bailable - Section 88 Cr.P.C. – power to take bond for appearance - does not confer any right on the accused to enforce for accepting the bond - confer a discretion on the Court concerned whether to accept bond from the accused or from a person appearing in the Court or not - Prevention of Corruption Act, 1988 (PC) - Section 13(2) read with Section 13(1)(d) - Indian Penal Code, 1860 - Sections 120-B and 409 IPC - application of an accused in the case relating to PML Act - in respect of granting bail or furnishing bond - has to be considered in accordance with the provisions contained in the CrPC - applications of the petitioner and other co-accused for releasing them on furnishing bonds – rejected - no error in the impugned order. (Para-27,31,33)

The petitioner and other co-accused moved an application before Sessions Judge/Special Judge, PMLA for allowing them to furnish bonds to the satisfaction of the PMLA Court in Complaint Case instead of taking them in custody and dealing with their bail applications etc. - learned Special Judge rejected the applications of the petitioner and other co-accused for releasing them on furnishing bonds - accused were issued summon for appearance under Section 3/4 of the Prevention of Money Laundering Act, 2002 - they did not appear - issued non-bailable warrants . (Para-1,2)

HELD:- A person accused of the offences under Section 3/4 PML Act, has been issued summon or warrant to appear before the Court, is not a ''free agent', and mere fact that he has

been granted bail by the Court in predicate/schedule offence(s), and he was not arrested by the Enforcement Directorate under Section 19 during the course of investigation are only factors to be considered at the time of considering the bail application of the accused by the PMLA Court, but it would not be correct to say that he is a "free agent" and, therefore, his bond should be accepted and he is not required to apply for regular bail - accused are trying to delay the trial- Special Judge, PMLA, should take all necessary steps for their appearance before the Court and early conclusion of the trial.
(Para-31,33)

Petition u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Babu Lal & ors. Vs. Smt. Momina Begum, Criminal Misc. Application No.8810 of 1989

2. Parasnath Dubey & ors. Vs. St. of U.P. & ors., Criminal Misc. Application No.8811 of 1989

3. Anand Deo Singh Vs. St. of Bihar, 2000 SCC OnLine Pat 311

4. Sanjay Chandra Vs. CBI, 2011 OnLine Del 2365

5. Pankaj Jain Vs. U.O.I & anr., 2018 (5) SCC 743;

6. Arun Sharma Vs. U.O.I., 2016 SCC Online P&H 5954;

7. Madhu Limaye & anr. Vs. Ved Murti & ors., 1971 AIR 2486;

8. Nikesh Tarachand Shah Vs. U.O.I. & anr., (2018) 11 SCC Page-1.

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

1. This petition under Sections 482 of the Code of Criminal Procedure, 1973 has been filed, impugning the order dated 12th November, 2019 passed by the Sessions Judge/Special Judge, PMLA, Lucknow on applications filed by the petitioner and other co-accused for allowing them to furnish bonds to the satisfaction of the PMLA Court in Complaint Case No. 9 of 2017 instead of taking them in custody and dealing with their bail applications etc.

2. The petitioner and other co-accused had been summoned for 29.01.2018 by the Court for appearance and participation in trial for offences under Section ¾ of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as the "PML Act'). The petitioner and other co-accused did not appear in person on 29.01.2018 in compliance of summoning order before the Court, however, their counsels appeared on the date fixed, and sought sometime to file applications necessary for putting appearance and furnishing bonds etc. on the ground that the petitioner and other co-accused were already released on bail in schedule offence(s), and they had not misused the liberty.

It was further contended that the Enforcement Directorate did not arrest the petitioner during the investigation under Section 19 PML Act. It was also contended that the trial of schedule offence(s) as well as offence(s) under PML Act should be jointly conducted by the Court as provided under the provisions of Section 44(1)(C) PML Act. The Special Court, however, vide order dated 29th January, 2018 did not grant any relief, as prayed for, and issued non-bailable warrants against the petitioner and other accused.

3. The petitioner, instead of appearing before the Special Court, approached this Court by way of filing Petition No. 509 of 2018 under Section 482 CrPC, praying therein that the proceedings of Complaint

Case No. 9 of 2017 initiated by the Enforcement Directorate before the Special Judge, PMLA/Sessions Judge, Lucknow be quashed, and secondly that the petitioner should be directed to furnish personal bond to the satisfaction of the Court concerned in the aforesaid complaint case, and the Court be directed to accept the same. However, during the course of arguments, the first prayer was not pressed.

4. This Court, vide order dated 13th February, 2018, without expressing its opinion on merit of the case, disposed of the said 482 petition, providing the petitioner to move an application before the learned Special Judge, PMLA through counsel within a week under Section 88 CrPC read with Section 45 PML Act, and, it was provided that the learned Special Judge should deal with the application strictly in accordance with law.

It was further provided that till the decision on the said application, non-bailable warrant issued against the petitioner vide order dated 29th January, 2018 would not be given effect to.

5. Pursuant to the aforesaid opportunity granted by this Court, the petitioner and other co-accused moved applications before the Special Judge, PMLA, Lucknow, praying therein that the Special Court should accept the bonds or personal bonds under the provisions of Section 88 CrPC read with Section 45 PML Act.

6. The Sessions Judge/Special Judge, PMLA, vide impugned order dated 12th November, 2019 has dismissed the applications filed by the petitioner and other co-accused in the light of judgment dated 23rd March, 2006 passed by the Division Bench of this Court in Criminal Misc. Application No.8810 of 1989 *"Babu Lal and others Vs. Smt. Momina Begum'* and Criminal Misc. Application No.8811 of 1989 *"Parasnath Dubey and others Vs. State of U.P. and others'*. This Court had issued Circular Letter No.33 of 2006 dated 7thAugust, 2006, circulating the judgment dated 23rd March, 2006 for its strict compliance. The relevant portion of the judgment dated 23rd March, 2006, which is contained in the Circular Letter No. 33 of 2006 dated 7th August, 2006 has been reproduced by the learned Special Judge in the impugned order.

7. The Division Bench of this Court, in the aforesaid judgment, had held that in cases which were governed by Sections 436 and 437 CrPC, the provisions of Section 88 CrPC would not be applicable for the reason that Section 436 and 437 CrPC are specific provisions which deal with particular kind of cases, whereas scope of Section 88 CrPC is much wider. The case, in which Section 436 CrPC is applicable, an accused has to appear before the Court, and thereafter, only the question of granting bail would arise. It had been further held that where summon or warrant to an accused was issued, the procedure under Section 436 and 437 CrPC would be necessarily followed, and summon or warrant, as the case may be, had to be executed and honoured.

8. The learned Special Judge, PMLA, in the impugned order has further held that the cases relating to schedule offence(s) and offence(s) under PML Act are mutually exclusive and, therefore, the benefit given in schedule offence(s) cannot be extended to the offence(s) of money laundering. The Special Judge has, thus, rejected the applications filed by the petitioner and other co-accused.

9. The proceedings of Complaint Case No. 9 of 2017 pending before the Special Judge, PMLA, Lucknow relates to a mega scam of several hundred crores known as National Rural Health Mission (hereinafter referred to as "NRHM") scam in Uttar Pradesh.

10 Allegation, against the petitioner and other co accused, is that they were involved a criminal conspiracy and in furtherance thereto they misappropriated an amount of Rs. 2.94 Crores approximately in supplying computers and peripherals by M/s HCL Infosystems Limited, Lucknow to NRHM.

11. The CBI had registered an FIR on 2nd January, 2012 under Sections 120-B and 409 IPC and Section 13(2) read with Section 13(1)(d) Prevention of Corruption Act, 1988 (hereinafter referred to as "PC Act') against the petitioner and other co-accused. The FIR was registered by the CBI in compliance of the order dated 15th November, 2011 passed by this Court in Writ Petition No. 3611 (M/B) of 2011 (PIL) and connected Writ Petition No.2647 (M/B) of 2011 (PIL).

12. In sum and substance, allegations are that Mr. G.K. Batra, the then Managing Director, Shreetron India Limited, Lucknow, a subsidiary of U.P. Electronic Corporation Limited (a State Government Undertaking), Mr. Virendra Goel, the present accused, proprietor of M/s Axis Marketing, New Delhi, Mr. Neeraj Upadhyay, Proprietor of M/s Radhey Shyam Enterprises, Lucknow and Mr. Avichal Mishra, Executive of M/s HCL Infosystems Limited, Lucknow and other unknown persons entered into a criminal conspiracy and in furtherance thereto misappropriated an amount of Rs.2.94 Crores by showing undue favours to private firms.

13. In pursuance of the tendered notice, three firms viz. M/s HCL Infosystems Limited, Lucknow, M/s Axis Marketing, New Delhi and M/s Radhey Shyam Enterprises, Lucknow submitted their bids, which were opened on 7th August, 2009. The lowest bidder was M/s HCL Infosystems Limited, Lucknow and, thus, the work of supplying computers and peripherals was given to M/s HCL Infosystems Limited, Lucknow. Strangely enough, after getting the order for supplying the computers and peripherals, the HCL Infosystems Limited, Lucknow informed that supply would be made through M/s Axis Marketing, New Delhi and M/s Radhey Shyam Enterprises, Lucknow, and both the firms would supply 50% each of the items. Shreetron India Limited made the total payment of Rs.7.49 Crores to M/s Axis Marketing, New Delhi and M/s Radhey Shyam Enterprises, Lucknow. However, the said two firms made payment of only Rs.4.55 Crores to M/s HCL Infosystems Limited and they, caused a pecuniary loss of Rs.2.94 Crores to the NRHM scheme. These accused had misappropriated balance amount of Rs.2.94 Crores.

14. Investigation under the provisions of PML Act was undertaken by Enforcement Directorate vide order dated 14th April, 2012 to investigate the offence of money laundering with reference to predicate offence(s) initiated vide FIR dated 2nd January, 2012 registered by the CBI in which the CBI had filed charge-sheet against four accused.

15. The investigation under the PML Act pertained to generation of proceeds of

crime by causing wrongful loss of Central Government funds allotted under the National Rural Health Mission Scheme in supply of 951 computers and peripherals through M/s Shreetron India Limited at an exorbitant price. The investigation under the PML Act has revealed that a sum of Rs.1,29,21,903/-, which is the "proceeds of crime' in terms of Section 2(1)(u) o PML Act, was in possession of Mr. V.K. Batra, son of Late G.K. Batra, Mr. Virendra Goel, Smt. Nidhi Upadhyay, wife of Mr. Neeraj Upadhyay and Mr. Neeraj Upadhyay.

16. The assets acquired by the aforesaid persons from the "proceeds of crime" were attached vide order dated 15thJanuary, 2015.

17. After investigation, a complaint case was filed, which is Complaint Case No. 9 of 2017 pending before the Sessions Judge/Special Judge, PMLA, Lucknow.

18. Heard Mr. Purnendu Chakravarty, learned counsel representing the petitioner, as well as Mr. Shiv P. Shukla, learned counsel representing the respondents.

19. Learned counsel for the petitioner has submitted that Section 45 PML Act provides for release of an accused on bail or on his own bond. The release of any accused on bond has been incorporated under section 45 of the PML Act because if the accused would be on bail in the schedule offence(s) and, the complaint by the Enforcement Directorate is filed under the PML Act in respect of the same predicate offence, no purpose would be served in sending the accused in custody for offences under PML Act and, under these circumstances the accused should be released on bond. He has submitted that circumstance for release on bond under Section 45 PML Act would be that if the Enforcement Directorate did not arrest the accused under Section 19 PML Act during the course of investigation and in the predicate offence(s) accused is on bail, then the accused should be released on bond inasmuch as custody of the accused would not be required during trial and, therefore, no purpose would be served by sending the accused in jail and, then he would be required to apply for regular bail. The learned counsel has placed reliance on the following judgments in support of his contentions:-

i) ***Pankaj Jain Vs. Union of India and another, 2018 (5) SCC 743;***

ii) ***Arun Sharma Vs. Union of India, 2016 SCC Online P&H 5954;***

iii) ***Madhu Limaye and another Vs. Ved Murti and others, 1971 AIR 2486;***

Besides, ***Nikesh Tarachand Shah Vs. Union of India and another (2018) 11 SCC Page-1.***

20. The learned counsel for the petitioner has further submitted that as per Section 44 (1)(C) PML Act trials of cases in relation of predicate offence(s) and offence(s) under the PML Act are to be conducted by the same Court.

21. Per contra, Mr. Shiv P. Shukla, learned counsel appearing for the Enforcement Directorate, has submitted that the offence(s) under the PML Act are cognizable and non-bailable. He has submitted that a person, who is facing trial for non-bailable offence(s), cannot be released on furnishing bond. The learned counsel has further submitted that the judgment of the Punjab-Haryana High Court in *Arun Sharma Vs. Union of India* has been held to be not correctly decided by the Supreme Court in its judgment in the

case of *Pankaj Jain Vs. Union of India and another (supra).*

22. The learned counsel for the Enforcement Directorate has further submitted that Section 88 CrPC confers discretion on the Presiding Officer of the Court. Section 88 CrPC does not confer any enforceable right to an accused that he must be released on furnishing bond. The predicate/schedule offence(s) and offence(s) under the PML Act are mutually exclusive. An accused does not become entitled automatically to be released on furnishing bond if the Court has granted him bail in schedule offence(s). Further Section 44 PML Act provides for transfer of trial of case under predicate offence to the Court of Special Judge on an application by the prosecution. It does not give any right to the accused to ask for transfer of the case under predicate offence(s) before the Special Judge. It is for the prosecution to decide whether it would be appropriate, convenient and in the interest of justice that the trial of schedule offence(s) and offence(s) under PML Act should be held by the same Court or not. The learned counsel has further submitted that the fact that the petitioner had been granted bail in the predicate offences by the concerned Court, and he was not arrested under Section 19 PML Act during the course of investigation would be the circumstances to be considered while deciding the bail application, but these factors do not confer a right to an accused to be released on furnishing bond or he should be allowed to furnish bond.

23. I have considered the submissions advanced by the counsels representing the respective parties and perused the record.

24. The question, which falls for consideration, is whether an accused facing trial for offences under the provisions of Section ¾ PML Act is entitled to be released on furnishing bond under Section 45 PML Act read with Section 88 Code of Criminal Procedure if he has been granted bail in the predicate/schedule offence(s) and, he was not arrested under Section 19 PML Act during the course of investigation by the Enforcement Directorate. Section 45 PML Act provides that the offences under the PML Act are cognizable and non-bailable.

25. The Supreme Court in *Nikesh Tarachand Shah Vs. Union of India's* case (supra) had struck down the two conditions mentioned in section 45 for grant of bail i.e. the Public Prosecutor has to be given an opportunity to oppose an application for release on bail and the Court must be satisfied where the Public Prosecutor opposes the application that there are reasonable grounds for believing that the accused is not guilty of such offence(s) and that he is not likely to commit any offence while on bail. Para-54 of the aforesaid judgment, on reproduction, reads as under:-

"54.Regard being had to the above, we declare Section 45(1) of the Prevention of Money-Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. All the matters before us in which bail has been denied, because of the presence of the twin conditions contained in Section 45, will now go back to the respective courts, which denied bail. All such orders are set aside, and the cases remanded to the respective courts to be heard on merits, without application of the twin conditions contained in Section 45 of the 2002 Act. Considering that the persons are languishing in jail and that personal liberty is involved, all these matters are to be taken up at the earliest by the respective courts for fresh decision. The writ petitions

and the appeals are disposed of accordingly."

The aforesaid decision has no bearing to the controversy involved in the present case.

26. Section 45 PML Act of post decision in Nikesh Tarachand Shah reads as under:-

"45. Offences to be cognizable and non-bailable.--(1) [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence 107 [under this Act] shall be released on bail or on his own bond unless--]

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

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

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm [or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees], may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by--

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

[(1-A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.]

(2) The limitation on granting of bail specified in [* *] sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.*

[Explanation.--For the removal of doubts, it is clarified that the expression "Offences to be cognizable and non-bailable" shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfilment of conditions under Section 19 and subject to the conditions enshrined under this section.]"

27. Section 46 PML Act provides that the provisions of CrPC, including the provisions as to the bails or bonds, shall apply to the proceedings before Special Court and for the purposes of such provisions, the Special Court shall be deemed to be a Court of Session. Section 65 PML Act further provides that the provisions of CrPC shall apply in so far as they are not inconsistent with the provisions of this Act, in arrest, search, seizure, attachment, confiscation, investigation and prosecution and all other proceedings under this Act. Thus, from a conjoint reading of Section 45, 46 and 65 PML Act, it is clear that the provisions of the CrPC would be applicable in the proceedings before the Special Court, including the provisions of bails or bonds

and also would be applicable in respect of arrest, search, seizure, attachment, confiscation, investigation and prosecution and all other proceedings under this Act. Thus, the provisions of CrPC have been made applicable even in respect of granting bail or furnishing bond, as the case may be. The application of an accused in the case relating to PML Act has to be considered in accordance with the provisions contained in this regard in the CrPC. Section 88 CrPC reads as under:-

*"**Section 88.** Power to take bond for appearance. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial."*

28. The Supreme Court had an occasion to consider Section 91 of CrPC, 1898 similar to provisions of Section 88 new Code of 1973 in *Madhu Limaye and another Vs. Ved Murti and others* (supra) 1970 (3) SCC 739. The following observations were made in context of Section 91:-

".....In fact section 91 applies to a person who is present in Court and is free because it speaks of his being bound over, to appear on another day before the Court. That shows that the person must be a "free agent" whether to appear or not. If the person is already under arrest and in custody, as were the petitioners, their appearances depended not on their own volition, but on the volition of the person, who had his custody..... ."

29. The Punjab-Haryana High Court in *Arun Sharma Vs. Union of India*, relying on the said observations of the Supreme Court in the case of *Madhu Limaye and another*, has held that in a situation where the accused were not arrested under Section 19 of the PML Act during the course of investigation and were not produced in custody for taking cognizance, Section 88 CrPC shall apply upon appearance of the accused person on their own volition before the trial Court to furnish bonds for their appearance.

30. A person, who has been issued summon or warrant to appear before the Court, cannot be said to be a "free agent'. The Supreme Court in *Pankaj Jain Vs. Union of India and another* (supra) has dealt with the judgment of the Punjab-Haryana High Court in paras-27 to 29, and in para-29 it has held as under:-

"29.In the Punjab & Haryana case, the High Court has relied on judgment of this Court inMadhu Limayev.Ved Murti[Madhu Limayev.Ved Murti, (1970) 3 SCC 739] and held that Section 88 shall be applicable since accused were not arrested under Section 19 of PMLA during investigation and were not taken into custody for taking cognizance. What the Punjab & Haryana High Court missed, is that this Court in the same paragraph had observed "that shows that the person must be a free agent whether to appear or not". When the accused was issued warrant of arrest to appear in the court and proceeding under Sections 82 and 83 CrPC has been initiated, he cannot be held to be a free agent to appear or not to appear in the court. We thus are of the view that the Punjab & Haryana High Court has not correctly applied Section 88 in the aforesaid case."

31. The Supreme Court in the aforesaid judgment has also held that the words used in Section 88 confer a discretion on the Court concerned whether to accept bond from the accused or from a person appearing in the Court or not. This Section does not confer any right on the accused to enforce for accepting the bond. Thus, since the judgment of the Punjab-Haryana High Court in *Arun Sharma*, (supra) does not lay down correct law, the petitioner ca not claim benefit of the same. A person accused of the offences under Section 3/4 PML Act, has been issued summon or warrant to appear before the Court, is not a "free agent', and mere fact that he has been granted bail by the Court in predicate/schedule offence(s), and he was not arrested by the Enforcement Directorate under Section 19 during the course of investigation are only factors to be considered at the time of considering the bail application of the accused by the PMLA Court, but it would not be correct to say that he is a "free agent" and, therefore, his bond should be accepted and he is not required to apply for regular bail.

32. Provisions to bail and bond are provided in Chapter-XXXIII of the Cr.P.C. The special provisions contained in Chapter-XXXIII of the Code cannot be made to rendered otiose by interpreting general provision of Section 88 of the Code. When a person is accused of cognizable and non-bailable offence, his bail application has to be dealt with the provisions contained in Chapter XIII of the Code. The Supreme Court in *Pankaj Jain Vs. Union of India* (supra) in paras-24 and 25 has approvingly quoted the judgments of Delhi High Court in ***Sanjay Chandra Vs. CBI, 2011 OnLine Del 2365*** and Patna High Court in ***Anand Deo Singh Vs. State of Bihar, 2000 SCC OnLine Pat 311***, which are reproduced hereunder:-

"24. Another judgment of the Delhi High Court in Sanjay Chandra v. CBI [SanjayChandra v. CBI, 2011 SCC OnLine Del 2365] decided on 23-5-2011 supports the submission raised by the learned Additional Solicitor General that power under Section 88 CrPC, the word "may" used in Section 88 CrPC is not mandatory and is a matter of judicial discretion. Paras 20, 21 and 22 of the judgment are to the following effect: (SCC OnLine Del)

"20. Learned Shri Ram Jethmalani and learned Shri K.T.S. Tulsi, Senior Advocates appearing for accused Sanjay Chandra, learned Shri Mukul Rohatgi, Senior Advocate appearing for accused Vinod Goenka, learned Shri Soli Sorabjee and learned Shri Ranjit Kumar, Senior Advocates appearing for accused Gautam Doshi, learned Shri Rajiv Nayar, Senior Advocate appearing for accused Hari Nair and learned Shri Neeraj Kishan Kaul, Senior Advocate appearing for accused Surendra Pipara, at the outset, have contended that the order of learned Special Judge dated 20-4-2011 rejecting the bail of the petitioners is violative of the mandate of Section 88 CrPC. It is contended that admittedly the petitioners were neither arrested during investigation nor were they produced in custody along with the charge-sheet as envisaged under Section 170 CrPC. Therefore, the trial court was supposed to release the petitioners on bail by seeking bonds with or without sureties in view of Section 88 CrPC. Thus, it is urged that on this count alone, the petitioners are entitled to bail.

21. The interpretation sought to be given by the petitioners is misconceived and based upon incorrect reading of Section 88 CrPC, which is reproduced thus:

*''88. **Power to take bond for appearance.**--When any person for whose*

appearance or arrest the officer presiding in any court is empowered to issue a summons or warrant, is present in such court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such court, or any other court to which the case may be transferred for trial.'

22. On reading of the above, it is obvious that Section 88 CrPC empowers the court to seek bond for appearance from any person present in the court in exercise of its judicial discretion. The section also provides that aforesaid power is not unrestricted and it can be exercised only against such persons for whose appearance or arrest the court is empowered to issue summons or warrants. The words used in the section are "may require such person to execute a bond" and any person present in the court. The user of word "may" signifies that Section 88 CrPC is not mandatory and it is a matter of judicial discretion of the court. The word "any person" signifies that the power of the court defined under Section 88 CrPC is not accused specific only, but it can be exercised against other category of persons such as the witness whose presence the court may deem necessary for the purpose of inquiry or trial. Careful reading of Section 88 CrPC makes it evident that it is a general provision defining the power of the court, but it does not provide how and in what manner this discretionary power is to be exercised. The petitioners are accused of having committed non-bailable offences. Therefore, their case for bail falls within Section 437 of the Code of Criminal Procedure which is the specific provision dealing with grant of bail to an accused in cases of non-bailable offences. Thus, on conjoint reading of Sections 88 and 437 CrPC, it is obvious that Section 88 CrPC is not an independent section and it is subject to Section 437 CrPC. Therefore, I do not find merit in the contention that order of the learned Special Judge refusing bail to the petitioners is illegal being violative of Section 88 CrPC."

25. Another judgment which is relevant in this context is the judgment of the Patna High Court in Anand Deo Singh v. State of Bihar [Anand Deo Singh v. State of Bihar, 2000 SCC OnLine Pat 311 : (2000) 2 PLJR 686] . The Patna High Court had the occasion to consider Section 88 CrPC where in para 18, following has been held: (SCC OnLine Pat)

"18. In my considered view, Section 88 of the Code is an enabling provision, which vests a discretion in the Magistrate to exercise power under the said section asking the person to execute a bond for appearance only in bailable cases or in trivial cases and it cannot be resorted to in cases of serious offences. Section 436 of the Code itself provides that bond may be asked for only in cases of bailable offences."

33. In view of the aforesaid discussions, I do not find that the learned Special Judge has committed any error in passing the impugned order and rejecting the applications of the petitioner and other co-accused for releasing them on furnishing bonds. The accused are not "free agents' as they were issued summon for appearance on 29th January, 2018 and when they did not appear, they had been issued non-bailable warrants vide order dated 29th November, 2018. The accused are trying to delay the trial and, therefore, it is provided that the Special Judge, PMLA, Lucknow should take all necessary steps for their appearance before the Court and early conclusion of the trial.

34. This petition stands ***dismissed***.

35. Let a copy of this order be transmitted to the Sessions Judge/Special Judge, PMLA, Lucknow forthwith.

(2020)03-05ILR A1529
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 98 of 2020

Ali Jan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Pavan Kishore, Sri Piyush Kishore Srivastava

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

(A) CriminalLaw- Negotiable Instrument Act- Section 138 Code of Criminal Procedure, 1973 - Section 482 - Inherent jurisdiction - Negotiable Instruments Act, 1881 - Section 138 – complaint is maintainable under only when it is filed after due service of notice as contemplated under Section 138 N.I. Act.(Shakti Travel and Tours v. State of Bihar ,*2002 (9) SCC 415)* (Para-5)

Notice dated 7th October, 2016 - sent by registered post - no whisper regarding effective service of notice at the end of the complainant in the complaint - complainant has not mentioned as to when he received back envelop containing notice - whether after receiving envelop back he had made complaint or prior to that - In the absence of any such mention in complaint itself - no inference of effective service and requirement of 15 days prior notice can be presumed to have been complied with - pre-condition as contained under Section 138 N.I. Act has remained uncomplied with .
(Para – 4,11)

HELD:- If the service is refused or service by absence could not be made effective, service could be deemed sufficient as per law, but in any case 15 days time prescribed by law should always be fulfilled to maintain complaint under section 138 of N.I.Act, 1881.(Para-13)

Application u/s 482 Cr.P.C. allowed. (E-7)

List Of Cases Cited:-

1. Shakti Travel and Tours v. St. of Bihar , 2002 (9) SCC 415,

2. Deepak Kumar & anr. Vs. St. of U.P. & anr, 2006 (8) ADJ, 427

3. Nawab Singh Vs. St. of U.P. & Anr., Application U/S 482 No. 2604 of 2020

4. Chand Mohd v. St. of U.P, (All) 2017 5 308

5. Yogendera Pratap Singh v. Savitri Pandey & anr., 2014 LawSuit (SC) 793

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

1. Heard Sri Pavan Kishore and Mr. Piyush Kishore Srivastava, learned counsel for the applicant and learned A.G.A. for the State.

2. Learned counsel for the applicant and the learned A.G.A. agree that the present application may be disposed of at this stage without calling for further affidavits in view of the order proposed to be passed today.

3. By means of this 482 Cr.P.C. application, the applicant has questioned summoning order dated 8th March, 2017 as well as the proceedings of complaint case

under Section 138 of Negotiable Instrument Act, 1881 (hereinafter referred to as "N.I. Act") registered as Complaint Case No. 846 of 2016 (Ayub Hasan Vs. Master Ali Jan), pending in the court of learned Judicial Magistrate, Garh Mukteshwar, Hapur.

4. Learned counsel for the applicant has argued that it is admitted case of the opposite party no. 2 that though, the opposite party no. 2 has sent a notice dated 7th October, 2016, but the service of notice has not been effected and therefore, the complaint which has been filed on 7th November, 2016, is not maintainable as the time period of 15 days cannot be calculated as to when the notice has been given to opposite party no. 2. He has also submitted that there is no whisper about service of notice sent on 7th October, 2016. Under the circumstances, pre-condition as contained under Section 138 N.I. Act has remained uncomplied with and, therefore according to him, proceedings are clearly not maintainable under the Negotiable Instruments Act, 1881.

5. Learned counsel for the applicant has relied upon the judgment of the Apex Court in the Case of **Shakti Travel and Tours v. State of Bihar** reported in *2002 (9) SCC 415,* wherein the Supreme Court has very categorically held that complaint is maintainable under Section 138 of Negotiable Instrument Act, only when it is filed after due service of notice as contemplated under Section 138 N.I. Act.

6. Learned counsel for the applicant has further placed reliance upon the judgment of Single Judge of this Court in the case of **Deepak Kumar and Another v. State of U.P. and Another,** reported in *2006 (8) ADJ, 427,* wherein this Court has very categorically held that service of notice is pre-condition to maintain a complaint under Section 138 of the N.I. Act. Considering in detail meaning of effective service of notice prescribed as pre-condition to maintain the complaint, the Court vide para 9 and 10 held thus:

"9. Pondering over the rival contentions, I find that there is substance in the submissions raised by the counsel for the applicant. As a fact, neither in the complaint, nor in statement under Section 200, Cr. P.C. nor in the counter-affidavit any date of service on notice demanding repayment of cheque money from the applicants is mentioned. No document was also appended along with the complaint so as to indicate the said date. Even during the course of argument, the counsel for the respondent-complainant could not point out the date of service of such notice. Thus, in the total absence of date of service of notice demanding payment of the cheque amount, no offence is made out against the applicants. Moreover, it cannot be said that any such notice was ever served on the applicants and consequently fifteen days period for making the payment of the cheque money cannot be counted and unless that is done no offence is made out against the applicants. The contention of respondent-complainant that the service is to be presumed as also cannot be accepted because Section 27 of General Clauses Act does not take into its purview service by private courier. For a proper understanding of this submission Section 27 of the General Clauses Act is quoted below:--

"Meaning of Service by post-- Where any (Central Act) or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression

"serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

10. Thus, the wordings of Section 27 of the General Clauses Act clearly indicates that this section deals only with service by "Post' and that too "registered service" when such a service is contemplated by the Act itself. Attour. no other mode of service is embraced in Section 27. The condition precedent for the applicability of this section are firstly, that the service must be provided by the Act itself and secondly, that such "service shall be deemed to be affected by properly addressing, pre-paying and posting by registered post" (Emphasis mine). Unless the twin conditions are satisfied Section 27 of the General Clauses Act will not apply. In the present case the second condition is not satisfied and therefore the service of notice on the applicants cannot be presumed. Since the legislature has kept service by private courier outside the purview of the Section 27 of the General Clauses Act, therefore the Courts cannot implant such presumption of service into that section and rightly so because private courier services are privately run businesses without any authenticity of service. (Emphasis mine) consequently, the contention of the learned counsel for the applicant that the service should be presumed in the present case cannot be accepted as it does not hold good on the provision of the statute itself and has to be rejected. Resultantly, the submission of the counsel for the applicant that in the present case no offence is made out holds good and deserves to be accepted and I hold so."

7. Learned counsel for the applicant has also placed reliance upon the judgment of this Bench in the case of **Nawab Singh Vs. State of U.P. & Another** (Application U/S 482 No. 2604 of 2020, decided on 21st January, 2020).

8. Countering the argument, learned A.G.A. has submitted that condition of service of notice virtually stands complied with. In support of his submission, the learned A.G.A. has placed relinace upon the judgment of Single Judge of this Court in the case of **Chand Mohd v. State of U.P,** reported in Laws (All) 2017 5 308. In paragraph nos. 19 and 20, the learned Single Judge has held thus:

"19. Perusal of Section 27 of the General Clauses Act, as aforequoted clearly indicates that there is a presumption of service by registered post. The provisions of the aforesaid Section 27 of the Act regarding presumption of service has been interpreted by Hon'ble Supreme Court and it has been held that there is a rebuttable presumption of service by registered post. Reference in this regard may be had to the judgment of Hon'ble Supreme Court in the case of Gujarat Electricity Board v. Atmaram Sungomal Poshani12; Commissioner of Income Tax (Adm.), Bengal v. V.K. Gururaj and Ors.13, State of U.P. v. T.P. Lal Srivastava14; Adavala Suthaiah and Ors. Special Deputy Collector, Land Acquisition and Ors. Anr.15 and Shimla Development Authority and Ors. v. Santosh Sharma (Smt.) and Anr., (1997) 2 SCC 637.

20. It has also been well settled by Hon'ble Supreme Court that when notice is sent at the correct address by registered

post and neither acknowledgment nor undelivered registered cover is received back then there is presumption of service although rebuttable. The burden to rebut presumption lies on the party challenging the factum of service. Reference in this regard may be had to the judgments of Hon'ble Supreme Court in the case of Indian Bank v. Datla Venkata Chinna Krishnam Raju17; Ram Chandra Verma v. Jagat Singh Singhi and others18; ATTABIRA Regulated Market Committee v. Ganesh Rice Mills19; Union of India v. Ujagar Lal20; C.C. Alavi Haji v. Palapetty Muhammed21 (Paras 10 & 15) and Sunil Kumar Shambhudayal Gupta (DR) and others v. State of Maharashtra22 (Paras 53 to 56)."

9. Banking upon the judgment, learned counsel for the applicant submits that the complaint was ultimately maintainable and it cannot be said that mandatory requirement of law was not fulfilled.

10. I have considered the submissions of the learned counsel for the applicant and the learned A.G.A. for the State and have gone through the records of the present application as well as the impugned order. Normally, this Court would have issued notice to opposite party no.2 to file counter affidavit but in view of mutual consent of learned counsel for the applicant and learned A.G.A. as recorded above, no purpose would be served by keeping the present application pending. However, liberty is reserved for opposite party no.2 to file an appropriate application, for modification or recall of this order, if he feels so aggrieved.

11. Having heard the arguments advanced across the Bar and pleadings advanced and having perused the record, I find two material aspects coming out from the pleadings very clearly: one that notice dated 7th October, 2016 infact was sent by registered post and, therefore, it cannot be said that notice was sent on itself, and second, it clearly comes out from the record that there is no whisper regarding effective service of notice at the end of the complainant in the complaint. The complainant has not mentioned as to when he received back envelop containing notice and whether after receiving envelop back he had made complaint or prior to that. Accordingly even if he made complaint after accepting of the notice from the post office with note 'left', he could have filed such complaint only after expiry of 15 days but it is not the case here. Secondly if he considers that service of notice was effected then in all probability complaint should have been filed only after expiry of 15 days, and the date of service would have been clearly mentioned in the complaint. In the absence of any such mention in complaint itself, no inference of effective service and requirement of 15 days prior notice can be presumed to have been complied with.

12. Under the circumstances, I am of the considered opinion that case of the complainant stands fully covered by the judgment of the Apex Court in the case **Shakti Travel and Tours (supra)** and in the case of Deepak Kumar and Another (supra).

13. So far judgment relied upon by counsel for the respondent is concerned, that refers to the word 'service', it cannot be doubted that in case if the service is refused or service by absence could not be made effective, service could be deemed sufficient as per law, but in any case 15 days time prescribed by law should always be fulfilled to maintain complaint under section 138 of N.I.Act, 1881, which is lacking in the present case.

14. In view of above, the application under Section 482 Cr.P.C. stands allowed and the proceedings are quashed.

15. It is however always open for opposite party no. 2 to proceed in accordance with law in the light of the judgment of Apex Court in the case of **Yogendera Pratap Singh v. Savitri Pandey and Another**, reported in 2014 LawSuit (SC) 793.

(2020)03-05ILR A1533
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 1652 of 2020

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

Counsel for the Applicants:
Nazrul Islam Jafri, Sri Sadaful Islam Jafri

Counsel for the Opposite Parties:
A.G.A., Sri Akhilesh Chandra Shukla

(A) Criminal Law- Dowry prohibition Act,1961- Section ¾-Code of criminal procedure, 1973 - Sections 482 – Inherent jurisdiction - Indian Penal Code, 1860 - Sections 498A, 323, 504, 506, 376D, 307, 201, 342 I.P.C. & – in case of recovery of further evidence related with above offence, further investigation under Section 173(8) of Cr.P.C. is to be directed - order of magistrate for further investigation - formal permission – according with law.(Para-10)

First Information Report lodged against accused persons - accusation of offences punishable under Sections 376-D, 307 I.P.C. - investigated and mentioned that those offences were not made out - nothing new added by I.O - since the beginning, and the contention of informant-victim was intact - Subsequent investigation mentioned the evidence collected after submission of previous charge-sheet - on the basis of that evidence, subsequent charge-sheet was filed, over which cognizance was taken .(Para-11)

HELD:- In exercise of inherent jurisdiction under Section 482 of Cr.P.C., court is not to embark upon factual matrix because it may prejudice trial and the fact is to be seen by trial court .(Para-11)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Vinubhai Haribhai Malaviya & ors. Vs. St. of Gujrat & anr., AIR 2019 SC 5233

2. Bikash Ranjan Rout Vs. St. through the Secretary (Home), Govt. of NCT Delhi, AIR 2019 SC 2002

3. Amrut bhai Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel & ors., AIR 2017 SC 774

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicants namely, Nusrat, Noor Mohammad, Nurkan, Furkana, Anjum, by means of this application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of the Court with prayer to set aside impugned charge-sheet dated 26.9.2019, order dated 4.9.2019, passed by Judicial Magistrate, Mawana, Meerut as well as the entire proceeding of Criminal Case No. 7075/9 of 2019 (State V/s Nusrat), arising out of Case Crime No. 4 of 2019, under Sections 498A, 323, 504, 506, 376D, 307, 201, 342 I.P.C. & Section ¾ of D.P. Act, P.S. Mawana, District Meerut, pending in the Court of Special Chief Judicial Magistrate, Meerut, which was subsequently filed after filing of

previous charge-sheet and taking of cognizance over it, in course of further investigation made by Investigating Officer and in accordance with order of Magistrate, over an application moved under Section 173(8) of Cr.P.C.

2. Heard learned counsel for the applicants and learned A.G.A. for the State.

3. Learned counsel for the applicants argued that Case Crime No. 4/2019, was got registered under Sections 498A, 323, 504, 506, 376-D, 307, 201, 342 I.P.C. & Section 3/4 of D.P. Act, upon the report of Saima, against Nusrat- husband, Noor Mohammad- father-in-law, Nurkan brother-in-law, Furkana- sister-in-law, Anjum- sister-in-law and one friend of Nurkan. This was investigated, wherein, charge-sheet was filed and cognizance over this charge-sheet was taken, for offences punishable under Sections 498A, 323, 504, 506 I.P.C. read with Section 3/4 of D.P. Act. Offences punishable under Sections 376-D, 307, 201 and 342 I.P.C. were held to be not made out and for those offences, charge-sheet was not filed. Subsequently, an application for further investigation was moved by Investigating Officer, before Magistrate and it was rejected, vide order dated 27.8.2019. It was a detailed judicial order, whereby, application moved under Section 173(8) of Cr.P.C. was rejected. Again, an application was moved by I.O. with same prayer, which was allowed by order dated 4.9.2019, by writing a single word "permitted" by Judicial Magistrate and in view of this, further investigation, made by Investigating Officer, subsequent, charge-sheet was filed, wherein, cognizance was taken for offences including offences punishable under Sections 376-D, 307, 201 and 342 I.P.C., which was apparently erroneous. Hence, this application under Section 482 of Cr.P.C. was filed. But due to mistake by steno, both of the cognizance taking orders were challenged. Whereas, this application was filed for challenging second and subsequent cognizance taking order. Hence, on previous date, this Court permitted for making deletion and correction in application, with a direction for filing of supplementary affidavit, which has been filed on today and taken on record. Hence, this subsequent investigation, in form of further investigation, was not permitted and the subsequent charge-sheet for those additional sections were under abuse of process of law. Hence, for ensuring end of justice, this application has been filed with above prayer.

4. Learned counsel for the informant vehemently opposed with this contention that primarily it is being challenged that in Para 5 of affidavit filed on today, it has been written that it is the first petition under Section 482 of Cr.P.C., which is against the fact and it can never be said that owing to error of steno relief was mentioned in application. The subsequent objection is that it was the order of Senior Superintendent of Police for making further investigation, which is provided under Section 173(8) of Cr.P.C. to Police Officer for making further investigation, in case of receiving of further changed circumstances and fact, even after, cognizance taken by Magistrate in a charge-sheet filed before, and this order of S.S.P. has not been challenged. Inspector in-charge submitted application before Magistrate for a permission, which needs to be a formal permission for further investigation, but it was rejected because there was no specification as to what evidence were available and what compels for moving of

this application. Under above circumstance, application was rejected. Subsequent application was moved, with mentioning of those facts and it was allowed by Magistrate and after obtaining this formal permission by Magistrate, investigation was made, wherein, charge-sheet was filed and cognizance over it, was taken. Hence, the application merits its dismissal. It be dismissed.

5. Learned AGA has also vehemently opposed the argument of learned counsel for the applicants.

6. The mere question to be seen at this juncture, is as to whether further investigation continued in exercise of permission granted by Magistrate, was erroneous? Or it was valid permission.

7. Apex Court in **Vinubhai Haribhai Malaviya and others vs. State of Gujrat and another, AIR 2019 SC 5233**, has held that Magistrate has power to order further investigation under Section 156(3) of Cr.P.C. even at post cognizance stage. At page No. 60, Apex Court has discussed various previous laws, which were of this view that in post cognizance stage, power to permit for further investigation by Magistrate was not there, but this was held to be incorrect law and this power remains with Magistrate at even post cognizance stage.

8. Section 173(8) of Cr.P.C. provides:-

"Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2)."

9. Meaning thereby, Magistrate needs for giving a formal permission to be given for further investigation. Though this power remains with Police officer under circumstances, when new facts emerges regarding the same case crime number and it is never mandatory that further investigation may not be proceeded by Investigating Officer, if Magistrate has denied for further investigation.

10. Now, in present case, the order of Magistrate, passed while rejecting application previously moved, under Section 173(8) of Cr.P.C., reveals that law of Apex Court in ***Bikash Ranjan Rout Vs. State through the Secretary (Home), Govt. of NCT Delhi, AIR 2019 SC 2002*** as well as in ***Amrut bhai Shambhubhai Patel vs. Sumanbhai Kantibhai Patel & others, AIR 2017 SC 774***, has been discussed, wherein, the law is very well elaborated that further investigation is to be initiated on application of prosecution/ investigating agency by Magistrate, if there is detection of material evidence/fresh evidence. Its purpose is to bring the true facts before the Court, even if they are discovered at a subsequent stage to the primary investigation. Meaning thereby, in case of recovery of further evidence related with above offence, further investigation under Section 173(8) of Cr.P.C. is to be directed. But the condition in which this application was rejected, was that that nothing has been

mentioned by Investigating Officer in its application regarding what kind of evidence is there, which required further investigation. Hence, application was vague in nature, that is why it was rejected. Meaning thereby, merit of application was not discussed in above order, but on the basis of devoid of fact to be written in it and being it a vague application, it was rejected. Subsequently, application by I.O. was moved with above fact, as was there, requiring further investigation and the order of rejection by Court of Magistrate was mentioned in this application that once an application was moved and it was rejected because of application being vague and with no fact and on this application, the fact which came in the light, were written. Then after, the same Magistrate permitted for further investigation. Hence, the very argument of learned counsel for the applicants that first order was not mentioned in this application, which was subsequently moved, was incorrect and against the fact. It was written in that application, subsequently moved, that previous application, moved by I.O., was not with that facts, which were required in view of law of Apex Court given in case of **Amrut bhai Shambhubhai Patel vs. Sumanbhai Kantibhai Patel & others (supra)**. Hence, the order for formal investigation could not be obtained.

11. In present case, a First Information Report was lodged against accused persons, with accusation of offences punishable under Sections 376-D, 307 I.P.C. and it was investigated and mentioned that those offences were not made out i.e. it is nothing new added by I.O. Rather, it was since the beginning, and the contention of informant-victim was intact. Subsequent investigation mentioned the evidence collected after submission of previous charge-sheet and on the basis of that evidence, subsequent charge-sheet was filed, over which cognizance was taken. Hence, this Court, in exercise of inherent jurisdiction under Section 482 of Cr.P.C., is not to embark upon factual matrix because it may prejudice trial and the fact is to be seen by trial court. The order of Magistrate for further investigation was a formal permission, given in accordance with law. Hence, this application merits its dismissal.

12. **Dismissed**, as such.

(2020)03-05ILR A1536
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.01.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 1946 of 2020

Ajit Pratap Singh ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Amit Daga, Sri Satendra Singh

Counsel for the Opposite Parties:
A.G.A., Sri Anurag Dubey

(A) Criminal law- Dowry Prohibition Act – Section 311 - Section 3/4. - Cr.P.C Code of criminal procedure, 1973 - Sections 482 – Inherent jurisdiction – Indian Penal Code, 1860 - Sections 498-A, 304-B, 504 I.P.C. - Power to summon material witness, or examine person present - principles governing Section 311 Cr.P.C. and end of justice is a sine qua non for exercise of jurisdiction under this section - no frustration of end of justice.(Para – 9)

Applicant - invoked the inherent jurisdiction of Court with prayer to quash the order passed by learned Additional Sessions Judge - under Sections 498-A, 304-B, 504 I.P.C. and Section 3/4 Dowry Prohibition Act - application moved under Section 311 Cr.P.C. for further examining applicant, his wife and his son in above trial by application 28-A - rejected.(Para-1)

HELD:- The court has been empowered under Section 311 Cr.P.C. to summon witnesses, in cases where end of justice require so. It is enabling section, which enables court for examining witnesses either examined or to be examined for the end of justice, but this situation should be there. (Para – 8)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Zahira Habibullah Sheikh Vs. St. of Guj., 2004 (49) ACC 238,

2. Vijay Kumar Vs. St. of U.P., 2011 (74) ACC 879,

3. Natasha Singh Vs. C.B.I., 2013 (82) ACC 387,

4. Sheela Devi Vs. St. of U.P., Criminal Revision No. 1344 of 2018

5. Allahabad and Dinesh Kumar Mishra Vs. St. of U.P., 2019 (108) ACC 40

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicant, by means of this application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of this Court with prayer to quash the order dated 13.12.2019, passed by learned Additional Sessions Judge, Court No. 2, Mainpuri, in Session Trial No. 3 of 2018, State of U.P. Vs. Vipul Pratap Singh and others, under Sections 498-A, 304-B, 504 I.P.C. and Section 3/4 Dowry Prohibition Act, Police Station Bhogaon, District Mainpuri (arising out of Case Crime No. 436 of 2017), at Police Station Bhogaon, District Mainpuri, wherein application moved under Section 311 Cr.P.C. for further examining applicant PW-1, his wife Shashi Prabha PW-3 and his son Rudra Pratap Singh PW-4 in above trial by application 28-A and the same was rejected.

2. Heard learned counsel for applicant, learned counsel for opposite party no. 2, learned A.G.A. for State and perused the record.

3. Learned counsel for applicant argued that applicant is complainant / informant of above case crime number, wherein death of his daughter under suspicious circumstances, within seven years of marriage, had occurred and it was by way of suicide regarding demand of dowry and cruelty by her husband and their close relatives, wherein bail to father-in-law, mother-in-law and brother-in-law were granted by this Court and bail to husband is still pending for disposal. The opposite party no. 3 is Police Inspector posted at Mathura, who is father-in-law of deceased, was exercising pressure over informant and his family members for not giving evidence against accused persons, otherwise to face dire consequences, but applicant was not afraid of it and this case crime number was got registered, wherein trial was proceeded, but applicant managed to get a forged case lodged for offence punishable under Section 376-D I.P.C. at Police Station Raya Mathura, wherein he managed to get co-accused Devendra Singh arrested, thereafter, a threat for giving evidence in favour of accused persons were extended and ultimately applicant succumbed to above threat. He, his wife and his son gave evidence before trial court and they have not supported case of prosecution. Even then, blackmailing was being made by

accused persons. Then application was moved under Section 311 Cr.P.C. for re-examining those three witnesses, who were examined by trial court, because their evidence were under threat and were not independent evidence and this application 28A was rejected by trial court under abuse of process of law. Hence, this application with above prayer.

4. Learned counsel for opposite party no. 2 has vehemently opposed this application with contention that in this very case crime number death by suicide had occurred at the place of informant i.e. not at the home of accused persons, even then, case was got lodged against accused persons, wherein charge sheet was submitted and trial was proceeded. There is a direction of Hon'ble Court for expeditious disposal of above trial that too within a stipulated period. Thereafter, applicant was summoned, but he did not appear for trial, whereupon warrant were issued against him and, thereafter, he appeared and was examined by court. After his examination, other witnesses were examined that too with interval, but at no point of time any allegation regarding threat was there and in those evidences, prosecution witnesses have not supported case of prosecution. Subsequently, with a view to malign and blackmail accused persons, who were innocent, an application under Section 311 Cr.P.C., was moved for summoning one witness Gyan Singh, who has not been examined under Section 311 Cr.P.C. This was objected by accused persons and it was rejected by trial court. Above order has not been placed on record. After above order, this application under section 311 Cr.P.C. with above prayer was moved and it was rejected by impugned order, which is well in accordance with law. This proceeding is itself under abuse of process of law. Hence, the same be rejected.

5. Learned A.G.A. has also vehemently opposed the application.

6. Having heard learned counsel for both sides and gone through material placed on record, it is apparent that applicant, his wife and his son were examined in examination-in-chief. Then, they were declared hostile upon the request of prosecution and they were cross-examined by prosecution itself. Again they were examined in cross-examination by defence counsel and all these witnesses have not supported case of prosecution. At no point of time it was raised before trial court that these testimonies were under coercion or under threat. Subsequently, another application was moved under Section 311 Cr.P.C.. Therein, also it was not mentioned. Ultimately, this application 28-A was moved on 19.11.2019 i.e. after a considerable lapse of time in between, with above prayer.

7. Section 311 Cr.P.C. reads as under:-

311. Power to summon material witness, or examine person present. *Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case.*

8. Meaning thereby, it is settled law that if the conditions under this Section are

satisfied, the court can call a witness not only on the motion of either side or suo motu for examination of a witness, who had already been examined or present in the court or being summoned for examination for the end of justice and proper judicial decision making. The court has been empowered by this Section to summon witnesses, in cases where end of justice require so. It is enabling section, which enables court for examining witnesses either examined or to be examined for the end of justice, but this situation should be there.

9. In the present case, if situation is to be analysed, it is apparent that with a view to have favour in a case of rape being said to be lodged against applicant, he became hostile to prosecution case. Not only he, his wife and his son became hostile. They have not supported case of prosecution with a view to have favour in a case, which was said to be manipulated and lodged upon initiation of Police Inspector opposite party no. 3 against applicant. Though, above case crime number and F.I.R. is not with specific title or parentage or residence. It is merely with a name of Ajit Pratap Singh. How it is related with this case is not apparent therein. The applicant has yet not been arrested by Investigating Officer in above case, as has been argued by learned counsel for applicant, whereas in this case he had appeared before trial court, had given evidence and the evidence is with interval, wherein evidence was recorded by trial court and at no point of time this complaint was ever lodged neither any complaint of such threat was there, whereas it was said that since the beginning threat was being extended. The law laid down in **Zahira Habibullah Sheikh Vs. State of Gujarat; 2004 (49) ACC 238, Vijay Kumar Vs. State of U.P.; 2011 (74) ACC 879, Natasha Singh Vs. C.B.I.; 2013 (82) ACC 387, Sheela Devi Vs. State of U.P.; Criminal Revision No. 1344 of 2018 Allahabad and Dinesh Kumar Mishra Vs. State of U.P.; 2019 (108) ACC 40**, relies that principles governing Section 311 Cr.P.C. and end of justice is a sine qua non for exercise of jurisdiction under this section and in present case there is no frustration of end of justice at all. Accordingly, this application merits its dismissal. The application is dismissed as such.

10. Interim order stands vacated. The trial court is directed to make compliance of order given in this case regarding disposal, as mentioned in it.

(2020)03-05ILR A1539
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.03.2020

BEFORE

THE HON'BLE RAJEEV SINGH, J.

Application U/S 482/378/407 Cr.P.C. No. 2005 of 2019

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

Counsel for the Applicants:
Baljeet Singh,Dr. Lalta Prasad Misra

Counsel for the Opposite Parties:
Govt. Advocate, Kunwar Sushant Prakash, Nadeem Murtaza, Nagendra Mohan, Nilesh Anand, Shubham Tripathi, Sushil Kumar Singh

(A) Criminal Law-Code of Criminal Procedure, 1973 - Section 482 - Inherent jurisdiction - Indian Penal Code, 1860 – Section 406, 420, 467,

468, 471, 120-B –- discretion vested in the High Court under Section 482 of the Code can be exercised suo motu to prevent the abuse of the process of the Court and/or to secure the ends of justice(Para-27)

Company is engaged in manufacture and sale of Beer, which is regulated and governed by the Excise Act and other relevant laws of the State - Respondent no. 2, who is the Manager of Licensee firm - engaged in business of sale of Beer etc. by purchasing the same from the Company - investigation - statement of the owner of the alleged two trucks bearing no. UP32 HN 3209 and UP32 FN 8048 - recorded under Section 161 Cr.P.C. - stated his trucks were not used for the purpose as his trucks were being used for transporting sand and since last three months, trucks were standing in the yard - charge sheet was prepared against the Company, with the allegation that by preparing a forged documents, the Company cheated the informant and also cause U.P. excise revenue loss. (Para-28,35,44)

HELD:- There is no evasion of tax and it seems that there is a dispute of rebate between the parties and, therefore, the impugned criminal prosecution is a sheer abuse of the legal process - no ingredients of deception, fraudulent or dishonest act by inducing the person or criminal breach of trust or forgery are found - the *impugned charge sheet* and its consequential *summoning order* passed by ACJM-I, are set aside. (Para-46,47)

Application u/s 482 Cr.P.C. partly allowed. (E-7)

List Of Cases Cited:-

1. Vinod Natesan Vs. St. of Kerala & ors., (2019) 2 SCC 401

2. Anand Kumar Mohatta & anr. Vs. St. (Govt. of NCT of Delhi) Department of Home & anr., 2019 (1) JIC 1 (SC)

3. Prof. R K Vijayasarathy & anr. Vs. Sudha Seetharam & anr. (Criminal Appeal No. 238 of 2019)

4. Pooja Ravinder Devidasani Vs. St. of Mah. & ors., 2015 (1) JIC 398 (SC)

5. Lalit Kargeti Vs. St. of U.P. & ors., 2018 (2) JIC 427 (All)

6. Surya Pratap Singh Vs. St. of U.P. & anr., 2016 (1) JIC 659 (All)

7. Nitin Jain & ors. Vs. St. of U.P. & anr., 2015 (1) JIC 424 (All)

8. Lourenco D' Souza Vs. St. of U.P. & anr., 2017 (1) JIC 592 (All)

9. Pawan Kumar Jain Vs. St. of U.P. & anr., 2018 (2) JIC 369 (All)

10. St. of Haryana Vs. Bhajan Lal, 1992 Supp. (1) SCC 335

11. International Advanced Research Center for Powder Metallurgy and New Materials (ARCI) & ors. Vs. Nirma Cerglass Technics Pvt. Ltd. & anr., (2016) 1 SCC (Cri) 269

12. Smt. Padma Jain & ors. Vs. St. of U.P. & anr. reported in 2016 (1) JIC 787 (All)

13. Pepsi Foods Ltd. & anr. Vs. S.J.M. & ors., (1998) 5 SCC 343

14. Sukhbir Singh Vs. St. of U.P. & ors., 2017 (1) JIC 451 (All)

15. Sunil Bharti Mittal Vs. C.B.I., (2015) 4 SCC 609

16. Indian Oil Corporation Vs. N.E.P.C. India Ltd., (2006) 6 SCC 736

17. Anand Kumar Mohatta & anr. Vs. State (Govt. of NCT of Delhi) Department of Home & Anr., 2019 (1) JIC 1 (SC)

18. St. of Guj. Vs. Afroz Mohammed Hasanfatta, 2019 OnLine SC 132

19. Bhaskar Laxman Jadhav & ors. Vs. Karamveer Kakasaheb Wagh Education Society & ors., (2013) 11 SCC 531

20. Sau. Kamal Shivaji Pokarnekar Vs. St. of Maharashtra & ors. (Criminal Appeal No. 255 of 2019)

21. Devendra Pratap Singh Vs. St. of Bihar & anr., (2019) 4 SCC 351

22. S. Krishnamoorthy Vs. Chellammal, (2015) 14 SCC 559

23. Chilakamarthi Venkateshwarlu & Anr. Vs. State of Andhra Pradesh & ors. (Criminal Appeal No. 1082 of 2019)

24. Mohd. Allaudin Khan Vs. St. of Bihar & ors., (2019) 6 SCC 107

25. Rajiv Thapar & ors. Vs. Mohan Lal Kapoor,(2013) 3 SCC 330

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

1. Heard Shri L.P. Mishra, learned counsel assisted by Shri Baljeet Singh appearing for the applicants, Shri V.K. Shahi, learned Additional Advocate General assisted by Shri Anurag Verma, learned A.G.A. for the State and Shri Prashant Chandra, learned Senior Counsel assisted by Ms. Mahima Pahwa appearing for the complainant-respondent no. 2.

2. This application under Section 482 Cr.P.C. has been filed seeking the following main reliefs:

"I. set aside the impugned summoning order dated 13.02.2019 passed in Criminal Case No. 5694/2019, Case Crime No. 0260/2018, under Section 406, 420, 467, 468, 471, 120-B I.P.C., Police Station-Husainganj, district Lucknow.

II. set aside the impugned charge sheet dated 10.02.2019, filed by the Investigating Officer in Case Crime No. 0260/2018, under Section 406, 420, 467, 468, 471, 120-B I.P.C., Police Station-Husainganj, District Lucknow.

III. set aside the entire proceedings of the Case Crime No. 0260/2018, under Section 406, 420, 467, 468, 471, 120-B I.P.C., Police Station-Husainganj, District Lucknow."

3. Shri L.P. Mishra, learned counsel appearing for the applicants submitted that applicant no. 4, i.e., M/s. United Breweries Ltd. (hereinafter referred to as the "Company'), which is a registered company engaged in manufacture and sale of Beer, received a demand order on 7th September, 2018 at 7.56 p.m. through e-mail by the Manager of the licensee-Ashok Jaiswal, on which, the Company directed its transporter, namely, M/s. Sical Logistics Ltd. to arrange vehicles to deliver the goods from its go-down located at Ghaziabad to the licensee at Lucknow.

4. M/s. Sical Logistics Ltd. has a contract for arrangement of trucks for transportation services with New Fatehpur Kolkata Transport Company, which, in turn, hires several trucks from open market. In the aforesaid transaction, New Fatehpur Kolkata Transport company had hired truck nos. UP32 HN 3209 and UP32 FN 8048 for delivery of consignment of respondent no. 2 to Lucknow. In the course of process, M/s. Sical Logistics Ltd. issued BT/consignment note dated 11th September, 2018 for delivering the Beer to the consignee, namely, Ashok Kumar Jaiswal, Station Road, Lucknow. After arrangement of the trucks by the transporter, transport permit-F.L. 36 was taken from Excise Department on 11.09.2018 for supply of the Beer by 13th September, 2018. Consignment of Beer was dispatched for delivery to the licensee

at Lucknow on 11.09.2018 by truck nos. UP32 HN 3209 and UP32 FN 8048 after payment of excise duty, in advance. It is, thus, submitted by learned counsel for the applicants that the Company consigned the entire goods/Beer in respect of the demand order dated 7th September, 2018 through Company's registered transporter by the aforesaid trucks, which were having GPS systems as mandated by Excise department's Track and Trace Policy.

5. He further submitted that one QTS Solutions Pvt. Ltd. was the contractor, authorised by the Excise department for tracking the location of the trucks and both the trucks were in contact of the said Agency through GPS upto the outer limit of city of Lucknow. The GPS device of both the trucks lost contact with GPS tracker Agency on 13th September, 2018 after 11.41 p.m., on which, QTS Solutions Pvt. Ltd. sent a message through e-mail on 14.09.2018 at 4.15 p.m. to Mr. Dharam Chand, who was working as Depot In-charge under the Company, who, in turn, informed to the two officials of Company as well as the transporters M/s. Sical Logistics Ltd. about the lost of the trucks. Learned counsel for the applicants submited that QTS Solutions Pvt. Ltd. and M/s. Sical Logistics Ltd. were instructed by the Company to make serious efforts for tracing the trucks. The officers of the Company also inquired about the location of the truck from respondent no. 2 through telephone forthwith, but respondent no. 2 informed that the trucks had not yet come at his place. Thereafter, the Company apprised the said fact to the Excise department, on which, Officer In-charge, District Excise Office vide letter dated 14th September, 2018 directed the Company to file F.I.R.

6. In pursuance to the aforesaid incident, Mukesh Kumar, Managar, M/s. Sical Logistics Ltd. lodged F.I.R. No. 0390 of 2018 on 16th September, 2018 under Sections 420, 406 I.P.C., P.S. Badalpur, District Gautam Budh Nagar with the allegation that on 11th September, 2018, two vehicles, one of which was bearing no. UP32 HN 3209 (driver-Mukesh Kumar s/o Moti Lal r/o Village and Post Khursaina, District Etawah and owner-Harjeet Kumar Rawat s/o Rampal Rawat r/o Sewai Baruna, U.P. Lucknow, mobile no. 7753995356) and second vehicle was bearing UP32 FN 8048 (driver-Shanu s/o Bhagwan Deen, r/o Mohalla Masjidganj, Shahjahanpur, mobile no. 8979887803 and owner-Subhash, mobile no. 7753995355 r/o Sewai Baruna Nagram road, Lucknow), were checked out from the factory premises carrying 1180 cases of Beer having LR No. 248000524, invoice value Rs.35,39,405/- and L.R. No. 248000523, invoice value Rs.39,23,630/- respectively. It is further alleged that on 13th September, 2018, at about 16.40 hrs., when the transporter, namely, Happy Singh Arora from his mobile no. 8750711313 talked to driver Mukesh on his mobile no. 6399156672, then he was informed that vehicles were standing near Junabganj, Lucknow at Chauhan Dhaba due to "no entry". Thereafter, they could not contact with the drivers and the vehicles along with goods were vanished.

7. Shri Mishra submitted that the incident was also reported to respondent no. 2. Thereafter, Company through e-mail dated 21st September, 2018 requested the licensee for sending fresh demand to re-supply of the Beer against the order dated 07.09.2018, the consent of which was given by the licensee to the Company by e-mail on 22.09.2018. However, by the same letter, licensee also informed the Company

that criminal proceedings have already been initiated in police Station Husainganj, Lucknow with regard to non-supply of Beer and civil proceedings are to be initiated for the loss suffered. Learned counsel for the applicants has submitted that after inquiry, it came into the notice of the applicants that F.I.R. No. 260 of 2018 under Section 406 I.P.C., P.S. Husainganj, District Lucknow was lodged on 16.09.2018 against the Company and the applicants herein, namely, Akhil Sharda, Arvind Padhi and Himanshu Tiwari, in which after conducting due investigation, the Investigating Officer found no incriminating material against the applicants, as such, he prepared final report dated 13th October, 2018 with the finding that the goods were supplied by the Company, but the same were not reached to the destination, but Company resupplied the goods, thus, no offence is made out.

8. Relevant part of the findings made by the Investigating Officer is being reproduced as under:

"श्रीमान जी निवेदन है कि वादी संजीत जायसवाल उपरोक्त की तहरीरी सूचना पर दिनांक 16.09.2018 को थाना–हाजा पर मु0अ0सं0–260/18 धारा–406 भा0दं0वि0 बनाम अखिल शारदा आदि तीन नफर उपरोक्त के पंजीकृत हुआ जिसकी विवेचना मुझ उ0नि0 द्वारा सम्पादित की गयी दौरान विवेचना बयान वादी मुकदमा, निरीक्षण घटनास्थल, बयाननात गवाहान, से अभियोग के जुर्म धारा 420 भा0दं0वि0 की बढ़ोत्तरी की गयी तमामी विवेचना से पाया गया कि वादी मुकदमा द्वारा तीन ट्रक बीयर का आर्डर दिया गया कम्पनी द्वारा आर्डर किये गये माल को समय से भेजा गया परन्तु वाहन चालकों द्वारा बीच मे ही माल को धोखाधड़ी करके हड़प लिया गया जिसके सम्बन्ध में थाना बादलपुर जिला गौतमबुद्ध नगर मे मु0अ0सं0–390/18 धारा–420, 406 भा0दं0वि0 अभियोग पंजीकृत कराया गया वादी मुकदमा द्वारा दिये गये आर्डर की पूर्ति वादी मुकदमा को कर दी गयी है। जिसकी पुष्टि जिला आबकारी अधिकारी लखनऊ द्वारा दिनांक 27.09.18 को की गयी है। विवेचना मे पाया गया वादी मुकदमा द्वारा किये गये माल आर्डर समय से कम्पनी द्वारा भेजा गया परन्तु बीच मे ही ट्रक चालको द्वारा हेराफेरी करके माल हड़प कर लिया गया जिसके सम्बन्ध मे थाना बादलपुर गौतमबुद्ध नगर मे अभियोग पंजीकृत होने के कारण वादी मुकदमा द्वारा दिये गये आर्डर की पूर्ति नही हो सकी थी। जो पूर्ति कर दी गयी। फलस्वरूप अभियोग मे प्रतिपक्षीगणो द्वारा धारा–420, 406 भा0दं0वि0 का गठन होना न पाये जाने के कारण जरिये अंतिम रिपोर्ट विवेचना समाप्त की जाती है निवेदन है कि तथ्यों एवं परिस्थितियों को दृष्टिगत अंतिम रिपोर्ट को स्वीकृत करने की कृपा करें।"

9. Learned counsel for the applicants further submitted that as per the provisions of the Excise Laws, the supplier/Company, is required to maintain lease of orders received in seriatim and the concerned Excise Officer verifies the lease of orders and credit of amount in the bank account of supplier/Company. Thereafter, the Company is required to arrange the trucks within 48 hours through its transporters for transportation of the Beer. Details of the trucks and drivers are also required to be provided to the concerned Excise Officers at the time of taking of F.L. 36 for transporting the Beer. The details of the trucks, drivers and the route for transportation of Beer are to be mentioned in F.L. 36. Learned counsel for the applicants also submitted that after consent of the licensee on 22nd September, 2018, fresh F.L. 36 was taken from the official website of the Excise Department on 22.09.2018 itself and the Beer was also sent on the same day against the order dated 07.09.2018 through the transporter of the Company without taking any extra cost from respondent no. 2. Thereafter, goods were delivered at the location of the licensee at Lucknow on 24.09.2018, which

was accepted by the licensee. He also submitted that since the Company supplied the goods to the informant, therefore, no offence under Sections 420, 406 I.P.C. can be said to be made out. He also submitted that, however, even after receipt of the goods, since the acknowledgement was not given by the licensee, the Company contacted Excise department, on account of which, an Excise Inspector was deputed to verify the delivery of the Beer. The concerned Excise Officer inspected the location of licensee and submitted his report dated 27.09.2018 that Beer was duly received by the licensee at his premises against the order dated 07.09.2018.

10. Learned counsel for the applicants also submitted that in pursuance of the first demand order dated 7th September, 2018, entire goods were resupplied to respondent no. 2 at his location on 24.09.2018 and the delay, which caused in delivery, was not in the hands of the applicants.

11. He further submitted that the licensee had also placed another order through e-mail on 11.09.2018 at 8.30 p.m. for delivery of 1880 cases of Beer at Varansi. Since the vehicles for transportation of Beer could not be arranged, in the meantime, the licensee on 15th September, 2018 modified its original order dated 11th September, 2018 through e-mail instructing that the ordered Beer be delivered at Lucknow instead of Varansi. After receipt of the revised order dated 15.09.2018 with the changed location, F.L. 36 was taken on 17.09.2018 and on the same day, consignment of Beer was dispatched after payment of excise duty through transporter of the Company, namely, M/s. Sical Logistics Ltd. by truck no. UP 81 BT 5285 from Aligarh to Lucknow and the consignment of Beer was received by the licensee on 19.09.2018.

12. Submission of Shri L.P. Mishra is that similarly in pursuance of the indent/order dated 7th September, 2018, after taking the transport permit F.L. 36 on 11th September, 2018, the consignment was dispatched on the same day for delivery to the licensee through truck nos. UP32 HN 3209 and UP32 FN 8048, but both the trucks lost communication with the GPS Tracker agency on 13th September, 2018, just 1 and 1/2 km. away from the Kanpur Road, Junabganj, Lucknow, U.P., 226401. However, the entire goods were supplied to respondent no. 2 at his location on 24.09.2018, without any extra cost. Even then, respondent no. 2 pressed F.I.R. bearing Case Crime No. 260 of 2018 (supra) under Section 406 I.P.C., P.S. Husainganj, District Lucknow., in which, Investigating Officer, after recording the statement of the informant and inspecting the site, prepared final report dated 13th October, 2018 (Annexure 12) with the observation that the goods were supplied by the Company, but the same were not reached to the destination, as a result, re-supply of the goods was made.

13. After filing of the said final report, Ashok Kumar Jaiswal, licensee of F.L. 2B moved an application (undated) before the Inspector General of Police, Lucknow and requested that the final report dated 13.10.2018 may be rejected as the officers of the Company are habitual in committing such types of crime. In pursuance to the said application, final report dated 13.10.2018 was rejected by Additional Superintendent of Police (Crime), Lucknow and the matter was transferred for reinvestigation to the Crime Branch. The second Investigating Officer prepared the impugned charge sheet dated 10th February, 2019, however, there is no incriminating evidence for making out the alleged offence.

14. Shri Mishra submitted that, as a matter of fact, the licensee was forcing for rebate and the second Investigating Officer was used as a tool for the same, as vide letter dated 26th December, 2018, Investigating Officer asked to the Company that why the rebate amounting to Rs.2,26,73,750/- was not paid for the period 01.04.2018 to 30.09.2018 to the firm of licensee-Ashok Jaiswal, M/s. Beehive Alcoveb Ltd. In reply to the same, the Company vide letter dated 15th January, 2019 categorically stated that the Company had not offered any rebate to the complainant during the period 01.04.2018 to 30.09.2018, therefore, the claim of rebate for the said period aggregating to Rs.2,26,73,750/- made by the complainant, is unfounded. Learned counsel for the applicants also submitted that the Company also clarified in the said letter that during the inspection of depot of the Company at NOIDA made by the Investigating Officer on 26th December, 2018 and Sales Office at Delhi, all the statement of account of the complainant maintained by the Company was also shown. In the said letter, it was further stated that all the transactions are managed and recorded in accordance with the Excise Laws under the supervision of Excise officials. He further submitted that on 25.01.2019, the Investigating Officer wrote another letter to the Company stating that Beehive Alcoveb Ltd., i.e., licensee of F.L. 2B, namely, Ashok Kumar Jaiswal lodged F.I.R. No. 0260 of 2018 against the applicants alleging that the rebate is not being given to the complainant, which was being provided prior to 1st April, 2018, therefore, asked the Company to give details of all the licensees for the period of 2015-16, 2016-17 and 2017-18 with the explanation that as to how much rebate has been given to other licensees. Learned counsel for the applicants submitted that the Investigating Officer Mr. Jai Prakash Yadav was continuously making pressure for giving the aforesaid rebate to the complainant, as he again wrote a letter dated 31st January, 2019 and asked that why the rebate in the account of complainant is not being credited for the period 1st April, 2018 to 30th September, 2018. Reply dated 03.02.2019 to the said letter was given by the officers of the Company stating that there is no agreement between the Company and complainant for sharing the profit of trade and no any rebate amount is payable to the complainant during the aforesaid period.

15. He further submitted that merely on the basis of presumption, impugned charge sheet has been prepared on 10th February, 2019 with the finding that huge loss of excise duty was found, as also forged documents were prepared by the applicants and the goods were deliberately shown missing, and as per the trade practice, rebate amount was to be credited in the account of complainant and by not doing so, the licensee was also cheated by the applicants. Learned counsel for the applicants submitted that the Company suffered a lot as its goods were found missing, but re-supply was made without any cost. He vehemently submitted that there is no evidence of criminal breach of trust, cheating or forgery on the part of the applicants. He also submitted that the dispute between the Company and complainant in relation to the rebate, is of civil nature, therefore, criminal prosecution is not permissible.

16. In support of his argument, Shri Mishra relied on the decision of the Hon'ble Apex Court in the cases of **Vinod Natesan Vs. State of Kerala & Ors., (2019) 2 SCC 401, Anand Kumar Mohatta & Anr. Vs.**

State (Govt. of NCT of Delhi) Department of Home & Anr., 2019 (1) JIC 1 (SC), Prof. R K Vijayasarathy & Anr. Vs. Sudha Seetharam & Anr. (Criminal Appeal No. 238 of 2019), Pooja Ravinder Devidasani Vs. State of Maharashtra & Ors., 2015 (1) JIC 398 (SC), Lalit Kargeti Vs. State of U.P. & Ors., 2018 (2) JIC 427 (All), Surya Pratap Singh Vs. State of U.P. & Anr., 2016 (1) JIC 659 (All) and **Nitin Jain & Ors. Vs. State of U.P. & Anr., 2015 (1) JIC 424 (All).**

17. He further submitted that the ingredients of alleged offences do not stand satisfied. He relied on the decision of this Court passed in the cases of **Lourenco D' Souza Vs. State of U.P. & Anr., 2017 (1) JIC 592 (All), Pawan Kumar Jain Vs. State of U.P. & Anr., 2018 (2) JIC 369 (All).**

18. In support of his submission that criminal prosecution cannot be used as a weapon of harassment nor can it be used for malicious intention, learned counsel for the applicants placed reliance on the decision in the cases of **State of Haryana Vs. Bhajan Lal, 1992 Supp. (1) SCC 335, International Advanced Research Center for Powder Metallurgy and New Materials (ARCI) & Ors. Vs. Nirma Cerglass Technics Pvt. Ltd. & Anr., (2016) 1 SCC (Cri) 269** and **Smt. Padma Jain & Ors. Vs. State of U.P. & Anr.** reported in **2016 (1) JIC 787 (All).**

19. Further submitting that cognizance cannot legally be taken in a mechanical manner without any application of mind, Shri Mishra placed reliance on the decision in the cases of **Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors., (1998) 5 SCC 343, Sukhbir Singh Vs. State of U.P. & Ors., 2017 (1) JIC 451 (All)** and **Sunil Bharti Mittal Vs. Central Bureau of Investigation, (2015) 4 SCC 609.**

20. He also submitted that High Court can analyse the material to secure the ends of justice and to prevent the use of process of any Court. He relied on the decision of the Hon'ble Apex Court in the case of **Indian Oil Corporation Vs. N.E.P.C. India Ltd., (2006) 6 SCC 736** and **Anand Kumar Mohatta & Anr. Vs. State (Govt. of NCT of Delhi) Department of Home & Anr., 2019 (1) JIC 1 (SC).**

21. On the other hand, Shri V.K. Shahi, learned Additional Advocate General submitted that the instant application is not maintainable. Placing reliance on the judgment and order of the Hon'ble Apex Court in the case of **State of Gujarat Vs. Afroz Mohammed Hasanfatta, 2019 OnLine SC 132**, he submitted that at the stage of issuing process on the police report, the court is not required to weigh the evidentiary value of the materials on record. Learned A.A.G. further submitted that on 16th September, 2018, F.I.R. No. 0260 of 2018 under Section 406 I.P.C. was lodged by Sanjeet Jaiswal, respondent no. 2 against the applicants. He submitted that as per the Excise Policy, it was obligatory on the part of the accused persons to supply the product within 72 hours and admittedly, the goods were supplied belatedly. He further submitted that it is the admitted case of the applicants that two trucks UP32 HN 3209 and UP32 FN 8048 were checked out on 11th September, 2018 for supply of the goods from the go-down of the applicants, but in the statement of Harjeet Kumar, owner of truck no. UP32 HN 3209 recorded by the Investigating Officer under

Section 161 Cr.P.C., he stated that he looks after the work of his truck as well as truck no. UP32 FN 8048 owned by his brother and their trucks were being used for transporting the sand and since last several months, the trucks were standing in the yard. Further in the statement of the informant under Section 161 Cr.P.C., he stated that the goods in lieu of Rs.92,98,902/- were not supplied within 72 hours, therefore, he suffered a lot. Shri V.K. Shahi also relied on the letter of District Excise Officer, Gautam Budh Nagar dated 18th September, 2018, written to the Excise Commissioner, Allahabad that the transporter lost the goods, therefore, the probability of affecting of excise revenue cannot be ruled out. Learned A.A.G. lastly submitted that the applicants have alternative remedy of moving discharge application before the trial court at the appropriate stage.

22. Shri Prashant Chandra, learned Senior Counsel appearing on behalf of the informant submitted that the charge sheet dated 10.02.2019 was filed after collecting the incriminating evidence against the applicants, on which the court below rightly taken cognizance under Section 190(1)(b) Cr.P.C. In support of his submission, Shri Chandra also relied on the decision of the Hon'ble Apex Court in the case of **State of Gujarat Vs. Afroz Mohammed Hasanfatta** (supra). He further submitted that since the entire charge sheet has not been filed and only some extract thereof has been annexed with the application, therefore, the validity of entire charge sheet can neither be assailed nor questioned, as something, which is not before the Court, cannot be examined. Shri Chandra also submitted that the applicants have not come with the clean hands and have consciously indulged in material suppression and have twisted facts with the object to mislead this Court and, thus, the application is liable to dismissed as it is not for the applicants to choose as to what facts are to be stated. In support of his argument, he relied on the decision of the Hon'ble Apex Court in the case of **Bhaskar Laxman Jadhav & Ors. Vs. Karamveer Kakasaheb Wagh Education Society & Ors., (2013) 11 SCC 531**. Further relying on the decision of the **Sau. Kamal Shivaji Pokarnekar Vs. State of Maharashtra & Ors. (Criminal Appeal No. 255 of 2019)**, he submitted that at the initial stage of issuance of process, it is not open to the court to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. He also relied on the decision of the Hon'ble Apex Court in the cases of **Devendra Pratap Singh Vs. State of Bihar & Anr., (2019) 4 SCC 351, S. Krishnamoorthy Vs. Chellammal, (2015) 14 SCC 559, Chilakamarthi Venkateshwarlu & Anr. Vs. State of Andhra Pradesh & Ors. (Criminal Appeal No. 1082 of 2019), Mohd. Allaudin Khan Vs. State of Bihar & Ors., (2019) 6 SCC 107**. He concluded his argument with the emphasis that the High Court may have an obligation to intervene under Section 482 Cr.P.C., in cases where manifest error has been committed by the Magistrate in issuing the process despite the fact that the alleged acts did not at all constitute offences.

23. I have considered the arguments advanced by the learned counsel for the parties and gone through the record.

24. Before dealing with the facts of the case, it is necessary to consider the argument of learned counsel for the complainant as well as learned Additional Advocate General regarding maintainability of the present application.

25. After going through the decisions of the Hon'ble Apex Court in the cases of

State of Gujarat Vs. Afroz Mohammed Hasanfatta (supra), **Bhaskar Laxman Jadhav** (supra) and **Mohd. Allaudin Khan** (supra) relied by Shri Prashant Chandra, it is evident that the Hon'ble Apex Court categorically held that under Section 482 Cr.P.C., High Court may intervene in cases where manifest error has been committed by the Magistrate in issuing process despite the fact that the alleged facts did not at all constitute offences. In such circumstances, it is obligatory to go through the facts of the case and the material collected by the Investigating Officer. In such circumstances, the argument advanced by the learned counsel for the respondents has no legs to stand.

26. Insofar as the submission advanced by Shri V.K. Shahi, learned A.A.G. that the applicants have alternative remedy of discharge at the appropriate stage, therefore, the application is not maintainable, is also baseless. It is well settled by the Hon'ble Apex Court in the case of **State of Haryana Vs. Bhajan Lal** (supra) that the inherent power under Section 482 Cr.P.C. can be exercised. Hon'ble Apex Court has laid down seven guidelines explaining as to under what circumstances, the power can be exercised. Para 102 of the report is reproduced as under:

"102.In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

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

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

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under

which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

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

27. Reiterating the parameters laid down in the case of **Bhajan Lal** (supra), Hon'ble Apex Court in the case of **Rajiv Thapar & Ors. Vs. Mohan Lal Kapoor, (2013) 3 SCC 330** laid down that the discretion vested in the High Court under Section 482 of the Code can be exercised suo motu to prevent the abuse of the process of the Court and/or to secure the ends of justice. Relevant part of the judgment is as under:

"25. Section 482 CrPC is being extracted hereunder:

"482.*Saving of inherent powers of High Court.*--Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."

The discretion vested in a High Court under Section 482 CrPC can be exercised suo motu to prevent the abuse of process of a court, and/or to secure the ends of justice.

26. This Court had an occasion to examine the matter in *State of Orissa v.Debendra Nath Padhi* [(2005) 1 SCC 568 : 2005 SCC (Cri) 415] (incidentally the said judgment was heavily relied upon by the learned counsel for the respondent complainant), wherein it was held thus: (SCC p. 581, para 29)

"29. Regarding the argument of the accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality,*the width of the powers of the High Courtunder Section 482 of the Code and Article 226 of the Constitution of India is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice within the parameters laid down in Bhajan Lal case [State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] ."
(emphasis supplied)

27. Recently, this Court again had an occasion to examine the ambit and scope of Section 482 CrPC in *Rukmini Narvekar v. Vijaya Satardekar* [(2008) 14 SCC 1 : (2009) 1 SCC (Cri) 721] wherein in the main order it was observed that the width of the powers of the High Court under Section 482 CrPC and under Article 226 of the Constitution of India, was unlimited. In the said judgment, this Court held that the High Court could make such orders as may be necessary to prevent abuse of the process of any court, or otherwise to secure the ends of justice. In a concurring separate order passed in the same case, it was additionally observed that under Section 482 CrPC, the High Court was free to consider even material that may be produced on behalf of the accused, to arrive at a decision whether the charge as framed could be maintained. The aforesaid parameters shall be kept in mind while we examine whether the High Court ought to have exercised its inherent jurisdiction

under Section 482 CrPC in the facts and circumstances of this case.

28. The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.

29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to

quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC"

28. The facts, as emerged out from the record, are that the Company is engaged in manufacture and sale of Beer, which is regulated and governed by the Excise Act and other relevant laws of the State. Respondent no. 2, who is the Manager of Licensee firm having F.L. 2B, is engaged in business of sale of Beer etc. by purchasing the same from the Company. On 7th September, 2018, respondent no. 2 sent a demand order at 7.56 p.m. to the Company through e-mail for truck load Beer, containing 2360 case. The said mail was also sent to the Assistant Excise Commissioner, Web Distillery Liquor. In pursuance of the indent/demand order dated 07.09.2018, the Company directed its transporter-M/s. Sical Logistics Ltd. to arrange vehicles to deliver the goods from its go-down located at 55, Loha Mandi near Shardha Dharamkanta, Ghaziabad, U.P. to the licensee at Lucknow. However, as the process for supply of goods to respondent no. 2 was initiated on 10.09.2018. After arrangement of the trucks by the transporter, transport permit F.L. 36 was taken on 11.09.2018 for supply of the Beer by 13.09.2018. Thereafter, the consignment of Beer was dispatched on 11.09.2018 for delivery to the licensee at Lucknow, after payment of excise duty, by the said transporter of the Company through truck nos. UP32 HN 3209 and UP32 FN 8048, which have the GPS systems. Location of both the trucks was being tracked by QTS Solutions Pvt. Ltd., which was authorised by the Excise department, through GPS upto the outer limit of city of Lucknow. On 13th September, 2018, the GPS device of both the trucks lost contact with GPS tracker Agency after 11.41 p.m. Ultimately, on 21.09.2018, the Company requested the licensee through e-mail for resupply of Beer against order dated 07.09.2018. The consent for resupply of the Beer against the order dated 07.09.2018 was given by the licensee through e-mail on 22.09.2018. The licensee also informed the Company that criminal proceedings have already been initiated in Police Station Husainganj, District Lucknow with regard to non-supply of Beer, as also of the civil proceedings to be initiated for the loss suffered.

29. On the written complaint of respondent no. 2, F.I.R. bearing Case Crime No. 260 of 2018, under Section 406 I.P.C., P.S. Husainganj, District Lucknow was lodged on 16.09.2018 against the employees of the Company, Akhil Sharda, Himanshu Tiwari and Arvind Padhis with the allegation that on 07.09.2018 and 11.09.2018, two orders were placed for supply of the Beer and Rs.92,98,902/- were paid as per the provisions of Excise Laws. The said Beer was to be supplied within 72 hrs., but the same had not been supplied and, thus, money paid by the informant was apprehended to be cheated. Investigating Officer after recording the statement of the informant and preparing the site plan, submitted final report dated 13th October, 2018 with the observation that the goods were supplied by the Company, but the same did not reach to the destination. Thereafter, Company again supplied the goods to the informant and, therefore, no offence under Sections 420, 406 I.P.C. is

made out. Thereafter, Ashok Kumar Jaiswal licensee of FL 2B moved an application before the Inspector General of Police, Lucknow and requested that the officers of the Company are habitual in committing such types of crime and the trucks loaded with the liquor worth of crores of rupees are being missed, on account of which, State suffered revenue loss. Thereafter, the final report dated 13.10.2018 was rejected by the Additional Superintendent of Police (Crime), Lucknow and the matter was transferred for reinvestigation to the Crime Branch. In pursuance of the same, Mr. Jai Prakash Yadav, Investigating Officer, after recording the statement of witness-Abdul Haq, Harjeet Kumar and Subhash (owner of the trucks in question) under Section 161 Cr.P.C., prepared charge sheet dated 10.02.2019 and observed that on the basis of evidence collected during the course of investigation, inspection of site plan, it is found that M/s. United Breweries Ltd., Akhil Sharda s/o Ashwani Kumar Sharda, Arvind Padhi s/o P.K. Padhi, Himanshu Tiwari s/o Ram Nandan Tiwari, all r/o 626, DLF Tower & DDA, Police Station Jasola, New Delhi prepared forged documents and did forgery with the common intention, as a result of which, State suffered huge loss of excise revenue. Investigating Officer further noticed that they committed cheating with the informant also, therefore, offence under Sections 406, 420, 467, 468, 471 and 120B I.P.C. is made out, on which, court below passed summoning order dated 13.02.2019.

30. As on 05.04.2019, interim order was passed by this Court, relevant part of which, is reproduced as under:

"Till that time, no coercive action will be taken against the applicants, subject to condition for deposit of adequate security regarding allegations of tax evasion, if any, fixed by the Court below within a week from today. It is also provided that applicants will not leave the country without permission of the Court below."

31. It is evident from the Annexure RA-7 to the rejoinder affidavit dated 17.07.2019 that the aforesaid order dated 05.04.2019 of this Court was placed before A.C.J.M., Court No. 25, Lucknow. He directed the Investigating Officer to submit a report that how much excise duty is evaded by the accused. The Investigating Officer submitted a report dated 17.04.2019 (Annexure-RA-8) and stated that the accused person evaded excise duty amounting to Rs.43,23,164/- in the present case, but this fact does not find place in the case diary. The relevant part of the report dated 17.04.2019 given by Investigating Officer to A.C.J.M., Court No. 25, Lucknow is as under:

"सेवा में,

श्रीमान ए0सी0जे0एम0

कक्ष सं0 25 लखनऊ

विषय– थाना हुसैनगंज पर पंजीकृत मु0अ0सं0 260/18 धारा 420/406/467/468/471 आई0पी0सी0 से सम्बन्धित आबकारी कर के बारे में आख्या।

महोदय,

निवेदन है कि मुकदमा उपरोक्त से सम्बन्धित 2 ट्रक बियर को अभियुक्तगण द्वारा गायब कर आबकारी राजस्व की चोरी की है वो प्रति ट्रक 21,62,582/–रू0 यानी दोनों ट्रक से मिलाकर 43,23,164/–रू0 की आबकारी कर की चोरी अभियुक्तगण द्वारा की गयी है। इसके अतिरिक्त इन उक्त लोगों द्वारा लगभग 15 (पंद्रह) ट्रक और गायब किया गया है जिसके सम्बन्ध में विवेचना प्रचलित है इस तरह अभियुक्तगणों द्वारा आबकारी राजस्व का नुकसान किया गया है।

इस तरह सम्बन्धित मुकदमें में अभियुक्तगणों द्वारा कुल 43 लाख 23 हजार 164 रूपये की आबकारी कर की चोरी की है तथा अन्य चोरी पूरी जांच के बाद ही प्रकाश में आयेगी।

रिपोर्ट सादर सेवा में प्रेषित ।

हस्ताक्षर अपठनीय
17.04.2019
(जय प्रकाश यादव)
SIS
काइम ब्रान्च लखनऊ"

32. After going through the aforesaid report of the second Investigating Officer, A.C.J.M., Court No. 25, Lucknow directed the Excise Officer and also called a report from from the Excise Commissioner, U.P. in relation to the tax evasion in the present case the order dated 18.04.2019 passed by A.C.J.M., Court No. 25, Lucknow is as under:

"**दिनांक : 18–04–2019**

आदेश

पत्रावली प्रस्तुत हुई। पुकार पर उभय पक्ष के विद्वान अधिवक्ता उपस्थित।

जघन्य अपराध इकाई, लखनऊ के विवेचक द्वारा रिपोर्ट दिनांक 17–04–19 को प्रस्तुत की गयी एवं आबकारी कर बचाने के सही आकलन हेतु आबकारी विभाग के सक्षम अधिकारी को तलब करने हेतु विद्वान अभियोजन अधिकारी ने प्रार्थना पत्र दिया।

सुना तथा पत्रावली का अवलोकन किया।

माननीय उच्च न्यायालय का आदेश दिनांक 05–04–19 एवं 16–04–19 के अधीन रहते हुये उपरोक्त आदेशों के अनुपालन हेतु इस न्यायालय के आदेश दिनांक 11–04–19 के क्रम में माननीय उच्च न्यायालय के आदेश का अनुपालन किये जाने हेतु प्रकरण के विवेचक तथा आबकारी आयुक्त अपनी विस्तृत आख्या सहित दिनांक 22–04–19 को अभियोजन के माध्यम से उपस्थित हों ताकि माननीय उच्च न्यायालय के आदेश का अनुपालन किया जा सके।

पत्रावली दिनांक 22–04–19 को पेश हो।

ह0 अपठनीय
{अजय कुमार सिंह {द्वितीय}
एसीजेएम क.सं.–25 लखनऊ"

33. In compliance of aforesaid order 18.04.2019 of A.C.J.M., report dated 21.04.2019 of Joint Excise Commissioner, U.P. along with the letter of Excise Commissioner, U.P. dated 21.04.2019 was placed before the court below and Deputy Excise Commissioner (Law), Headquarter, Prayagraj filed affidavit dated 22.04.2019 and deposed that no any excise tax is evaded by the applicants in the alleged transaction.

34. Relevant part of the aforesaid affidavit is being reproduced as under:

"शपथ पत्र

मैं शपथी विजय कुमार सिंह आयु लगभग 55 वर्ष पुत्र स्व0 भगवान बख्श सिंह उप आबकारी आयुक्त (विधि) मुख्यालय प्रयागराज का हूँ जो कि सशपथ निम्नलिखित तथ्य घोषित करता हूँ:–

1– यह कि न्यायालय श्रीमान जी द्वारा पारित आदेश दिनांक 18.04.2019 के अनुपालन में मु0अ0सं0 260/18 धारा 406, 420, 468, 467, 471, 120बी0 आई0पी0सी0 थाना हुसैनगंज लखनऊ सरकार–बनाम–मेसर्स यूनाइटेड ब्रेवरीज लि0 आदि में आबकारी डियूटी के संबंध में आख्या मांगी गयी थी। आदेश दिनांक 18.04.2019 के अनुपालन में विस्तृत आख्या मय संलग्नक कुल 12 वर्क न्यायालय श्रीमान जी के समक्ष इस शपथ पत्र के साथ प्रस्तुत की जा रही है।

2– यह कि आख्या अनुसार मु0अ0सं0 260/2018 थाना हुसैनगंज लखनऊ के मुकदमें में गायब दो ट्रक के संबंध में कोई **आबकारी कर की चोरी नहीं की गई है**। जिसका वाहन संख्या न्च्32थ्छ8048 तथा न्च्32भ्छ3209 है।

3– यह कि बी0डब्लू0 एफ0एल0–2बी0 द्वारा अग्रिम आबकारी कर जरिये ट्रेजरी चालान जमा किया जाता है उक्त डियूटी जमा होने के उपरांत ही निकासी की जाती है।

4– यह कि मु0अ0सं0 260/2018 थाना हुसैनगंज लखनऊ में गायब हुए दो ट्रक की पूर्ति बी0डब्लू0 एफ0एल0–2बी0 द्वारा 10 दिन विलम्ब से माल की आपूर्ति अनुज्ञापी अशोक जायसवाल को कर दी गयी हैं जिसकी पुष्टि क्षेत्रीय आबकारी निरीक्षक लखनऊ द्वारा की जा चुकी है। पूर्ति वाहन संख्या UP32CZ9273 तथा UP81BT6658से की गई है।

5– यह कि उक्त गायब ट्रक के संबंध में टांसपोर्टर मेसर्स सिकल की पूर्ति नहीं हो सकती थी। जो पूर्ति कर दी गयी। फलस्वरूप भियोग मे लोजिस्टिकस लि0 कम्पनी के मैनेजर श्री मुकेश कुमार द्वारा दिनांक 16.09.2018 को थाना बादलपुर जनपद गौतमबुद्ध नगर में मु0अ0सं0 390/2018 धारा 420, 406 आई0पी0सी0 ..... ट्रक ड्राइवर सानू व मुकेश कुमार के विरूद्ध पंजीकृत करायी गयी है। उक्त मुकदमें की चिक प्राथमिकी आख्या के साथ संलग्न है।

लखनऊ
दिनांक–22.04.2019

ह0 अपठनीय
शपथी"

35. It is undisputed that for re-supply of the Beer, excise duty was duly paid to the Excise department, after which F.L. 36 was issued and the goods were supplied by the Company, which was duly received by the informant's side. It is also undisputed that initially, in Case Crime No. 260 of 2018 (supra), final report was prepared by the Investigating Officer on 13.10.2018. However, on the request of the Ashok Kumar Jaiswal, investigation was transferred to the Crime branch and charge sheet was prepared by the 2nd Investigating Officer on 10.02.2019 with the observation that there is a loss of U.P. Excise revenue. The charge sheet was prepared against the Company, Akhil Sharda, Arvind Padhi and Himanshu Tiwari with the allegation that by preparing a forged documents, the Company cheated the informant and also cause U.P. excise revenue loss.

36. In the present case, admittedly, on the order having been placed by the complainant's side for supply of the liquor, it was dispatched by the applicants, strictly in accordance with the provisions of U.P. Excise Laws and when it was found missing near the border of District Lucknow, information of the same was duly reported to the Excise officials. Thereafter, on the direction of the Excise officials, F.I.R. No. 0390 of 2018, under Sections 420, 406 I.P.C., P.S. Badalpur, District Gautam Budh Nagar was lodged on 16th September, 2018 by Mukesh Kumar-Manager of M/s. Sical Logistics Ltd., provider of the vehicles. Thereafter, fresh request was asked by the applicants from the complainant on 21st September, 2018 as per the requirement of excise law to pay the excise duty against the order, in response to which, he gave consent on 22.09.2018 against the order dated 7th August, 2018 to resupply the goods. However, vide letter dated 21.09.2018, it was also informed by the complainant that F.I.R. No. 0260 of 2018 (supra) was lodged against the applicants due to non-supply of the goods. Indisputably, applicants re-supplied the goods against the order dated 07.09.2018 in lieu of the missing goods without taking any extra cost. Thereafter, final report dated 13th October, 2018 was prepared by the 1st Investigating Officer. However, on the application (undated) of Shri Ashok Kumar Jaiswal-licensee, investigation was transferred to the Crime branch. Thereafter, the subsequent Investigating Officer distorted the investigation and started making queries from the applicants that as to why the rebate amounting to Rs.2,26,73,750/- was not paid to the complainant for the period of 1st April, 2018 to 30th September, 2018.

37. On 26th December, 2018, 2nd Investigating Officer-Jay Prakash Yadav wrote a letter to the Company and asked that why the rebate amounting to Rs.2,26,73,750/- has not been paid to the complainant, reply of which, was given by the Company on 15th January, 2019. This fact is recorded in the case diary of Parcha No. SCD 13. Letter dated 26.12.2018 written by the 2nd Investigating Officer is as under:

"यूनाईटेड ब्रेवरीज लिमि0
जसोला दिल्ली

कृपया अवगत कराना है कि थाना हुसैनगंज लखनऊ पर पंजीकृत मु0अ0सं0 260/18 धारा 406 IPC से सम्बन्धित अनुज्ञापी अशोक कुमार जयसवाल (विहाइव एल्फोवेव) 18 स्टेशन रोड लखनऊ जो उपरोक्त कम्पनी के माध्यम से व्यापार करते है तथा उपरोक्त अनुज्ञापी को आपकी कम्पनी के द्वारा वित्तीय वर्षो मे पूर्व मे वर्ष 2015, 2016 व 2016–2017 मे कम्पनी द्वारा रिबेट प्रदान किया गया है जबकि अनुज्ञापी को 01 अप्रैल 2018 से 30 सितम्बर 2018 तक का रिबेट कुल राशि 2,26,73,750/00 नही दिया गया है

कृपया इस सम्बन्ध मे अपना लिखित स्पष्टीकरण प्रदान करे किन परिस्थितियों मे अनुज्ञापी को रिबेट नही प्रदान किया गया है। प्रकरण अति महत्वपूर्ण है अतः सूचना 15 जनवरी 2019 तक उपलब्ध कराने का कष्ट करें।

(जे0पी0 यादव)
निरीक्षक
अपराध शाखा
लखनऊ"

38. Reply of the Company dated 15.01.2019 is also reproduced as under:

"15.01.2019
The Inspector,
Crime Branch ,
Lucknow.
Kind Attention: Mr. J.P Yadav
Dear Sir ,
Ref: Your letter dated 26.12.2018

We refer to your letter dated 26.12.2018 in relation to a complaint by Mr. Ashok Kumar Jaiswal, Licencee FL-2B, Beehive Alcoveb, Lucknow (hereinafter " the Complainant ") regarding non- payment of rebate for the period 01.04.2018 - 30.09.2018 aggregating to Rs. 2,26,73,750/- by United Breweries Limited (hereinafter "the Company").The Complainant also alleged that the Company has not provided the statement of account to them.

We would like to inform you that the Company has not offered any rebate to the Complainant during the period 01.04.2018 to 30.09.2018 and therefore the claim of rebate for the said period aggregating to Rs 2,26,73,750/- made by the Complainant is unfound. The Complainant is put to strict proof of the same. During your inspection of our Depot at Noida on 26.12.2018 and our Sales Office at Delhi on 26.12.2018, we have shown you the statement of account of the Complainant maintained by the Company. We have also shared the statement of account of the Complainant maintained by the Company. WE have also shared the statement of account with the Complainant and therefore the allegation made by the Complainant that they have not received the statement of account is not true.

It may be noted that the Company is engaged in manufacture and sale of beer and the business transactions between the Company and the Complainant are governed by State Excise Laws. All Laws of the Sate under supervision of the Excise officials.

Notwithstanding what is stated above, it is humbly submitted that the dispute in question is civil/ commercial in nature and may fall under differently jurisdiction.

Thanking you."

39. Thereafter, Investigating Officer again wrote a letter dated 25.01.2019, which reads as under:

"रिपोर्ट जघन्य अपराध इकाई लखनऊ

सेवा में,

यूनाईटेड ब्रेवरीज लिमिटेड
626, 6th Floor DFL टावर ठ
DDA डिस्ट्रिक सेन्टर जसौला
नई दिल्ली

थाना हुसेन गंज लखनऊ पर पंजीकृत मु0अ0सं0 260/18 धारा 406/420 IPC से सम्बन्धित कागजात उपलब्ध कराने के सम्बन्ध मे :–

आपको अवगत कराना है कि आप के कम्पनी के लाइसेन्सधारी विहाईव एल्कोहल लाइसेन्स FL-2B लाइसेन्स धारक अशोक कुमार जायसवाल द्वारा अपने प्रबन्धक के माध्यम से अभियोग आप की कम्पनी के अधिकारियों व कम्पनी के विरूद्ध उपरोक्त मुकदमा पंजीकृत कराया है जिसमे यह आरोप लगाया गया है कि कम्पनी जो लाभ/रिबेट हमको पूर्व मे देती थी वह हमको 1.4.18 से 30.9.18 तक का क्यों नही दी।

अतः आपको अवगत कराना है कि आप के कम्पनी के उ0प्र0 के या अन्य स्टेट के जितने भी लाइसेन्स धारी है उनका लेन देन का पूरा विवरण यानि सन् 2015–2016, 2016–2017, 2017–2018 तक का विवरण उपलब्ध कराने की कृपा करें। जिससे यह मिलान कराया जा सके कि अन्य लाइसेन्सधारियों को आप द्वारा इन सत्रो मे रिबेट/लाभ दिया गया है कि नही।

मामला अत्यन्त महत्वपूर्ण है अतः जल्द से जल्द सूचना उपलब्ध कराना सुनिश्चित करें अन्यथा सूचना न उपलब्ध कराने के सम्बन्ध मे सारी जिम्मेदारी आप की होगी।

(जय प्रकाश यादव)
25.1.19
क्राइम ब्रान्च
SSP आफिस लखनऊ"

40. Again a letter dated 31st January, 2019 was written by Jay Pakash Yadav, 2nd Investigating Officer to the Company and asked that under what circumstances, the rebate for the period 01.04.2018 to 30.09.2018 has not been paid. It is evident from the Parcha No. SCD 15 dated 30th January, 2019, in which majeed statement of licensee-Ashok Kumar Jaiswal was recorded by the Investigating Officer under Section 161 Cr.P.C., in which he stated that he is doing business with the Company since long and from time to time, viz., for the period of 31.03.2017 to 16.06.2017, the Company gave rebate and credited the amount of Rs.2 crore in his account. Again on 27.09.2017, Rs.30,00,000/- was credited in his account by the Company. He, thus, stated that for the period of 01.04.2018 to 30.09.2018, about Rs.2 crore 43 lacs were to be credited in his account as rebate, but the same has not been credited. He also stated that the facility of rebate was being given to other groups.

41. The relevant part of the statement of Ashok Kumar Jaiswal is as under:

"श्रीमान जी,

मुकदमा उपरोक्त मे पर्चा नं0 SCD (14) पूर्व मे किता है दीगर कार्य सरकार से फुरसत पाकर मै निरीक्षक मसरूफ विवेचना हुआ तथा लाइसेन्सधारी अशोक जायसवाल को तलब कर कम्पनी तथा उनके बीच के व्यापार के सम्बन्ध मे जानकारी हेतु मजीद बयान किया जा रहा है।

बयान लाइसेन्सधारी अशोक जायसवाल पुत्र स्व0 रामचन्द्र जायसवाल निवासी एफ.एल. 2 बी बिहाइव एल्कोहल 18 स्टेशन रोड लखनऊ ने बादरयाफ्त पूछने पर बताया कि मेरा यूनाईटेड ब्रेवरी से बहुत पुराना व्यापार चल रहा है। तथा कम्पनी तथा मेरे बीच व्यापार के दौरान ट्रेड प्रैक्टिस का जो भी रूपया मेरे खाते मे समय समय पर केडिट किया जाता रहा है उदाहरण के तौर पर बताया कि दिनांक 31.3.17 को 16.6.17 तक मेरे खाते मे कम्पनी द्वारा 20000000 (दो करोड़) रूपया 1.5 करोड़ रूपया व्यापार का केडिट किया गया तथा फिर 27.09.2017 को 3000000 (तीस लाख) 205 625.00 रूपया केडिट किया गया है। 20.3.18 को 65000 लाख 118000 रूपया केडिट किया गया इसे तरह दिनांक 1.4.18 से 30.9.18 तक करीब 2.

43 करोड रूपया जो मेरे खाते मे क्रेडिट होना चाहिए था वह क्रेडिट नही किया गया। कम्पनी के अधिकारी दुर्भावनावश मेरी रकम खाना चाहते है। तथा मेरे व्यापार का नुकसान कर विपक्षी को फायदा पहुॅचाना चाहते है इसी तरह बेवरीज यूनाईट का मेरे बराबर का काम चड्ढा ग्रुप याानि वेव ग्रुप का काम बराबरी का है इनसे आप उसका का डिटेल प्राप्त करे क्या उनको लाभ दिया या कि नहीं।"

42. Thereafter, Investigating Officer again wrote a letter on 31.01.2019 to the Company, which is being reproduced as under:

"सेवा में,
यूनाईटेड ब्रेवरीज लिमि0
626, 6th Floor DFL टावर ठ
क्क। डिस्ट्रिक सेन्टर जसौला
नई दिल्ली

कृपया अवगत कराना है कि थाना हुसैनगंज जनपद लखनऊ पर पंजीकृत मु0अ0सं0 260/18 धारा 406, 420 IPC से सम्बन्धित निम्न बिन्दुओं पर सूचना व आवश्यक प्रपत्र प्रदान करने का कष्ट करें।

1– चड्ढा ग्रुप (वेव ग्रुप) से सम्बन्धित समस्त लाइसेन्सधारियों की सूची संलग्न की जा रही है कि इनका वर्ष 2016–2017–2018 तथा 1.4.2018 से 30.9.18 तक का कारा`बार का स्टेटेम`न्ट उपलब्ध कराये।

2. विहाइव एल्कोहल लाईसेन्स FL-2B लाइसेन्स धारक अशोक कुमार जायसवाल का आपकी कम्पनी से पिछले कई वर्षो से व्यापार हो रहा है तथा ट्रेड प्रैक्टिस के हिसाब से व्यापार मे आपके कम्पनी और लाइसेन्सधारी उपरोक्त के बीच व्यापार के लाभ का दोनो पक्षो पूर्व मे हिस्सा देते रहे है जैसा कि आपके द्वारा पूर्व दिया गया है किन्तु ऐसा क्या कारण है कि आपके द्वारा दिनांक 1.4.2018 से 30.9.18 तक का जो लाइसेन्सधारी था लाभ का हिस्सा बनता था उसके खाते मे क्यो नही क्रेडिट किया गया, आपके द्वारा पूर्व अवगत करायी गयी सूचना अपूर्ण है तथा आपका यह कहना है कि यह प्रकरण सिविल नेचर या एक्साइज ला के अन्तर्गत है औचित्य पूर्ण नही है, कृपया स्पष्ट करें।

3– क्या आप दोनो पक्षो के बीच व्यापार के दौरान दि0 1.4.2018 से 30.9.18 तक के दौरान लाइसेन्सधारी के व्यापार के लाभ को नही दिया गया है इस सम्बन्ध मे क्या आपके द्वारा कोई लिखित सूचना लाइसेन्सधारी को दी गयी है अथवा नही।

संलग्नक – यथोपरि – 02 वर्ष
(जय प्रकाश यादव)
प्रभारी निरीक्षक
जघन्य अपराध इकाई
लखनऊ"

43. Reply dated 03.02.2019 given by the Company is also reproduced as under:

"03.02.2019
The inspector In-Charge,
Heinous Crime Branch,
Lucknow.
Kind Attention : Mr. JP Yadav
Dear Sir,
Ref: Your letter dated 31.01.2019

We refer to you letter dated 31.01.201 in connection with FIR No. 260/18 (pertaining to non- supply of goods) seeking details on the points raised in your letter. We submit our response as under:

1. Statement of business transactions with Licensees of Chadha Group (Wave Group) in the year 2016-17,2017-18 and 01.04.2018 to 30.09.2018.

You have sought information in respect of several licensees for past three years ans you will appreciate that the information cannot be compiled in short notice as the information pertains to 3rd party. Further, the information is privileged and confidential and we will have to inform the concerned parties to provided this information.

2. It would be incorrect to say that as per the trade practice we have been sharing profit in trade with the complainant in the past. The Company offers some trade

benefits to Licensees which based on various factors including brands, market, volume, etc. and there is no profit sharing understanding/agreement with the complainant. It is entirely at the discretion of the Company to offer such benefits. You are already informed that the Company has not offered any scheme/rebate during the period 01.04.2018 to 30.09.2018 and therefore no amount is payable to the Complainant on this account. We reiterated that these are purely commercial aspects of the trade and may fall under diffrent jurisdiction.

3. As explained above, there is no agreement between the Company and the Complainant for sharing of profit in trade.

4. Notwithstanding the above, it is humbly submitted that the case in subject FIR No. 260/2018 was for non- supply of beer against the consideration paid by the complainant and for which amounts the goods have already been supplied and the grievance stands resolved."

44. It is worthy to be noticed here that during the course of investigation, statement of the owner of the alleged two trucks bearing no. UP32 HN 3209 and UP32 FN 8048 was also recorded under Section 161 Cr.P.C., in which he stated that his trucks were not used for the purpose as his trucks were being used for transporting sand and since last three months, trucks were standing in the yard, meaning thereby, the vehicle provider provides some other vehicles plying with the numbers UP32 HN 3209 and UP32 FN 8048 and this was the subject matter of investigation of F.I.R. No. 0390 of 018 under Section 420, 406 I.P.C. lodged by Mukesh Kumar-Manager of M/s. Sical Logistics Ltd. But, it reveals from the record of the case diary provided by Shri V.K. Shahi, learned A.A.G. of the aforesaid case that the investigation of the aforesaid case was transferred from Police Station Badalpur, Gautam Budh Nagar to Police Station Banthara, Ditrict Lucknow and was re-numbered as F.I.R. No. 227 of 2019, under Sections 406, 420 I.P.C., P.S. Banthara, District Lucknow. However, investigation of the aforesaid case was dropped by the Investigating Officer on 28th June, 2019 with the finding that for the same offence, F.I.R. No. 260 of 2018 (supra) was lodged in P.S. Husainganj, District Lucknow, investigation of which was being conducted by the same Investigating Officer. Thereafter, impugned charge sheet dated 10.02.2019 was filed in F.I.R. No. 260 of 2018 (supra) with the finding that the alleged goods were vanished with the conspiracy of the Company and its officials and only in the peshbandi, F.I.R. No. 227 of 209 (old no. 390 of 2018) was lodged at P.S. Badalpur.

45. It is evident from the case diary of Case Crime No. 260 of 2018 (supra) that initially 1st Investigating Officer submitted final report with the finding that the goods were re-supplied to the licensee/buyer, but the 2nd Investigating Officer twisted the investigation with the correspondence to the applicants that as to why the rebate was not being paid to the complainant.

46. It is apparent from the record and the pleadings that there is no evasion of tax and it seems that there is a dispute of rebate between the parties and, therefore, the impugned criminal prosecution is a sheer abuse of the legal process. It is in view of the reasons, as observed above that no ingredients of deception, fraudulent or dishonest act by inducing the person or criminal breach of trust or forgery are found.

47. Considering the aforesaid facts and parameters laid down by the Hon'ble Apex Court in the case of **State of Haryana Vs. Bhajan Lal** (supra) and

Rajiv Thapar (supra), the application is allowed and the impugned charge sheet dated 10.02.2019 in F.I.R. No. 260 of 2018 and its consequential summoning order dated 13.02.2019 passed by ACJM-I, Court No. 25, Lucknow are set aside.

48. However, before parting with the judgment, it is hereby observed that since it is evident from the record that the owner of the vehicle nos. UP32 HN 3209 and UP32 FN 8048 stated that the vehicles were standing in his yard, meaning thereby, either the owner is a falsehood or the service provider of the vehicles to the Company is plying illegal vehicles on the aforesaid numbers, which is a matter of investigation.

49. In such circumstances, it is directed that the investigation of Case Crime No. 227 of 2019 under Sections 406, 420 I.P.C., P.S. Banthara, District Lucknow (old no. 390 of 2018, under Sections 406, 420 I.P.C., P.S. Badalpur, District Gautam Budh Nagar) be transferred to C.B.C.I.D. forthwith. Commissioner of Police, Lucknow is directed to pass necessary orders for handing over all the necessary documents to the office of Director General of C.B.C.I.D., who, in turn, is directed to depute some competent officer not below the rank of Deputy Inspector General of Police to monitor the further investigation of the aforesaid case on weekly basis and conclude the same as early as possible, strictly in accordance with law.

50. Photocopy of both the case diaries are returned back to the learned A.A.G.

51. Office is directed to communicate this order to the Chief Judicial Magistrate, Lucknow as well as Additional Chief Secretary (Home), Director General (Police), U.P., Director General, C.B.C.I.D. and Police Commissioner, Lucknow for necessary compliance.

(2020)03-05ILR A1559
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 3015 of 2020

Indradev Seth ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Seema Mishra

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

(A) Criminal Law-Code of criminal procedure, 1973 - Sections 482 – Inherent jurisdiction - Indian Penal Code, 1860 - Section 498A, 304B, 201 I.P.C. read with Section 3/4 of D.P. Act - Section 311 of Cr.P.C. - provides power to trial Judge for summoning any of the witness being needed for the just decision of case before delivery of judgement at any stage of any inquiry, trial or other proceeding - trial Judge was justified in passing impugned order. (Para - 6)

Trial Court, summoned two witnesses under Section 311 of Cr.P.C. - no such argument was ever raised either by prosecution or by defence side - nor those witnesses were necessary for their evidence - Court became bias, after filing of a written argument by defence side - Then after for deferring delivery of judgment, this impugned order has been passed.(Para -3)

HELD:- Just and proper decision is to be seen by trial Court for summoning any witness, under Section 311 of Cr.P.C. Court may summon, upon motion moved by either

side or by *suo moto*, if it finds it necessary. (Para-9)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Raja Ram Prasad Yadav Vs. St. of Bihar & anr., AIR 2013 SC 3081

2. Mohanlal Shamji Soni vs U.O.I. And Another, 1991 CriLJ 1521

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicant Indradev Seth, by means of this application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of the Court with prayer to quash the summoning order dated 21.11.2019, passed by learned Additional Session Judge, Fast Track Court- I, Mirzapur, in S.T. No. 43 of 2016 (State of U.P. Vs. Suraj Seth and others), under Section 498A, 304B, 201 I.P.C. read with Section 3/4 of D.P. Act, Police Station- Ahrora, District- Mirzapur, pending before the Court of learned Additional Session Judge, Fast Track Court- I, Mirzapur.

2. Heard learned counsel for the applicant and learned A.G.A. for the State.

3. Learned counsel for the applicant argued that file was scheduled for judgement but trial Court, vide impugned order, summoned two witnesses under Section 311 of Cr.P.C., whereas no such argument was ever raised either by prosecution or by defence side nor those witnesses were necessary for their evidence. Rather, Court became bias, after filing of a written argument by defence side and this argument was gone through by the Presiding Judge. But no where this was mentioned in order-sheet that this argument was filed. Then after for deferring delivery of judgment, this impugned order has been passed. Many other arguments regarding facts of case, were argued but the same are not concerned with disposal of present matter, in issue. Hence, need not to be mentioned.

4. Learned AGA has vehemently opposed the above prayer.

5. The sole question is whether trial Judge was justified in passing impugned order or not.

6. No doubt Section 311 of Cr.P.C., provides power to trial Judge for summoning any of the witness being needed for the just decision of case before delivery of judgement at any stage.

7. Section 311 Cr.P.C. provides "Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

8. It is crystal clear that the Court is empowered to summon any person as witness, at any stage of any inquiry, trial or other proceeding. The power is not confined to any particular class or person. It is settled law that if the conditions under this Section is satisfied, the Court can call a witness not only on the motion of either of the prosecution or defence but also it can

do so on its own motion. Any person can be summoned as a witness or recalled or re-examined at any stage of proceeding, where those ingredients is present and this has been propounded by Apex Court in **Mohanlal Shamji Soni vs Union Of India And Another, 1991 CriLJ 1521**. Learned counsel for the applicant has pressed law of Apex Court in **Raja Ram Prasad Yadav Vs. State of Bihar and another, AIR 2013 SC 3081**, where this power of trial court to summon, recall or re-examine any person, has been stated as follows:

(B) Criminal P.C. (2 of 1974), S. 311 - Power of Court to summon, recall or re-examine any person - Exercise of - Governing principles.

While dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour

of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

9. Meaning thereby, just and proper decision is to be seen by trial Court for summoning any witness, under Section 311 of Cr.P.C. Court may summon, upon motion moved by either side or by *suo moto*, if it finds it necessary. Now in case in hand, it has been written in First Information Report that information of alleged disease of deceased was communicated to informant by some Mohan Seth. Subsequently, this Mohan Seth apprised that deceased had died. Now Mohan Seth was shown as a witness but prosecution not examined this witness. This was a plea by defence that no such occurrence ever occurred. Rather it was a natural death, owing to ailment, for which deceased was being taken for her treatment. Meaning thereby, the *bona fide* of accused that he communicated one relative of informant about disease of deceased and he communicated instantly to informant about this ailment of deceased, is a crucial point and if Mohan Seth proves it that he had been informed by accused side that deceased was under ailment and was taken for treatment, then it will prove the *bona fide* of accused persons, that will substantiate the plea of defence. Subsequently, information of death, being said to be given to Mohan Seth and communicated to informant by Mohan Seth, is also of that much crucial nature. Hence, Mohan Seth was an important witness to be examined before trial Court for appreciation of this aspect that accused persons did informed Mohan Seth about disease of deceased and she being taken for treatment. Hence, trial Judge rightly concluded for summoning Mohan Seth, for his examination and this examination will be helpful for accused himself, in case he proves so. By examining this witness the real and just decision will be passed.

10. Regarding other witnesses, driver of that tempo, by which deceased was said to be taken to hospital for treatment and if it is so and proved on record, then, *bona fide* of accused persons and plea of defence, will be substantiated. Either prosecution or defence itself ought to examine these witnesses, for fortifying their plea and placing their *bona fide* but unfortunately these witnesses are not examined and for reaching correct and just decision in judicial decision making, their evidence was must and in course with guidelines given by Apex Court, narrated as above. Accordingly, there is nothing

wrong in the impugned order. This application merits its dismissal.

11. Dismissed, as such.

(2020)03-05ILR A1563
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.02.2020

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 Cr.P.C. No. 3068 of 2020

Iqbal Ahmad ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Gaurav Kakkar, Sri Pravin Kumar Mishra

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

(A) Criminal Law- The Negotiable instruments Act, 1981 - Section 138 - Section 391 (1)- Cr.P.C.Code of criminal procedure, 1973 - Sections 482 – Inherent jurisdiction - Section 243 Cr.P.C. – Evidence for defence - Section 391 Cr.P.C. - Appellate court may take further evidence or direct it to be taken - - appellate court is entitled to take additional evidence, only if it thinks, additional evidence to be necessary - it depends on facts of each and every case to come to a conclusion as to whether it is 'necessary' to take additional evidence or not. (Para-12)

Complaint filed against the applicant - Section 138 of the Negotiable Instruments Act - application moved by the applicant before the trial court & concerned bank - with respect to loss of cheque - cheque in question dishonored with the endorsement "insufficient fund" and not with the endorsement "mismatch of signature" - For the first time, the applicant claimed before the appellate court through application under section 391 Cr.P.C. that the cheque did not bear his signature and disputed cheque be got examined by hand writing expert – despite ample opportunity given during trial to get admitted signatures compared with the disputed signature on the cheque - no such prayer was made. (Para-16)

HELD:-The applicant did not want to file any additional evidence but wanted to create new evidence merely on the ground that the disputed cheque does not bear his signatures . Application under Section 391 Cr.P.C. filed by the applicant before the Appellate court was not bonafide and was simply moved to create confusion and delay in disposal of appeal and the application has been rightly rejected by learned Additional District and Sessions Judge.(Para –13, 17)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Rambhau and Another Vs. St. of Mah., (2001) 4 SCC 759

2. Kalyani Baskar vs. M.S. Sampornam , 2006 0 Supreme(SC) 1109

3. Brig. Sukhjeet Singh (Retd.) MVC vs. St. of U.P. & ors., , 2019 (3) Supreme 242

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

1. Supplementary affidavit filed by the learned counsel for the applicant today in the Court, which is taken on record.

2. Heard Mr. Pravin Kumar Mishra, learned counsel for the applicant, Mr. P.K. Shahi, learned A.G.A. for the State and perused the record.

3. This application under Section 482 Cr.P.C. has been filed by the applicant seeking to quash the impugned order dated 12.12.2019 passed by the learned

Additional District and Sessions Judge, Court No.05, Bijnor in Criminal Appeal No. 72 of 2018, whereby an application under Section 391 Cr.P.C. was rejected.

4. The brief facts of the case are that, a complaint has been filed by the complainant/opposite party no.2 against the applicant under Section 138 of the Negotiable Instruments Act with the allegations that the applicant purchased pots of brass worth Rs. 2,75,000/- on 24.04.2015 from opposite party no. 2 and for payment of which, he gave a cheque bearing No.993347 dated 24.04.2015 for Rs. 2,75,000/- drawn on Oriental Bank of Commerce, Branch, Bhaneda to the complainant. The cheque was presented before the concerned bank on 24.04.2015 but it was dishonored with the endorsement "insufficient fund'. A notice was sent by the complainant to the applicant on 28.04.2015, which was received by him on 29.04.2015, but despite notice, the amount was not paid. Therefore, the complaint was filed against the applicant, on which, the applicant was summoned and put into for the trial. After trial, the learned Judge, Additional Court, Bijnor, vide judgment and order dated 31.10.2018 convicted the applicant under Section 138 of the Negotiable Instruments Act and sentenced him to undergo simple imprisonment for three months with fine of Rs. 3,50,000/- and in case of default of payment of fine further undergone simple imprisonment for a period of one month. It was further directed that out of total amount of fine/compensation of Rs. 3,50,000/-, Rs. 3,40,000/- has been directed in favour of complainant/opposite party no.2.

5. Feeling aggrieved by the judgment and order of the trial court dated 31.10.2018, the applicant filed a Criminal Appeal No. 72 of 2018, which is pending in the Court of Additional District and Sessions Judge, Court No. 05, Bijnor. During pendency of appeal, an application Kha-22 was moved by the applicant under Section 391 Cr.P.C. for getting the alleged signature of the applicant on the disputed chaque verified by hand writing expert on the ground that the cheque was alleged to have been issued by the applicant on 24.04.2015 whereas the cheque was not issued by the applicant nor it bears signature. During defence evidence, the applicant had moved applications B-25 and B-26 before the court below stating therein that the cheque of applicant was stolen for which an application was given to the bank concerned on 29.04.2015. Consequently, the application under Section 391 Cr.P.C. was rejected by the Additional District and Session Judge on the ground that earlier no such application was moved by the applicant before the trial court with respect to verification of the signature of the applicant on the disputed cheque, however, the applicant moved the applications B-25 and B-26 before the trial court regarding stolen cheque. During trial, applicant had enough time to verify his signature but the opportunity was not availed by the applicant and, therefore, no sufficient ground to invoke Section 391 Cr.P.C. arises. Consequently, application Kh-22 was rejected.

6. It has been contended by learned counsel for the applicant that learned Additional District and Session Judge, was not justified in rejecting the application under Section 391 Cr.P.C. specially when there was specific denial of the applicant that the cheque did not bear his signature and entire case was fabricated. The cheque was stolen and was misused, for which, an application was already moved by the

applicant before the concerned bank. Therefore, the appellate court should have directed for sending the disputed cheque to hand writing expert for verification of signature on the cheque in question. It has further been contended by learned counsel for the applicant that appellate court committed error in not exercising jurisdiction under Section 391 Cr.P.C. in not permitting the applicant to verify his signature by hand writing expert, which has resulted in failure of justice.

7. Learned counsel for the applicant has relied upon the judgment of the Hon'ble Supreme Court in the case of ***"Brig. Sukhjeet Singh (Retd.) MVC vs. State of Uttar Pradesh and others" reported in 2019 (3) Supreme 242*** wherein the Hon'ble Supreme Court has held as under:-

"11. In the present appeal, we are concerned only with the rejection of application filed by the appellant under Section 391 Cr.P.C. before the Session Judge in the criminal appeal filed by him against the conviction order, whether the Session Judge committed error in not exercising power under Section 391 Cr.P.C. to permit the appellant to lead additional evidence is a question to be answered. Whether the High Court committed error in not exercising power under Section 482 Cr.P.C. as to secure the ends of justice?

12. Chapter XXIX of the Code of Criminal Procedure, 1973 deals with "Appeals". Section 391 Cr.P.C. empowers the Appellate Court to take further evidence or direct it to be taken. Section 391 is as follows:-

"391. Appellate court may take further evidence or direct it to be taken.--

(1) In dealing with any appeal under this chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate. (2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal. (3) 7 of 13 The accused or his pleader shall have the right to be present when the additional evidence is taken. (4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

13. The key words in Section 391(1) are "if it thinks additional evidence to be necessary". The word "necessary" used in Section 391(1) is to mean necessary for deciding the appeal. The appeal has been filed by the accused, who have been convicted. The powers of Appellate Court are contained in Section 386. In an appeal from a conviction, an Appellate Court can exercise power under Section 386(b), which is to the following effect:-

(b) in an appeal from a conviction- (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (ii) alter the finding, maintaining the sentence, or (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

14. ***Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the Appellate Court to secure ends of justice.*** *The scope and ambit of*

Section 391 Cr.P.C. has come up for consideration before this Court in Rajeswar Prasad Misra Vs. State of West Bengal and Another, AIR 1965 SC 1887. Justice Hidayatullah, speaking for the Bench held that a wide discretion is conferred on the Appellate Courts and the additional evidence may be necessary for a variety of reasons. He held that additional evidence must be necessary 8 of 13 not because it would be impossible to pronounce judgment but because there would be failure of justice without it. Following was laid down in Paragraph Nos. 8 and 9:-

"8. ..... Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section. 9. Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may 9 of 13 be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise..... ....."

15. This Court again in Rambhau and Another Vs. State of Maharashtra, (2001) 4 SCC 759 had noted the power under Section 391 Cr.P.C. of the Appellate Court. Following was stated in Paragraph Nos. 1 and 2:-

"1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same..... 2. A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in the case of Rajeswar Prasad Misra v. State of W.B. in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and 10 of 13 in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard."

16. From the law laid down by this Court as noted above, it is clear that there are no fetters on the power under Section 391 Cr.P.C. of the Appellate Court. All powers are conferred on the Court to secure ends of justice. The ultimate object of judicial administration is to secure ends of justice. Court exists for rendering justice to the people...." ***In the aforesaid judgment, the Hon'ble Supreme Court while discussing two grounds rejecting the application under Section 391 Cr.P.C. by the Court of Sessions and High Court held that neither the filing of an application for additional evidence at a belated stage is a ground to reject the same nor the delay in decision of the appeal is a ground to dismiss the same if the proposed additional evidence enables the Court to secure the ends of justice in achieving the object of judicial administration."***

8. Learned counsel for the applicant has also relied upon the judgment of the Hon'ble Supreme Court in the case of ***"Kalyani Baskar vs. M.S. Sampornam" reported in 2006 0 Supreme(SC) 1109.***

9. Learned counsel for the applicant has, thus, contended that if the applicant is able to prove that his standards signature do not tally with the signature appended on the cheque in question, he can be acquitted and, therefore, the impugned order dated 12.12.2019, passed by the appellate court, dismissing the application of the applicnat filed under Section 391 Cr.P.C., be set aside.

10. Per contra, Mr. P.K. Shahi, learned A.G.A. for the State supported the impugned order and submitted that the cheque was issued by the applicant in connection with payment which was due from the applicant. During defence evidence, the applicant had ample opportunity to file an application for verifying his signature but he did not make any application before the trial court for comparison of his admitted signature with the disputed signature on the cheque in question and no such application was maintainable in the appellate court. It was also submitted that provisions of Section 391 Cr.P.C. will apply only in case of additional evidence, which came to light subsequently but the provision cannot be used to create additional evidence, which was not available to the trial court.

11. Before dealing with the arguments of learned counsel for the applicant, it would be useful to reproduce Section 391 of the Code of Criminal Procedure:-

"391. Appellate court may take further evidence or direct it to be taken.-

(1) In dealing with any appeal under this chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

12. According to Section 391 (1) Cr.P.C., the appellate court is entitled to take additional evidence, only if it thinks, additional evidence to be necessary. The

key words in Section 391(1) Cr.P.C. are 'if it thinks additional evidence to be necessary'. The word 'necessary' used in Section 391(1) Cr.P.C. is to mean necessary for deciding the appeal. However, it depends on facts of each and every case to come to a conclusion as to whether it is 'necessary' to take additional evidence or not.

13. In the facts and circumstances of the present case, the applicant did not want to file any additional evidence but wanted to create new evidence merely on the ground that the disputed cheque does not bear his signatures.

14. The judgment relied upon by learned counsel for the applicant, in the case of **Brig. Sukhjeet Singh** ***(supra)*** wherein the Apex Court has held that mere delay in filing the application is not a ground to reject the same if the proposed additional evidence allows the lower appellate Court to achieve the object of judicial administration and to secure the ends of justice. This decision is of no help of the applicant as the Appellate Court has not rejected the application under Section 391 Cr.P.C. on the ground of delay in filing the said application, whereas, the Appellate Court has rejected the same on the ground that during course of trial, the applicant did not move any application for verification of his signature, it means that, the applicant did not want to file any additional evidence but wanted to create new evidence merely on the ground that the disputed cheque does not bear his signatures.

15. The judgment relied upon by learned counsel for the applicant, in the case of ***Kalyani Baskar (supra)*** wherein the Apex Court has held that where the accused denies his or her signature on the cheque and moved an application under Section 243 Cr.P.C. for sending the cheque in question for expert opinion, the same should have been allowed. This decision is also of no help of the applicant as during trial before the court below, the applicant did not make any application under Section 243 Cr.P.C. for verification of signature by hand writing expert, though sufficient opportunity was granted by the trial court to the applicant to lead defence evidence. Had such an application been moved before the trial court and the same having been rejected, it was open to the applicant to make a prayer under Section 391 Cr.P.C. before the Appellate Court but since no such prayer was made by the applicant before the trial court, there was no occasion for moving such an application before the Sessions Judge.

16. Perusal of the record shows that during trial, the applicant moved an application before the trial court with respect to loss of cheque for which an application was moved by the applicant before the concerned bank on 01.04.2015. However, the cheque in question was dishonored with the endorsement "insufficient fund" and not with the endorsement "mismatch of signature". Thus, it is clear that signature on the cheque is of the applicant. In spite of that, if the applicant find that the cheque in question was not issued by him, he should have moved an application before the trial court for verification of his signature by hand writing expert. For the first time, the applicant claimed before the appellate court that the cheque did not bear his signature and disputed cheque be got examined by hand writing expert. The applicant had ample opportunity during trial to get his admitted signatures compared with the disputed signature on the cheque but

despite sufficient opportunity being given by the trial court, no such prayer was made by him. Thus the application for getting the signatures verified by handwriting expert was simply moved with a view to delay the disposal of appeal and the application under Section 391 Cr.P.C. does not appear to be bonafide.

17. Having considered the submissions advanced by learned counsel for the applicant, learned A.G.A. and also perusing the record, I have come to the conclusion that application under Section 391 Cr.P.C. filed by the applicant before the Appellate court was not bonafide and was simply moved to create confusion and delay in disposal of appeal and the application has been rightly rejected by learned Additional District and Sessions Judge, Bijnor. Hence the prayer made in the present application is refused.

18. The present application lacks merit and is, accordingly, **rejected.**

(2020)03-05ILR A1569
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.02.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 Cr.P.C. No. 3171 of 2016
connected with
Application U/S 482 Cr.P.C. No. 7792 of 2017
connected with
Application U/S 482 No. 7793 of 2017
connected with
Application U/S 482 No. 7790 of 2017
connected with
Application U/S 482 No. 7795 of 2017

Anil Kumar Agarwal ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Hare Krishna Tripathi

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

(A) Criminal Law- Forum to file an appeal – legal controversy - referred to larger bench for opinion - Code of criminal procedure, 1973 - Section 482 Cr.P.C - appeal being the creation of statute - when the victim or when the victim is also a complainant chose to file an appeal against acquittal in a case instituted upon complaint, it would be under proviso to Section 372 CrPC read with 378 (4) & 378 (5) CrPC - Proviso to 372 CrPC gives right to the victim to file an appeal - Section 378 (4) & (5) CrPC provides procedure, limitation and forum to file an appeal in a case instituted upon complaint. (Para-40)

Complainant filed an application under section 138 of Negotiable Instruments Act before the court of Chief Judicial Magistrate - accused acquitted by the concerned Magistrate after dismissal of the complaint - Against the order of acquittal the complainant preferred an appeal, before the Sessions Court under section 372 Cr.P.C. - appeal dismissed by the sessions court – ground – not maintainable under section 372 Cr.P.C. - application under section 482 Cr.P.C. filed with a prayer to quash the order passed by the Additional District and Sessions Judge.
(Para-3,4)

HELD:- (a)The appeal by a 'victim' who is a complainant also against the order of acquittal in a criminal complaint case under 138 of Negotiable Instrument Act would lie to the *High Court* under proviso to Section 372 read with Sub-section (4) & (5) of Section 378 CrPC.
(Para - 41)

(b) Against the same judgment and order of acquittal in a complaint case, in a situation

where victim and complainant both are different persons, appeal by a victim would lie under the proviso to 372 CrPC read with Section 378 (4) (5) CrPC only before the *High Court*.
(Para - 41)

(B) Statutory Interpretation - legislative intent of insertion of proviso to section 372 CrPC - victim, whether complainant or not, has right to file appeal against the acquittal in a case constituted upon complaint also - interpretation which promotes and advances the object and purpose of the enactment - object and purpose of insertion of proviso is to strengthen the give rights to victim - purposive interpretation to the enactment – not to result in anomalies, injustices or absurdities - Section 378 (4) and (5) CrPC, provides procedure to file appeal by complainant against acquittal in a case instituted upon the complaint .(Para-49,50,51)

HELD:- Upon conjoint reading, the sole interpretation is that, an appeal in both the situations have to be filed before one forum only as any other interpretation will lead into a situation of uncertainty and anomalies . The forum that is prescribed under section 378(4) CrPC is High Court to file appeal by the complainant, therefore considering the principles of statutory interpretation even victim has to file appeal against acquittal in a case constituted upon complaint, before High Court only. This will not only avoid uncertainty but will also serve the purpose of the enactment.
(Para – 51)

Reference answered (E-7)

List Of Cases Cited:-

1. Legal Representatives Vs. St. of Karn. & ors., (2019) 2 SCC 752

2. Subhas Chand Vs. State Delhi Administration, (2013) 2 SCC 17

3. M/s Tata Steel Ltd. Vs. M/s Atma Tube Products Ltd. & ors., 2013 (1) ILR 719 (P&H)

4. Damodar S. Prabhu Vs. Sayed Babalal H. ,2010 CrLJ 2860,

5. Dharmveer Singh Tomar Vs. Ramraj Singh Tomar, 2011, Law Suit (MP) 55,

6. Top Notch Infotronix (I) Pvt. Ltd. Vs. Infosoft Systems & ors., 2011 Law Suit (Bom) 711.

7. Mast Ram Tiwari Vs. St. of U.P. & ors., Criminal Misc. Application u/s 372 Cr.P.C. (Leave to Appeal) No. 351 of 2017

8. Bhavuben Dineshbhai Makwana Vs. St. of Guj., 2013 Cri LJ 4225

9. The Central India Spinning and Weaving Manufacturing Comp. Vs. The Municipal Committee, Wardha), AIR 1958 SC 341

10. Girdhari Lal & Sons Vs. Balbir Nath Mathur), 1986(2) SCC 237

11. Utkal Contractors & Joinery Pvt. Ltd. Vs. St. of Orissa, 1987 (3) SCC 279

12. Eera (through Dr. Manjula Krippendorf) Vs. St. (NCT of Delhi) and anr., 2017(15) SCC 133

(Delivered by Hon'ble Shashi Kant Gupta, J.)

1. The questions referred to this Bench for opinion are as follows:

(i) Whether against acquittal order in a criminal complaint case under Section 138 Negotiable Instruments Act, the victim, who is complainant also, may prefer appeal before the Sessions Judge taking recourse to the proviso to Section 372 Cr.P.C. or the said appeal shall lie before the High Court under the said provisions.

(ii) Whether against the same judgment and order of acquittal in a complaint case, in a situation when victim

and complainant both are different persons, victim may file appeal under the proviso to Section 372 CrPC before the Sessions Judge or such appeal shall lie before the High Court ?

2. Since the learned Single Judge could not subscribe to the views expressed by the learned Single Judges of this Court in Criminal Misc. Application (Under Section 482 Cr.P.C) No. 5934 of 2012, Ashok Kumar Srivastava and others vs. State of UP and another, (decided on 30.03.2012) and Criminal Revision No. 3539 of 2015, Ved Prakash Yadav and 2 others Vs. State of UP and 2 others, (decided on 24.09.2015), referred the matter to a larger bench for resolving the conflict, the Chief Justice thereupon has referred the matter to us for our opinion.

3. Since the legal controversy raised in all the criminal Misc. Applications are similar, they are decided by a common order by treating the Criminal Misc. Application No. 3171 of 2016 (U/S 482 CrPC) Anil Kumar Agrawal Vs. State of UP as a leading case. For the purpose of deciding the matter, it would be appropriate to have a quick glance to the fact of the Criminal Misc. Application No. 3171 of 2016 (U/s 482 Cr.P.C) Anil Kumar Agarwal Vs. State of U. P. and another. The complainant therein had filed an application under section 138 of Negotiable Instruments Act before the the court of Chief Judicial Magistrate Jhansi. The accused were acquitted by the concerned Magistrate after dismissal of the complaint.

4. Against the order of acquittal the complainant preferred an appeal, being appeal no. 145 of 2013, Anil Kumar Agrawal Vs. Braj Bhushan Lahariya and another before the Sessions Court , Jhansi under section 372 Cr.P.C. The said appeal was dismissed by the sessions court, Jhansi as not maintainable under section 372 Cr.P.C. Hence, the application under section 482 Cr.P.C. was filed with a prayer to quash the order dated 16.11.2015 passed by the Additional District and Sessions Judge, Fast Track Court, Jhansi in Criminal Appeal No. 145 of 2013 (Anil Kumar Agarwal vs. Braj Bhushan Lahariya and another) .

5. Learned counsel for the applicant Sri Sushil Shukla has submitted that the victim or the complainant has been given unfettered right of appeal in terms of proviso to Section 372 Cr.P.C to challenge the acquittal of an accused by preferring an appeal before the Court of Session if the order of acquittal is passed by the Court of Magistrate or before the High Court if order of acquittal is passed by the Court of Session and for preferring such appeal there is no need to obtain leave/special leave from such Courts after insertion of the proviso to Section 372 Cr.P.C by Act 5 of 2009 w.e.f. 31.12.2009. He further submitted that appeal against the order of acquittal would lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court irrespective of the fact whether the acquittal order is passed in a case instituted upon a complaint case or police report. While placing reliance upon the decision **Malikarjun Kodagali (Dead) Represented through Legal Representatives Vs. State of Karnataka and others-(2019) 2 SCC 752**, he has submitted that the victim for challenging the order of acquittal in an appeal need not to obtain leave of the Court and that his appeal has to be dealt as a regular appeal.

6. Per contra, learned Standing Counsel Mr. Syed Ali Murtaza appearing

on behalf of the State has submitted that the complainant in a compliant case, who is a victim also is entitled to prefer appeal before the High Court against the order of acquittal whether it is passed by a Magistrate or Sessions Judge and appeal would lie again before the High Court even when the victim and complainant both are different persons in a case arising from the same judgment and order of acquittal in a complaint case.

7. Learned AGA in support of his contention has placed reliance upon the following decisions of the High Court as well as of the Apex Court:

i. Mallikarjun Kodagali (Dead) Represented Through Legal Representative Vs. State of Karnataka & others, (2019) 2 SCC 752

ii. Subhas Chand Vs. State Delhi Administration, (2013) 2 SCC 17

iii. M/s Tata Steel Ltd. Vs. M/s Atma Tube Products Ltd. & others, 2013 (1) ILR 719 (P&H)

iv. Damodar S. Prabhu Vs. Sayed Babalal H. 2010 CrLJ 2860,

v. Dharmveer Singh Tomar Vs. Ramraj Singh Tomar, 2011, Law Suit (MP) 55,

vi. Top Notch Infotronix (I) Pvt. Ltd. Vs. Infosoft Systems & Ors, 2011 Law Suit (Bom) 711.

8. Before we proceed further, it would be relevant to note certain provisions of CrPC, which are relevant for our purpose, to address the questions. The word 'complaint' and the word 'victim' have been defined by clauses (d) and (wa) of Section 2 of CrPC, which read as under :

"(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant; (wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir".

9. We are referring to above definitions, 'complainant and victim' as they are referred to in Section 372 and Section 378 of CrPC respectively around which the whole web of arguments has been woven by learned counsel for the parties. Chapter XXIX CrPC deals with appeal. The heading of section 372 CrPC is "No appeal to lie unless otherwise provided". Unamended Section 372 CrPC prior to 31.12.2009 stood as follows:

"372. No appeal to lie unless otherwise provided.- No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code by any other law for the time being in force:

10. Section 372 CrPC was amended by Act 5 of 2009 with effect from 31.12.2009, whereby a proviso was added. It would be advantageous at this stage to reproduce the amended Section 372 CrPC, which reads as under:

"372. No appeal to lie unless otherwise provided.- No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

11. A bare reading of the proviso inserted to Section 372 CrPC, it is evident that there are following three circumstances in which the victim shall have the right to prefer an appeal against any order:

(a) acquitting the accused;
(b) convicting for lesser offence;
(c) imposing inadequate compensation.

12. Similarly, we are also concerned with Section 378, which provides for appeal in case of acquittal. The provisions contained in Section 378, read as follows:

"378. Appeal in case of acquittal. - (1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub- sections (3) and (5), -

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal-

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.

(3) No appeal to the High Court under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

4. If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty

days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub- section (2)."

13. Prior to the amendment in section 372 Cr.P.C. there was no specific provision for the victim. By way of amendment in section 372 Cr.P.C. the proviso was added to enable the victim to file a statutory appeal against any order passed by the court acquitting or convicting the accused for a lesser offence or imposing inadequate compensations and further providing that that such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.

14. At this stage, it would also be appropriate to refer to the statements and reasons to achieve the objectives for whichthe amendment of Codeof Criminal Procedure by Act No.5 of 2009 was enforced. It reads as follows:

"(1) The Law Commission has undertaken a comprehensive review of the Codeof Criminal Procedure in its 154th report and its recommendations have been found very appropriate, particularly those relating to provisions concerning arrest, custody, and remand, procedure for summons and warrant-cases, compounding of offences, victimology, special protection in respect of women and injury and trial of persons of unsound mind. Also, as per the Law Commission's 177th report relating to arrest, it has been found necessary to revise the law to maintain a balance between the liberty of the citizens and the society's interest in maintenance of peace as well as law and order.

(2) The need has also been felt to include measures for preventing the growing tendency of witnesses being induced or threatened to turn hostile by the accused parties who are influential, rich and powerful. At present, the victims are the worst sufferers in a crime and they don't have much role in the Court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system. The application of technology in investigation, inquiry and trial is expected to reduce delays, help in gathering credible evidences, minimize the risk of escape of the remand prisoners during transit and also facilitate utilization of police personnel for other duties. There is an urgent need to provide relief to women, particularly victims of sexual offences, and provide fair-trial to persons of unsound mind who are not able to defend themselves. To expedite the trial of minor offences, definition of warrant-case and summons-case are to be changed so that more cases can be disposed of in a summary manner."

15. While creating a substantive right to the victim to prefer an appeal against an order passed by the Court acquitting the accused or convicting for a lessor offence or imposing inadequate compensation, no limitation was provided under Section 372 CrPC.

16. Full Bench of this court in the case of **Mast Ram Tiwari Vs. State of U.P. and others passed in Criminal Misc. Application u/s 372 Cr.P.C. (Leave to Appeal) No. 351 of 2017 decided on 19.1.2018** held that the limitation for preferring an appeal against the order of

acquittal by the victim would be 90 days in all cases other than the cases instituted upon complaint, and six months where the complainant is Public Servant and 60 days in every other case instituted upon complaint against the order of acquittal after the High Court grants special leave to appeal. Meaning thereby the aforesaid Full Bench of this Court in **Mast Ram Tiwari (supra)** acknowledged the fact that an appeal filed against the order of acquittal by the victim instituted upon complaint would be maintainable before the high court subject to limitation as provided under the said section 378(5) Cr.P.C.

17. The word 'victim' as defined under Section 2(wa) does not make any distinction between the victim in a complaint case and the victim in a police case (State prosecution) and if, for taking recourse to proviso to Section 372, the victim in a complaint case opts to file appeal against the order of acquittal, he would be governed by sub-section (5) of Section 378 CrPC. Section 378, does not use the word 'victim'. Sub-sections (4) and (5) of Section 378 thereof, deal with a right of appeal against the order of acquittal in any case instituted upon complaint on behalf of the complainant and, that too, on an application made to the High Court seeking special leave to appeal and once the leave is granted, the complainant can present the appeal to the High Court.

18. It may be noted that the Code of Criminal Procedure when originally enacted in the year 1861 did not provide for any right to appeal against acquittal to anyone including the State. It was in the Code of Criminal Procedure of 1898 that Section 417 was inserted enabling the Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. The Code of Criminal Procedure, 1973 came into being on January 25, 1974 repealing the Code of Criminal Procedure, 1898. The recommendations made by the Law Commission of India, referred to above, was more or less adopted by the Parliament when it imposed a restriction in sub-Section (3) to Section 378 against entertainment of an appeal against acquittal "except with the leave of the High Court". Sub- section (4) of Section 378 retained the condition of maintainability of an appeal at the instance of a complainant against an order of acquittal passed in a complaint-case only if special leave to appeal was granted by the High Court.

19. The only significant amendment brought into force was in Section 378 whereby the appeals against acquittal in certain cases are now maintainable in the Court of Session without any leave to appeal to check arbitrary exercise of power and to curb reckless acquittal. Amending Act 5 of 2009 came into force conferring the 'right to a victim and further adding a new Section 2(wa) which defines "victim". The concept of 'Victim Compensation Scheme' has also been brought on the Statute Book by the same Amendment Act through a newly-added Section 357A which inter alia provides that "every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to them victim or his dependents who have suffered loss or injury as a result of the crime and who, require rehabilitation".

20. The principal controversy before us is whether against acquittal order in a criminal complaint case under Section 138

Negotiable Instruments Act, the victim, who is a complainant also, may prefer appeal against the order passed by the Magistrate before the Sessions Judge taking recourse to the proviso to Section 372 Cr.P.C. or the said appeal shall lie before the High Court under the said provisions and secondly whether against the same judgment and order of acquittal in a complaint case, in a situation when victim and complainant both are different persons, victim may file appeal under the proviso to Section 372 CrPC before the Sessions Judge or such appeal shall lie before the High Court ?

21. The Full Bench of this Court in the case of Manoj Kumar Singh Vs. State of U.P. & 3 Others in Criminal Misc. Application Defective U/s 372 CrPC (Leave to Appeal) No. 67 of 2013 while referring to the definition of Section 2 (wa) of Cr.P.C has held that the victim means the actual sufferer of offence (receiver of harm caused by the alleged offence) and no person other than actual receiver of harm can be treated as victim of offence, so as to provide him /her right to prefer appeal under the proviso of section 372, though, in his or her absence or disability, his "legal heir" or "guardian" would qualify as victim and have a right to appeal. A person who claims himself to be 'guardian' or 'legal heir' of actual victim (direct sufferer), would be able to maintain appeal provided he establishes his claim as such before the court in his application by disclosing his particulars; relationship with the direct sufferer; and the grounds on which such claim of being "legal heir" or "guardian" is based. It was further held that the expression "Legal Heir" has to be understood in its ordinary or natural sense. That is if any person is able to establish his status as "heir" recognized by law, he can be termed as "Legal Heir" and the preferences/restrictions / categories provided under any statute / personal law governing succession/ inheritance will have no consequence. It was further held that the word "Guardian" includes a Judicial Guardian (appointed by law), a legal Guardian, a Natural Guardian.

22. It may be noted that the Legislature has prescribed different conditions for the maintainability of appeal against order of acquittal passed in a 'police-case' vis-à-vis a 'complaint-case' i.e. a case instituted upon a private complaint. No appeal against acquittal in a complaint-case is maintainable to the Court of Session and for an appeal to High Court, the State or Central Government are required to obtain 'leave' of the High Court as mandated by Section 378(3) and if such an appeal is presented by the complainant, he/she is required to seek 'special leave' of the High Court under Section 378(4) of the Code.

23. In this context, it is notable to refer to the decision of the Apex Court in the case of Subhash Chand Vs. State (Delhi Administration)- (2013) 2 SCC 17 wherein it has been held that Sub-Section (4) of Section 378 makes provision for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of "special leave' as against sub-section (3) relating to other appeals which speaks of "leave'. **Thus, complainant's appeal against an order of acquittal is a category by itself.** The complainant could be a private person or a public servant. This

is evident from sub-section (5) which refers to application filed for "special leave' by the complainant. It grants six months period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub-Section (6) is important. It states that if in any case complainant's application for "special leave' under sub-Section (4) is refused no appeal from order of acquittal shall lie under sub-section (1) or under sub-section (2). Thus, if "special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate not the State Government can appeal against that order of acquittal.

24. The question arose before the Full Bench of High Court of Punjab and Haryana in the case of **M/s Tata Steel Ltd Vs. M/S Atma Tube Products Ltd (Supra)** that What will happen if the 'victim' in a complaint-case is different from the 'complainant' or where such 'victim' cannot otherwise be a 'complainant' due to statutory embargo against the filing of the complaint by some one other than the designated authority of State? Would he/she be entitled to file an appeal under proviso to Section 372 Cr.P.C and it was held by the Full Bench of the said Court interalia as follows:-

(i) the 'complainant' in a complaint-case who is a 'victim' also, shall continue to avail the remedy of appeal against acquittal under Section 378(4) only except where he/she succeeds in establishing the guilt of an accused but is aggrieved at the conviction for a lesser offence or imposition of an inadequate compensation, for which he/she shall be entitled to avail the remedy of appeal under proviso to Section 372;

(ii) the 'victim', who is not the complainant in a private complaint-case, is not entitled to prefer appeal against acquittal under proviso to Section 372 and his/her right to appeal, if any, continues to be governed by the un- amended provisions read with Section 378 (4) ***of the Code;***

(iii) the Legislature has given no separate entity to a 'victim' in the complaint-case filed by a public servant under a special Statute and the appeal against acquittal in such a case can also be availed by the 'complainant' of that case under Section 378(4) of the Code only.

(iv) those 'victims' of complaint-cases whose right to appeal have been recognized under proviso to Section 372, are not required to seek 'leave' or 'special leave' to appeal from the High Court in the manner contemplated under Section 378(3) & (4), for the Legislature while enacting proviso to Section 372 has prescribed no such fetter nor has it applied the same language used for appeals against acquittals while enacting sub-Section (3) & (4) of Section 378 of the Code.

25. Thus, the Full Bench of the Punjab and Haryana High Court in the case ***M/S Tata Steels Ltd. (Supra)*** has categorically held that the complaint in a complaint case who is a victim shall continue to avail the remedy of appeal against acquittal order under Section 378 (4) and when the 'victim' who is not the complainant in a private complaint-case, is not entitled to prefer appeal against acquittal under proviso to Section 372 and his/her right to appeal, if any, continues to be governed by the un- amended provisions read with Section 378 (4) of the Code. However, if the appeal is being filed by the

victim in his own right or where the complainant is also a victim, he or she is not required to take leave to appeal or special leave to appeal under Section 378(3)(4) of the Code. The decision of Full Bench of Punjab and Haryana High Court in **Tata Steel Ltd. (supra)** with regard to taking special leave to appeal or leave to appeal under Section 378(3)(4) of the Code has been affirmed by the Apex Court in the case of Malikarjun Kodagali (Supra) wherein it has been held in paragraph 93 of the judgment that the right(s) of a "victim' under the amended Code are substantive and not mere *brutam fulmen* hence these are not accessory or auxiliary to those of the State and are totally incomparable as both the sets of rights or duties operate in different and their respective fields. It was further held that a "victim' is not obligated to seek "leave' or "special leave' of the High Court for presentation of appeal under proviso to Section 372 of the Code."

26. It may be worthwhile to note that the Full Bench of the Punjab and Haryana High Court in the case of M/S Tata Steel Ltd. (Supra) has further held that where a 'victim' is competent to institute a private complaint but permits or consents expressly or implicitly to the filing of such complaint by his family-members, near and dears or an acquaintance, the 'victim' and 'complainant' in such a case cannot be seen differently and would be inseparable, hence the 'victim' will also fall back on Section 378(4) **only which specifically refers to filing of appeals against acquittal at the instance of complainant and not under proviso to Section 372 of the Code which has been pre-dominantly incorporated to provide right to appeal to the 'victims' in police-case who are not permitted to participate or have any say during trial.** For ready reference Para 81 of the judgment rendered in the **Tata Steel Ltd.'s case (supra)** is quoted hereinbelow :

"What will happen if the 'victim' in a complaint-case is different from the 'complainant' or where such 'victim' cannot otherwise be a 'complainant' due to statutory embargo against the filing of the complaint by some one other than the designated authority of State? Would he/she be entitled to file an appeal under proviso to Section 372 or should he/she be clubbed together with the complainant underSection 378(4) of the Code? We are of the view that the 'victim' in complaint-cases cannot have a remedy superior to that of the complainant of such case and since the Apex Court in the latest decision in Subhash Chand's case (supra) has held that the complainant's remedy, whether he is a private person or a public servant, to question the acquittal lies only inSection 378(4) of the Code, hence the 'victim' will also have to be relegated to that conditional remedy only. Similarly, where a 'victim' is competent to institute a private complaint but permits or consents expressly or implicitly to the filing of such complaint by his family-members, near and dears or an acquaintance, the 'victim' and 'complainant' in such a case cannot be seen differently and would be inseparable, hence the 'victim' will also fall back onSection 378(4) only which specifically refers to filing of appeals against acquittal at the instance of complainant and not under proviso toSection 372 of the Code which has been pre-dominantly incorporated to provide right to appeal to the 'victims' in police-case who are not permitted to participate or have any say during trial."

27. At this stage, it would also be apposite to refer to the decision of the three

Judges Bench of the Apex Court in the case of Mallikarjun Kodagali (Supra). In the aforesaid case, the basic question arose before the Apex Court that whether the appeal filed by the appellant before the High Court under the proviso to Section 372 CrPC was maintainable or not against the order dated 28.10.2013 passed by the District and Sessions Judge, Bagalkot (Karnataka) acquitting the accused by a judgment wherein the alleged offence was committed prior to 31.12.2009 i.e. 06.02.2009 although the judgment was passed after 31.12.2009 i.e. on 28.10.2013. The Apex Court held that right to appeal is available even if alleged offence took place prior to 31.12.2009 (Act 5 of 2009 was enacted) but the order of acquittal was passed by Trial Court after 31.12.2009. The Apex Court for the reasons mentioned in the judgment allowed the appeals setting aside the judgment passed by the High Court holding that the victim as defined in Section 2(wa) of the Cr.P.C. would be entitled to file an appeal before the Court to which an appeal ordinarily lies against the order of conviction, as such, the appeal filed by Kodagali was found maintainable. **Facts of the aforementioned case (Mallikarjun) clearly indicates that judgment was passed therein by the Sessions Judge in a case instituted upon a Police Report and not upon complaint.** Thus, the Apex Court was dealing with a situation as to whether right of appeal is available if the alleged offence was committed prior to 31.12.2009 (before enactment of Act 5 of 2019) but the judgement was passed by the Sessions Judge after 31.12.2009.

28. A close look to para 76 of the judgment in the case of **Mallikarjun Kodagali (supra)** would reveal that the apex court in the said para was engaged in a controversy as to whether the 'victim' as defined in Section 2 (wa) CrPC was required leave to appeal for preferring appeal against the order of acquittal. It was further observed by the Apex Court in paragraph 76 of aforementioned case **Mallikarjun Kodagali (supra)** that the language of the proviso to Section 372 CrPC is quite clear particularly when it is contrasted with the language of Section 378(4) CrPC, which confines to an order of acquittal passed in a case instituted upon a complaint, and the word "complaint' has been defined in Section 2(d) of the Cr.P.C. and refers to any allegation made orally or in writing to a Magistrate and this has nothing to do with the lodging or the registration of an FIR, and therefore, according to the Apex Court, it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to Section 372 of the Cr.P.C. is concerned. Thus, the Apex Court was also of the opinion that Section 378(4) CrPC deals with the appeal arising against the acquittal in any case instituted upon the complaint. It has nothing to do with the case arising out of the police report. For ready reference para 76 of Mallikarjun Kodagali (Supra) is quoted here under:

"76. As far as the question of the grant of special leave is concerned, once again, we need not be overwhelmed by submissions made at the Bar. The language of the proviso to Section 372 of the Cr.P.C. is quite clear, particularly when it is contrasted with the language of Section 378(4) of the Cr.P.C. The text of this provision is quite clear and it is confined to an order of acquittal passed in a case instituted upon a complaint. The word ''complaint' has been defined in Section 2(d) of the Cr.P.C. and refers to any allegation made orally or in writing to

a Magistrate. This has nothing to do with the lodging or the registration of an FIR, and therefore it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to Section 372 of the Cr.P.C. is concerned."

29. Section 378(4) & 378(5) specifically provides remedy to the complainant to file an appeal against the acquittal in any case instituted upon complaint. Section 378(4)(5) Cr.PC provides the forum to file an appeal, period of limitation and leave to appeal.

30. Before amendment in 372 CrPC there was no provision for the victim to file an appeal against acquittal either in a police case, or complaint case. However, proviso to 372 Cr.P.C gives substantive right to the victim to file appeal without leave to appeal. Section 378(1) (2) & (3) CrPC has been predominantly incorporated to deal with the appeal against acquittal arising out of police case.

31. The Full Bench of this Court in the case of **Mast Ram Tiwari Vs. State of UP (Supra)** has held that the word 'victim' as defined under Section 2(wa) does not make any distinction between the victim in a complaint case and the victim in a police case (State prosecution) and if, for taking recourse to proviso to Section 372, if the victim in a complaint case opts to file appeal against the order of acquittal, he would be governed by sub-section (5) insofar as the limitation is concerned. In other words, a limitation for filing an appeal by the victim in a complaint case against the order of acquittal would be 60 days as provided for under sub-section (5) by seeking leave to appeal from the High Court.

32. The apex court in **Subhash Chand Vs. State (Delhi Admn.) (supra)** has held that once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence is bailable or non-bailable, cognizable or non-cognizable, the complainant can file an application under Section 378 (4) for special leave to appeal against it in the High Court. So far as the State is concerned, as per Section 378 (1) (b), it can in any case, that is even in a case instituted on a complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. The apex court in the aforesaid case **Subhash Chand** finally concluded at paragraph 23 of the judgment that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court. He cannot file such appeal in the Sessions Court. For ready reference para 20 of the judgment in **Subhash Chand (supra)** is quoted hereinbelow :-

"Since the words ''police report' are dropped from Section 378(1) (a) despite the Law Commission's recommendation, it is not necessary to dwell on it. A police report is defined under Section 2(r) of the Code to mean a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. It is a culmination of investigation by the police into an offence after receiving information of a cognizable or a non-cognizable offence. Section 2(d) defines a complaint to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Explanation to Section 2(d) states that a report made by a police officer in a case which discloses after investigation, the commission of a non- cognizable offence

shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant. Sometimes investigation into cognizable offence conducted under Section 154 of the Code may culminate into a complaint case (cases under the Drugs & Cosmetics Act, 1940). Under the PFA Act, cases are instituted on filing of a complaint before the Court of Metropolitan Magistrate as specified in Section 20 of the PFA Act and offences under the PFA Act are both cognizable and non-cognizable. Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or non- bailable, cognizable or non-cognizable, the complainant can file an application under Section 378(4) for special leave to appeal against it in the High Court. Section 378(4) places no restriction on the complainant. So far as the State is concerned, as per Section 378(1)(b), it can in any case, that is even in a case instituted on a complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. But there is, as stated by us hereinabove, an important inbuilt and categorical restriction on the State's power. It cannot direct the Public Prosecutor to present an appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and non-cognizable offence. In such a case the District Magistrate may under Section 378(1)(a) direct the Public Prosecutor to file an appeal to the Session Court. This appears to be the right approach and correct interpretation of Section 378 of the Code."

33. Section 378 (4) (5) CrPC specifically provides for an appeal against the acquittal in any case instituted upon complaint. Therefore, as corollary thereto, it can be safely inferred that dichotomy has been created by the legislature with respect to appeals against acquittal in any case instituted on police report/case and appeals against acquittal in any case instituted upon complaint. Section 372 does not provide mode or procedure or limitation. It is merely an enabling provision conferring right to the victim to file an appeal against the orders detailed in the proviso to Section 372 CrPC. If the appeal is filed against acquittal in a case instituted upon **'police case/report',** the victim for lesser offence or imposing adequate compensation, then such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such count. Meaning thereby that in a police case if the acquittal order is passed by the Magistrate then the appeal would lie before the Sessions Judge and in case order of acquittal is passed by the Sessions Judge in its original jurisdiction or as a appellate court, then the appeal would lie before the High Court but if the order of acquittal is passed in any case instituted upon complainant then the appeal on behalf of the victim as well as the complainant of the case would lie only and only before the High Court under Section 378 (4)(5) CrPC. Proviso to Section 372 is only a enabling provision conferring right on the victim to file an appeal but if the appeal is filed against the acquittal in a complaint case then the procedure and conditions as provided under Section 378 (4)(5) CrPC would be applicable. Meaning thereby that the appeal would be only in High Court against the order of Magistrate as well as Sessions Court acquitting the accused in a complaint case. However, in view of the decision in the case of **Tata Steel Ltd. (supra)** and **Mallikarjun Kodagali (supra)** victim or when victim is

a complainant also would not require to seek special leave or leave to appeal from an order of acquittal in a complaint case

34. The interpretation of the Proviso to Section 372 CrPC was also considered by the Full Bench of the Gujarat High Court in the case of **Bhavuben Dineshbhai Makwana Vs. State of Gujarat, 2013 Cri LJ 4225** where one of the questions framed for consideration in the case was as follows :-

"(iii) If the victim prefers an appeal before this Court, challenging the acquittal, invoking his right under proviso to Sec. 372 of Cr.P.C., whether that appellant is required to first seek leave of the Court, as is required in case of appeal being preferred by the State?"

35. The aforesaid question was answered in the following words by the Full Bench of Gujarat High Court in the case of **Bhavuben Dineshbhai Makwana (supra)**:-

"36. If the victim also happens to be the complainant and the appeal is against acquittal, he is required to take leave as provided in Sec. 378 of the Criminal Procedure Code but if he is not the complainant, he is not required to apply for or obtain any leave. For the appeal against inadequacy of compensation or punishment on a lesser offence, no leave is necessary at the instance of a victim, whether he is the complainant or not."

36. The decision in the case of **Bhavuben Dineshbhai Makwana** came into consideration before the Apex Court in the case of **Mallikarjun Kodagali (supra)**. The apex court in paragraph 35 of the judgment while referring to the aforesaid decision of the Full Bench of the High Court of Gujarat has held as follows : -

"In our opinion, the Gujarat High Court made an artificial and unnecessary distinction between a victim as a victim and a victim as a complainant in respect of filing an appeal against an order of acquittal. The proviso to Section 372 of the Cr.P.C. does not introduce or incorporate any such distinction."

37. Thus, the apex court was of the opinion that the Full Bench of the Gujarat High Court made an artificial and unnecessary distinction between a victim as a victim and a victim as a complainant in respect of filing an appeal against the order of acquittal under Section 372 CrPC.

38. The learned Single Judge while referring the matter to the larger Bench has very rightly observed that in **Ashok Kumar Srivastava's case (supra)**, the learned Single Judge has not dealt with the Situation/contingency which may arise if the victim and complainant both are different persons and the victim prefers to file an appeal against the acquittal before the Sessions Judge taking recourse to the proviso to Section 372 CrPC and the complainant being different person files an application for leave before the High Court for filing appeal under Section 378 (4) CrPC against the same judgment and order. In other words, if the leave is granted to the complainant by the High Court to file an appeal under Section 378 (4) CrPC and the appeal is admitted and the criminal appeal preferred by the victim before the Sessions Judge against the order of acquittal in a case instituted on a complaint is also admitted, there is further chance of conflict of opinion against the same judgment and

order of acquittal. If the law laid down by the Single Judge of this Court in **Ashok Kumar Srivastava's case (supra)** and **Ved Prakash Yadav (supra)** is sustained, it would lead to absurdity and inconsistency. It will be seen that neither this aspect has been considered in the said judgment nor any solution in this regard has been given.

39. It is significant to note that proviso to 372 CrPC, inter alia, provides that appeal filed by the victim shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court, however, under Section 378 (4) & (5), the legislature confers right to the complainant to file an appeal against the order of acquittal in a case instituted upon complaint before the High Court. Thus, anomaly has been apparently created with respect to forum to which appeal on behalf of the victim and complainant would lie against the order of acquittal in a case instituted upon complaint. In cases, where the language used in a statue is capable of bearing more than one construction, the court in its attempt to find out the true meaning shall have due regard to the consequences of alternative constructions so as to avoid the resultant hardship, serious inconvenience, injustice, absurdity, inconsistency or straight clash between two sections of the same act. In that situation, rule of harmonious construction may be applied so that aim and object of the legislature inserting new provisions can be achieved harmonizing both the provisions in order to avoid any absurdity and inconsistency. In this context it would be useful to refer to the observation by the Full Bench of the Calcutta High Court in the case of **Tata Steel Ltd. (supra)** that the proviso to Section 378 of the Code has been pre-dominantly incorporated to provide right to appeal to the victim in a 'police case' who are not permitted to participate or have any say during trial. Proviso to Section 372 CrPC does not speak about the 'complaint case' or 'police case'/report. In case, proviso to Section 372 and Section 378 (4) & (5) are harmonized in order to give true meaning and intention of the legislature, it can be safely be held that under the proviso to Section 372 appeal against acquittal in a case instituted on police report/state prosecution shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court. The aforesaid interpretation is consonance with the scheme of the Chapter XXIX of CrPC dealing with the Criminal Appeal and would give effect to both the provision i.e. Section 372 and Section 378 (4) (5) CrPC. It will result in harmonizing the two provisions.

40. The appeal by the victim against the order of acquittal in any case instituted on the complaint requires to be dealt with in the same manner as appeal filed by the complainant. Section 378 (4) & (5) CrPC is required to be read with the Section 372 CrPC when the appeal is filed by the victim. However, the victim or when the victim is a complainant also, would not require to seek leave or special leave to appeal. Chapter XXIX of the CrPC deals with appeals. Proviso to Section 372 CrPC cannot be read into isolation. It does not lay down the procedure as to how and in what manner and within what time, the appeal has to be filed. The appeal being the creation of statute, it is also necessary to prescribe the limitation and procedure for filing an appeal, therefore, when the victim or when the victim is also a complainant chose to file an appeal against acquittal in a case instituted upon complaint, it would be under proviso to Section 372 CrPC read with 378 (4) & 378 (5) CrPC. Proviso to

372 CrPC gives right to the victim to file an appeal and Section 378 (4) & (5) provides procedure, limitation and forum to file an appeal in a case instituted upon complaint.

41. Thus, in view of the aforesaid discussion, our answers to the questions referred to us are as follows :-

(a). We are of the firm opinion that the appeal by a 'victim' who is a complainant also against the order of acquittal in a criminal complaint case under 138 of Negotiable Instrument Act would lie to the High Court under proviso to Section 372 read with Sub-section (4) & (5) of Section 378 CrPC.

(b). Against the same judgment and order of acquittal in a complaint case, in a situation where victim and complainant both are different persons, appeal by a victim would lie under the proviso to 372 CrPC read with Section 378 (4) (5) CrPC only before the High Court.

42. The reference is answered accordingly.

Per- Hon'ble Saurabh Shyam Shamshery, J. **:- (concurring)**

43. I have privilege of going through well-reasoned and eloquently written judgment by my brother Justice Shashi Kant Gupta. I am in agreement with reasoning and conclusion arrived at by my Learned brother. In my supplementary judgment, I am dealing with the issue of statutory interpretation only.

44. In the present reference, submissions on behalf of applicants is that the proviso to section 372 CrPC shall also give right to a "victim' irrespective of the fact that whether he is a complainant or not, to prefer an appeal against acquittal of the accused, even in a case arising out of a complaint also. Such appeal shall lie to the court before which an appeal ordinarily lies against the order of conviction of such Court. Further submission is that, such appeal shall lie without special leave to appeal.

45. Countering the submissions, counsel for the State has submitted that any interpretation which may lead to provide two different forum of appeal on the basis of appellant being "victim' (whether complainant or not) or being complainant (who is not a victim), before the court to which an appeal ordinarily lies against the order of conviction of such Court under the proviso to section 372 CrPC as well as before the High Court with special leave to appeal under section 378 (4) and (5) CrPC respectively in case of filling appeal against the order of acquittal in any case instituted upon complaint, will only lead to a situation of uncertainty, anomalies, injustice and absurdities. Further submission is that this Court has to give such interpretation to proviso of section 372 and section 378 (4) and (5) CrPC, which is not only harmonious and purposive but also advances the purpose and object of the enactment.

46. Jurisprudence of statutory interpretation has moved from literal interpretation to purposive interpretation, which advances the purpose and object of a legislation. The Supreme Court in catena of judgments has dealt with the issue of literal interpretation vis-a-vis purposive interpretation. Following references to this respect from the Supreme Court are some of them. :-

(I) The Apex Court in ***The Central India Spinning and Weaving Manufacturing Comp. versus The Municipal Committee, Wardha); AIR 1958 SC 341*** has held that :-

"It is also a recognised principle of construction that general words and phrases however wide and comprehensive they may be in their literal sense must usually be construed as being limited to the actual objects of the Act."

(II) The Apex Court in ***Girdhari Lal & Sons versus Balbir Nath Mathur); 1986(2) SCC 237*** has held that :-

"9. So we see that the primary and foremost task of a Court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the Court must then strive to so interpret the statute as to promote and advance the object and purpose of the enactment. For this purpose, where necessary the Court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need no meek and mute submission to the plainness of the language. To avoid patent injustice, anomly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing the written word if necessary".

"16. Our own court has generally taken the view that ascertainment of legislative intent is a basic rule of statutory construction and that a rule of construction should be preferred which advances the purpose and object of a legislation and that though a construction, according to plain language, should ordinarily be adopted, such a construction should not be adopted where it leads to anomalies, injustices, or absurdities, vide K.P. Varghese V. ITO (1981) 4 SCC 173 , State Bank of Travancore v. Mohd. M. Khan, (1981) 4 SCC 82, Som Prakash Rekhi V. Unioin of India, (1981) 1 SCC 449, Ravula Subba Rao V. CIT, AIR 1956 SC 604, Govindlal v. Agricultural Produce Market Committee, (1975) 2 SCC 482 and Babaji Kondaji v. Nasik Merchants Co-op Bank Ltd. (1984) 2 SCC 50."

(III) The Supreme Court in ***Utkal Contractors & Joinery Pvt. Ltd. versus State of Orissa; 1987 (3) SCC 279*** *has held that :-*

"....A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the Preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. Parliament does not

indulge in legislation merely to state what is already validly done. Parliament may not be assumed to legislate unnecessarily. Again while the Words of an enactment are important, the context is no less important. For instance, "the fact that general words are used in a statute is not in itself a conclusive reason why every case falling literally within them should be governed by that statute, and the context of any act may well indicate that wide or general words should be given a restrictive meaning." (See Halsbury, 4th Edn. Vol. 44 Para 874)."

(IV) The Supreme Court in ***Eera (through Dr. Manjula Krippendorf) v. State (NCT of Delhi) and Anr.; 2017(15) SCC 133*** *has held that :-*

"I have referred to the aforesaid authorities to highlight that legislative intention and the purpose of the legislation regard being had to the fact that context has to be appositely appreciated. It is the foremost duty of the Court while construing a provision to ascertain the intention of the legislature, for it is an accepted principle that the legislature expresses itself with use of correct words and in the absence of any ambiguity or the resultant consequence does not lead to any absurdity, there is no room to look for any other aid in the name of creativity. There is no quarrel over the proposition that the method of purposive construction has been adopted keeping in view the text and the context of the legislation, the mischief it intends to obliterate and the fundamental intention of the legislature when it comes to social welfare legislations. If the purpose is defeated, absurd result is arrived at. The Court need not be miserly and should have the broad attitude to take recourse to in supplying a word wherever necessary. Authorities referred to hereinabove encompass various legislations wherein the legislature intended to cover various fields and address the issues. While interpreting a social welfare or beneficent legislation one has to be guided by the "colour", "content" and the context of "statutes" and if it involves human rights, the conceptions of Procrustean justice and Lilliputtian hollowness approach should be abandoned. The Judge has to release himself from the chains of strict linguistic interpretation and pave the path that serves the soul of the legislative intention and in that event, he becomes a real creative constructionist Judge."

47. Upon conscientious analysis of the above-mentioned judgments, following are the points which a court should consider while interpreting any enactment :-

(I) ascertain legislative intent (actual or imputed) of the enactment

(II) interpret the enactment as to promote and advance its object and purpose.

(III)to avoid patent injustice, the court may depart even from golden rule of interpretation.

(IV) for purposive interpretation, the court must give complete interpretation to the purpose, object, text and context of the enactment.

(V) any construction which leads to anomalies, injustice or absurdities should not be adopted.

(VI) court should move towards such interpretation which serves the soul of the legislative intent.

48. On the basis of arguments advanced and judgments cited before this bench, following position of law on the issue emerges :-

(a) Statements and reasons of the Act No. 5 of 2009 wherein by proviso to section 372 of CrPC was inserted, mainly states that the 'victims' are the worst sufferers in a crime, they don't have much role in court proceedings. Therefore they need to be armoured with special rights. Rights of a 'victim' as defined under section 2 (wa) CrPC are kept on a higher pedestal and that must be given its full meaning.

(b) Supreme Court in Mallikarjun Kodagali (Dead) Represented through Legal Representative Vs State of Karnataka and Others : (2019) 2 SCC 752, has held that :- "the proviso to Section 372 of the Cr.P.C. must also be given a meaning that is realistic, liberal, progressive and beneficial to the victim of an offence". The Court further held that it is not mandatory for victim to obtain special leave to appeal from High Court to file appeal under the said proviso.

(c) Section 378 (4) and (5) CrPC provides that an order of acquittal passed in a case instituted upon complaint can be challenged before High Court on grant of an application for special leave to appeal and no such application shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

49. Applying the points emerged from the judgment cited for interpretation of the enactment, first point to be ascertained is the legislative intent of insertion of proviso to section 372 CrPC. As mentioned earlier, the object of amendment is to give a 'victim' certain privileges during the court proceedings. Therefore victim, whether complainant or not, has right to file appeal against the acquittal in a case constituted upon complaint also.

50. Second point is to give such interpretation which promotes and advances the object and purpose of the enactment. The object and purpose of insertion of proviso is to strengthen the give rights to victim. In Mallikarjun Kodagali (supra) the Court held that :-

"Putting the Declaration to practice, it is quite obvious that the victim of an offence is entitled to a variety of rights. Access to mechanisms of justice and redress through formal procedures as provided for in national legislation, must include the right to file an appeal against an order of acquittal in a case such as the one that we are presently concerned with. Considered in this light, there is no doubt that the proviso to Section 372 of the Cr.P.C. must be given life, to benefit the victim of an offence". Therefore even filling appeal against acquittal in a case instituted upon a complaint, the victim does not require leave to appeal.

51. Next point is to give purposive interpretation to the enactment which may not result in anomalies, injustices or absurdities. It is to be determined that, whether a victim has a right to file appeal to the court to which an appeal ordinarily lies against the order of conviction of such Court as provided under proviso to section 372 CrPC or before High Court as provided under section 378 (4) CrPC. Section 378 (4) and (5) CrPC, provides procedure to file appeal by complainant against acquittal in a case instituted upon the complaint. Upon conjoint reading, the sole interpretation is that, an appeal in both the situations have to be filed before one forum only as any other interpretation will lead into a situation of uncertainty and anomalies. The forum that is prescribed under section 378(4) CrPC is High Court to file appeal by the

complainant, therefore considering the principles of statutory interpretation even victim has to file appeal against acquittal in a case constituted upon complaint, before High Court only. This will not only avoid uncertainty but will also serve the purpose of the enactment.

52. Registrar General of this Court is directed to ensure the circulation of this order amongst all the judicial officers in the State for their guidance.

53. Let a copy of this order be also sent to the Chief Secretary, Principal Secretary (Law) & Legal Remembrancer, Government of U.P. Lucknow and Stamp Reporter of this Court for taking necessary follow up action.

54. Let the records of these cases be accordingly placed before the respective Single Judge as per roster for final disposal.

(2020)03-05ILR A1588
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.04.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482/378/407 Cr.P.C. No. 3651 of 2012

Kaushal Kishore Mishra & Ors.
...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Arun Sinha, Alok Srivastava

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law-Code of Criminal Procedure, 1973 - Section 482 - Inherent jurisdiction - Indian Penal Code, 1860 – Sections 147, 323, 336, 296, 504, 505 (3), 506 IPC - accused applicants sustained injuries on a particular date (21.11.2008) - a matter of evidence - At this stage, it cannot be said that no incident has taken place or no offence has been committed and there is no evidence whatsoever - Whether accused defence is justified or not is not to be examined at this stage - The allegations being factual in nature can be decided only after evidence is recorded in trial- no findings can be recorded about veracity of allegations at this juncture in absence of evidence - no interference under Section 482 Cr.P.C. would be justified.(Para-10,11,28)

Seven accused applicants, have challenged Charge Sheet No. 358A of 2008 dated 06.07.2009 in Case No.1713 of 2009 (Case Crime No. 827 A of 2008) under Sections 147, 323, 336, 296, 504, 505 (3), 506 IPC, and the entire proceedings in the aforesaid case pending in the Court of Judicial Magistrate Second - Applicants have also requested that final report submitted by police in Case Crime No. 827A/2008, under Sections 147, 323, 336, 296, 504, 505 (3), 506 IPC be accepted.(Para-1)

HELD:- Whenever question of fact is raised which requires evidence, Courts always said that at pre trial stage i.e. at the stage of cognizance taken by Magistrate power under Section 482 Cr.P.C. would not be appropriate to be utilized, since, question of fact has to be decided in the light of evidence which are yet to be adduced by parties.(Para-17)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Md. Allauddin Khan Vs. St. of Bihar & ors. Criminal Appeal No.675 of 2019 (Arising out of S.L.P. (Crl.) No.1151 of 2018)

2. St. of M.P. Vs. Yogendra Singh Jadaun & anr., Criminal Appeal No. 175 of 2020

3. St. of Hary. Vs. Bhajan Lal & ors., 1992 Supp (1) SCC 335

4. Google India Pvt. Ltd. Vs. Visakha Industries and ors. , AIR 2020 SC 350

5. Jeffrey J. Diermeier & ors., Vs. St. of W.B. and ors., 2010 (6) SCC 243

6. Som Mittal Vs. St. of Karnataka, 2008 (3) SCC 753

7. Lakshman vs. St. of Karnataka & ors., 2019 (9) SCC 677

8. Chilakamarthi Venkateswarlu & ors. Vs. St. of A.P. & ors. AIR 2019 SC 3913

9. Zandu Pharmaceuticals Works Ltd. & ors. vs Mohd. Sharaful Haque & ors., 2005 (1) SCC 122

10. M.A.A. Annamalai Vs. St. of Karnataka & ors., 2010 (8) SCC 524

11. Sharda Prasad Sinha Vs. St. of Bihar, AIR 1977 SC 1754

12. Nagawwa Vs. Veeranna Shivalingappa Konjalgi & ors., 1976 AIR 1976 SC 1947

13. Rakhi Mishra Vs. St. of Bihar & ors., 2017 (16) SCC 772

14. Sonu Gupta Vs. Deepak Gupta & ors., 2015 (3) SC 424

15. Roshni Chopra & ors. Vs. St. of U.P. & ors., 2019 (7) Scale 152

16. Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal & ors., (2003) 4 SCC 139

17. U. P. Pollution Control Board vs. Mohan Meaking Limited & ors., 2000 (3) SCC 745

18. Kanti Bhadra Shah Vs St. of W.B., 2001 SCC 722

19. Nupur Talwar Vs C.B.I. & ors., 2012 (11) SCC 465

20. Parbatbhai Aahir & ors. Vs St. of Guj. & ors., 2017 (9) SCC 641

21. Arun Singh and other Vs St. of U.P., Criminal Appeal no.250 of 2020 (arising out of Special Leave Petition (Crl.) No. 5224 of 2017)

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

1. By means of this application filed under Section 482 of the Code of Criminal Procedure *(hereinafter referred to as "the Cr.P.C.")*, seven accused applicants, namely, Kaushal Kishore Mishra, Smt. Indrani Mishra, Kaushika Mishra, Shailja Mishra, Shailka Mishra, Kaushlendra Mishra and Harsh Vardhan Verma, have challenged Charge Sheet No. 358A of 2008 dated 06.07.2009 in Case No.1713 of 2009 (Case Crime No. 827 A of 2008) under Sections 147, 323, 336, 296, 504, 505 (3), 506 IPC, Police Station Kotwali Nagar, District Gonda and the entire proceedings in the aforesaid case pending in the Court of Judicial Magistrate Second, Gonda. Applicants have also requested that final report submitted by police in Case Crime No. 827A/2008, under Sections 147, 323, 336, 296, 504, 505 (3), 506 IPC be accepted.

2. Facts, in brief, giving rise to this application are that a First Information Report (hereinafter referred to as "FIR") No. 90/09 registered as Case Crime No. 827A/2008, under Sections 147, 323, 336, 296, 504, 505 (3), 506 IPC, was lodged on 19.03.2009 at 05:40 P.M. at Police Station Kotwali Nagar, District Gonda by Mohd. Shabbir Khan son of Abdul Rajjak Khan (hereinafter referred to as the "Complainant"), wherein ten accused including all the applicants and others were implicated alleging that they are

resourceful persons indulged in unlawful activities and also have political patronage. They have unauthorisedly encroached upon the land of Maszid Hanafia Madarsa Islamia Mousul Ulma Warsi, Baharaich Road, Gonda and have created a mound of earth soil causing lot of inconvenience to the people who used to go Madrasa for study and offer Namaj in Maszid belong to Muslim Community. Accused persons are intending to raise unauthorised construction on the disputed land which used to be opposed by Complainant as well as other respected persons of society and they also put pressure upon authorities to make impartial enquiry in the matter so that communal harmony be maintained. Pursuant thereto police made an investigation and after perusal of government record, illegal possession of accused persons was removed. A document of compromise was also prepared and signed by representatives of both parties which included signatures of accused persons. Representatives of Muslim Community were honestly following the aforesaid compromise but accused and their relatives used to talk senseless and tried to find out an opportunity to weaken Complainant and other representatives of Muslim Community. On 21.11.2008 when people had gone to offer Namaj, after parking their cycles, accused persons started to damage their cycles as also throwing bricks and stones and started riots. Hearing noise, members of Peace Committee came to settle the matter but accused being annoyed attacked collectively upon Syed Ali, Sonu, Babbu, Mansoor Khan, Kallan Khan, Complainant and others and also hit them with Lathi and Danda causing injuries to several persons. Complainant and others ran away to protect themselves but accused continued to threaten them of killing and evicting from area itself. Accused with a common intention formed unlawful assembly, entered Maszid and Madarsa to kill Complainant and others, beat them inside the Mosque and damaged goods kept in Mosque, like, Clock, Chatai etc. They also attempted to take away Rs. 630/- which was a donation. Naib Secretary, Kallan Khan tried to stop them from taking away donation box, whereupon accused Kaushlendra hit on the chest of Kallan Khan with his legs and forcibly taken away donation box.

3. Police made investigation and during course of investigation recorded various statements including that of Shabbir Khan, Complainant, on 19.03.2009. On the same day Police also recorded statements of Heera Lal Gupta and Sheetla Bux Tripathi, who said that accused Kaushlendra Mishra was with him when he had gone to Court for some work and in the afternoon he received an information that Kaushlendra Mishra's family members were assaulted by the persons who had come to offer Namaz. The witnesses and Kaushlendra Mishra rushed to the house and found Kaushlendra Mishra's father, aged about 70 years and mother as well as sister in serious injured condition. Sri Kaushal Kishore Mishra, Smt. Indrani Mishra, Smt. Kaushaka Mishra, Smt. Shalaja Mishra, Km. Shalaka Mishra and Harsh Vardhan Verma were medically examined on 21.11.2008 at District Hospital Gonda and their medical report containing injuries are Annexures-4 to 9 to the application. Smt. Indrani Mishra also found to have suffered fracture in the shaft of middle phalanx of right index finger. Medical examination of Mansoor, Mohd. Kallan Khan, Sonu, Syed Ali and Babbu was held on 09.12.2008 wherein also they found to have sustained injuries

and all where categorized by Doctors in District Hospital, Gonda as simple injuries caused by hard and blunt object about three weeks back.

4. On 19.05.2009 investigation was transferred to SIS, Bahraich vide order of Deputy Inspector General of Police, Devipatan and after transfer Investigating Officer recorded statements of Babbu Ali, Sonu, Monu, Kaleem, Shahjadey, Guddu alias Shakoor, Nawab, Rajjoo, Lallan Khan and Akbar Ali. Police submitted charge sheet on 06.07.2009 against 10 accused persons including all applicants under Sections 147, 323, 336, 296, 504, 505 (3), 506 IPC.

5. It is contended that no case under the aforesaid provisions is made out at all and Police has submitted charge sheet in hurried manner without making proper investigation and charge sheet is founded on no evidence at all.

6. Police, during investigation, also recorded statements of Dr. Roop Chandra, Chief Medical Superintendent, District Hospital, Gonda who admitted that he conducted medical examination on 09.12.2008 and by mistake noticed duration of injuries as three weeks though it was only three days. Similar statement was given by Dr. Ajeet Singh, Emergency Medical Officer, District Hospital, Gonda, who also conducted medical examination of some injured persons on 09.12.2008. Consequently, a Final Report was submitted by Police on 17.12.2009 in Case Crime No. 827A of 2008. Complainant filed protest petition which was allowed by Court below and applicants have been summoned to face trial vide order dated 11.01.2010.

7. Learned counsel for applicants submitted that as per own complaint of Complainant, incident took place on 21.11.2008 and alleged injured persons of Complainant side were examined on 09.12.2008, i.e., almost on 18th day while the accused injured persons were examined on 21.11.2008 itself and their injuries are well supported by medical examination but ignoring the same Magistrate has failed to apply its mind that Doctors who examined Complainant's injured persons mentioned duration of their injuries as three weeks while in statement recorded by Police they clearly said that duration was only three days hence Complainant's story was apparently false, still Magistrate has taken cognizance and summoned applicants which is nothing but a sheer gross abuse of process of law.

8. Learned A.G.A., however, submitted that statements of two Doctors that they mistakenly mentioned duration of three weeks though it was only three days, is subject to further examination in evidence as it is not probable that when more than one medical officer conducted medical examination, both committed same mistake with respect of duration of injuries and at this stage, therefore, defence of applicants cannot be examined.

9. I have gone through the record and rival submissions. It is no doubt true that injured witnesses have confirmed FIR story that they sustained injuries on 21.11.2008 and the factum that injuries were found on the person/ persons named by Complaint also cannot be doubted but further question is, "whether they sustained injuries on 21.11.2008 or just three days earlier when medical examination was conducted on 09.12.2008".

10. Further, accused applicants sustained injuries on 21.11.2008 is also a matter of evidence but atleast this much is clear that some incident took place on 21.11.2008. As per own showing of applicants, they sustained injuries and not Complainant's named persons. If there was a cross case, who was aggressor, who started dispute, who attacked first, is all a matter of evidence. At this stage, it cannot be said that no incident has taken place or no offence has been committed and there is no evidence whatsoever. Whether accused defence is justified or not is not to be examined at this stage. The allegations being factual in nature can be decided only after evidence is recorded in trial.

11. In view of settled legal proposition, no findings can be recorded about veracity of allegations at this juncture in absence of evidence. Apex Court has highlighted that jurisdiction under Section 482 Cr.P.C. be sparingly/rarely invoked with complete circumspection and caution. Very recently in **Criminal Appeal No.675 of 2019 (Arising out of S.L.P. (Crl.) No.1151 of 2018) (Md. Allauddin Khan Vs. The State of Bihar & Ors.)** decided on 15th April, 2019, Supreme Court observed as to what should be examined by High Court in an application under Section 482 Cr.P.C. and in paras 15, 16 and 17 said as under :

"15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379 read with Section 34 IPC, ***then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not.*** *In other words****, in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint.*** *In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.*

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. In our view, the ***High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482*** *of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.")* ***because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties****. That stage is yet to come in this case."*

(emphasis added)

12. Recently, above view has been reiterated by Apex Court in **Criminal Appeal No. 175 of 2020 (State of Madhya Pradesh Vs. Yogendra Singh Jadaun and another)**, decided on 31.01.2020.

13. The principles which justify interference under Section 482 Cr.P.C. by Court have been laid down in various authorities in which Supreme Court's judgment in **State of Haryana vs. Bhajan Lal and others, 1992 Supp (1) SCC 335** was leading precedent and thereafter matter has also been examined by even Larger Benches.

14. In **State of Haryana vs. Bhajan Lal and others (supra)** issue of jurisdiction of this Court under Section 482

Cr.P.C. has been considered and what has been laid down therein in paragraph 102, has been repeatedly followed and reiterated consistently. In very recent judgment in **Google India Private Limited Vs. Visakha Industries and Ors. , AIR 2020 SC 350**, guidelines laid down in paragraph 102 in **Bhajal Lal's case (supra)** have been reproduced as under :

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power Under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the ***following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice****, though it may* ***not be possible to lay down any precise, clearly defined and sufficiently*** *channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*

(1) Where the ***allegations made in the first information report*** *or the complaint,* ***even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the Accused.***

(2) Where the ***allegations*** *in the first information report and other materials, if any, accompanying the FIR* ***do not disclose a cognizable offence****, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

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

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

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

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

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

15. Court has also reproduced note of caution given in paragraph 103 in **Bhajan Lal's case (supra)** which reads as under :

"103. We also give a note of caution to the effect that the ***power of quashing a criminal proceeding should be exercised very sparingly and with circumspection*** *and that* ***too in the rarest of rare cases****; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the*

FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

(emphasis added)

16. What would be the scope of expression "rarest of rare cases" referred to in para 103 in **State of Haryana vs. Bhajan Lal (supra)** has been considered in **Jeffrey J. Diermeier and Ors. Vs. State of West Bengal and Ors. , 2010 (6) SCC 243**, Court has said that words "rarest of rare cases" are used after the words 'sparingly and with circumspection' while describing scope of Section 482 CrPC. Those words merely emphasize and reiterate what is intended to be conveyed by the words 'sparingly and with circumspection'. They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasize that the power under Section 482 Cr.P.C. to quash FIR or criminal proceedings should be used sparingly and with circumspection.

17. Supreme Court in **Jeffrey J. Diermeier (supra)** infact referred to an earlier Three Judges' Bench judgment in **Som Mittal Vs. State of Karnataka, 2008 (3) SCC 753,** to explain phrase "rarest of rare cases". In **Som Mittal (supra)**, Court also said that exercise of inherent power under Section 482 CrPC is not a rule but exception. Exception is applied only when it is brought to notice of Court that grave miscarriage of justice would be added if trial is allowed to proceed where accused would be harassed unnecessarily or if trial is allowed to linger when prima facie it appears to Court that trial would likely to be ended in acquittal. Whenever question of fact is raised which requires evidence, Courts always said that at pre trial stage i.e. at the stage of cognizance taken by Magistrate power under Section 482 CrPC would not be appropriate to be utilized, since, question of fact has to be decided in the light of evidence which are yet to be adduced by parties.

18. In **Lakshman vs. State of Karnataka and others, 2019 (9) SCC 677** Court said that it is not permissible for High Court in application under Section 482 CrPC to record any finding wherever there are factual disputes. Court also held that even in dispute of civil nature where there is allegation of breach of contract, if there is any element of breach of trust with mens rea, it gives rise to criminal prosecution as well and merely on the ground that there was civil dispute, criminality involved in the matter cannot be ignored. Further whether there is any mens rea on part of accused or not, is a matter required to be considered having regard to facts and circumstances and contents of complaint and evidence etc, therefore, it cannot be said pre judged in a petition under Section 482 CrPC.

19. In **Chilakamarthi Venkateswarlu and Ors. Vs. State of Andhra Pradesh and Ors., AIR 2019 SC 3913**, Court reiterated that inherent jurisdiction though wide and expansive has to be exercised sparingly, carefully and with caution and only when such exercise would justify by tests specifically laid down in Section itself. In paragraph 14 of judgment, Court said :

"14. For interference Under Section 482, three conditions are to be

fulfilled. The ***injustice which comes to light should be of a grave, and not of a trivial character; it should be palpable and clear and not doubtful and there should exist no other provision of law by which the party aggrieved could have sought relief."***

(emphasis added)

20. Court also said that in exercise of jurisdiction under Section 482 CrPC it is not permissible for the Court to act as if it were Trial Court. Court has only to be prima facie satisfied about existence of sufficient ground for proceeding against accused. For that limited purpose, Court can evaluate material and documents on record but it cannot appreciate evidence to conclude whether materials produced are sufficient or not for convicting accused. High Court should not exercise jurisdiction under Section 482 CrPC embarking upon an enquiry into whether evidence is reliable or not or whether on reasonable apprehension of evidence, allegations are not sustainable, or decide function of Trial Judge. For the above proposition, Court relied on its earlier authority in **Zandu Pharmaceuticals Works Limited and others vs Mohd. Sharaful Haque and others, 2005 (1) SCC 122.**

21. Power under section 482 CrPC should not be exercised to stifle legitimate prosecution. At the same time, if basic ingredients of offfences alleged are altogether absent, criminal proceedings can be quashed under Section 482 CrPC. Relying on **M.A.A. Annamalai Vs. State of Karnataka and Ors. , 2010 (8) SCC 524, Sharda Prasad Sinha Vs. State of Bihar, AIR 1977 SC 1754** and **Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Ors., 1976 AIR 1976 SC 1947, Court in Chilakamarthi Venkateswarlu and Ors. (supra)** said that where allegations set out in complaint or charge sheet do not constitute any offence, it is open to High Court exercising its inherent jurisdiction under Section 482 CrPC to quash order passed by Magistrate taking cognizance of offence. Inherent power under Section 482 CrPC is intended to prevent abuse of process of Court and to clear ends of justice. Such power cannot be exercised to do something which is expressly barred under CrPC. Magistrate also has to take cognizance applying judicial mind only to see whether prima facie case is made out for summoning accused persons or not. At this stage, Magistrate is neither required to consider FIR version nor he is required to evaluate value of materials or evidence of complainant find out at this stage whether evidence would lead to conviction or not.

22. It has also been so observed in **Rakhi Mishra Vs. State of Bihar and Ors., 2017 (16) SCC 772** and **Sonu Gupta Vs. Deepak Gupta and Ors. , 2015 (3) SC 424** and followed recently in **Roshni Chopra and others vs. State of U.P. and others, 2019 (7) Scale 152**. Here Court also referred to judgment in **Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal and Ors., (2003) 4 SCC 139**, wherein paragraph 9, Court said that in determining the question whether any process has to be issued or not, Magistrate has to be satisfied whether there is sufficient ground for proceeding or not and whether there is sufficient ground for conviction; whether the evidence is adequate for supporting conviction, can be determined only at the trial and not at the stage of inquiry.

23. However, it is also true that at the stage of issuing process to the accused, Magistrate is not required to record detailed reasons. In **U. P. Pollution Control Board**

vs. Mohan Meaking Limited and others, 2000 (3) SCC 745, after referring to a decision in **Kanti Bhadra Shah Vs State of West Bengal 2001 SCC 722**, Court said :

"Legislature has stressed the need to record reasons in certain situations such as dismissal of complaint without issuing process. There is ***no such requirement imposed on a Magistrate for passed detailed order while issuing summons. Process issued to accused cannot be quashed merely on the ground that Magistrate had not passed a speaking order."***

(emphasis added)

24. Same proposition was reiterated in **Nupur Talwar Vs Central Bureau of Investigation and others, 2012 (11) SCC 465.**

25. In a Three Judges' Bench in **Parbatbhai Aahir and Ors. Vs State of Gujarat and Ors, 2017 (9) SCC 641**, Court has observed that Section 482 CrPC is prefaced with an overriding provision. It saves inherent power of High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any court; or (ii) otherwise to secure the ends of justice. In Paragraph 15 of the judgment Court summarized as under :

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

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

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

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

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

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

trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

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

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

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

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

26. Above observations have been reiterated in **Arun Singh and other Vs State of U.P.** passed in **Criminal Appeal no.250 of 2020 (arising out of Special Leave Petition (Crl.) No. 5224 of 2017)**, decided by Supreme Court on 10.02.2020.

27. Reliance placed by learned counsel for petitioner in **Pepsi Foods Ltd (supra)** on the scope of Section 482 CrPC is also in conformity with law as discussed above. I do not find anything otherwise stated therein or something which is different than what has been discussed above, which may help petitioner in a different manner. No doubt Court said that summoning of accused in criminal case is a serious matter and Criminal law cannot be set into motion as a matter of course, but to suggest that at the cognizance stage, defence evidence can be looked into and assessed on merit or it can be done by this Court when an application under Section 482 CrPC is brought to this Court against order of cognizance/summoning is neither legal nor permissible. This argument is, therefore, rejected.

28. In view of above discussion and facts and circumstances, I do not find that any case has been made out justifying interference at this stage. It cannot be said that no incident has taken place or there is no evidence whatsoever to show that applicants have committed no offence. Hence, no interference under Section 482 Cr.P.C. would be justified.

29. Application is accordingly dismissed.

(2020)03-05ILR A1597
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.04.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482/378/407 No. 3716 of 2010

Smt. Anshu Goel & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Saurabh Mishra

Counsel for the Opposite Parties:
Government Advocate, Manish Kumar II

(A) Criminal Law- Dowry Prohibition Act, 1961 - Sections 3/4-Code of Criminal Procedure, 1973 - Section 482 - Inherent jurisdiction - Indian Penal Code, 1860 - under Sections 498-A, 427, 506– FIR do not disclose a commission of offence by an individual accused - would be justified to quash the proceedings against him/ her so as to prevent abuse of process of law - No one can be allowed to undergo an ordeal of illegal, malicious or false prosecution and undergo a physical and mental torture so long as such proceedings continue.(Para-50)

A First Information Report was lodged by complainant wife against her husband , father-in-law, mother-in-law, sister-in-law and brother-in-law under Sections 498-A, 427, 506 IPC read with Sections 3/4 of Dowry Prohibition Act, 1961 - Police after making investigation, submitted charge-sheet on 31.03.2010 - Magistrate took cognizance and issued process by summoning applicants and other three accused vide order dated 22.07.2010 - Husband meanwhile filed a divorce petition dated 14.01.2010 under Section 13 of Hindu Marriage Act, 1955.(Para-2,3)

HELD:- Performance of marriage by itself is no offence and if anyone is relative of one of the spouse who is alleged to be a guilty of offence of dowry, mere relationship should not be a reason to implicate such person in a criminal proceedings - Charge-sheet passed by Additional Chief Judicial Magistrate taking cognizance, issuing process and registering as Case No.1908 of 2010, under Sections 498-A, 427, 506 IPC read with Sections 3/4 of Act, 1961 as well as subsequent proceedings thereto are hereby quashed.(Para-64,67)

Application u/s 482 Cr.P.C. allowed. (E-7)

List Of Cases Cited:-

1. Ramesh & ors. Vs. St. of T.M., 2005 Crl.L.J. 1732

2. U. Suvetha Vs. State by Inspector of Police & anr., (2009) Cri.L.J. 2974

3. Preeti Gupta and Another Vs. St. of Jharkhand & anr., 2010 AIR SCW 4975

4. Geeta Mehrotra & anr. Vs. St. of U.P. & anr., AIR 2013 (SC) 181

5. Smt. Rani & anr. Vs. St. of U.P. & anr. ,2010 (7) ADJ 72 (Ald.)

6. Sunil Kumar Singh & anr. Vs. St. of Bihar & anr.,2006 Cr.L.J. 3527 (Patna)

7. Khuman Chand Vs. St. of Raj. ,1998 Cr.L.J. 1670

8. Savitri Devi Vs. Ramesh Chand & ors.,2003 Cr.L.J. 2759

9. Lakhwinder Singh Vs. St. of Punjab, 2000 Cr.L.J. 4751

10. Md. Allauddin Khan Vs. St. of Bihar & ors.,2019 (6) SCC 107

11. St. of M.P. Vs. Yogendra Singh Jadaun & anr., Criminal Appeal No.175 of 2020

12. St. of Hay. vs. Bhajan Lal & ors., 1992 Supp (1) SCC 335

13. Google India Private Ltd. Vs. Visakha Industries & ors., AIR 2020 SC 350

14. Jeffrey J. Diermeier & ors. Vs. St. of W.B. & ors.,, 2010 (6) SCC 243,

15. Som Mittal Vs. St. of Karn., 2008 (3) SCC 753,

16. Lakshman vs. St. of Karn. & ors,, 2019 (9) SCC 677

17. Chilakamarthi Venkateswarlu and Ors. Vs. State of Andhra Pradesh and Ors., AIR 2019 SC 3913,

18. Zandu Pharmaceuticals Works Limited and others vs Mohd. Sharaful Haque and others, 2005 (1) SCC 122.

19. M.A.A. Annamalai Vs. State of Karnataka and Ors. , 2010 (8) SCC 524,

20. Sharda Prasad Sinha Vs. State of Bihar, AIR 1977 SC 1754

21. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Ors., 1976 AIR 1976 SC 1947

22. Rakhi Mishra Vs. State of Bihar and Ors., 2017 (16) SCC 772

23. Sonu Gupta Vs. Deepak Gupta and Ors. , 2015 (3) SC 424

24. Roshni Chopra and others vs. State of U.P. and others, 2019 (7) Scale 152

25. Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal and Ors., (2003) 4 SCC 139

26. U.P. Pollution Control Board vs. Mohan Meaking Limited and others, 2000 (3) SCC 745,

27. Kanti Bhadra Shah Vs State of West Bengal , 2001 SCC 722

28. Nupur Talwar Vs Central Bureau of Investigation and others, 2012 (11) SCC 465.

29. Parbatbhai Aahir and Ors. Vs State of Gujarat and Ors, 2017 (9) SCC 641,

30. Arun Singh and other Vs State of U.P. ,Criminal Appeal no.250 of 2020 (arising out of Special Leave Petition (Crl.) No. 5224 of 2017)

31. G.V. Rao Vs. L.H.V. Prasad and Others , 2000 (3) SCC 693

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

1. This is an application under Section 482 of Code of Criminal Procedure, 1973 *(hereinafter referred to as "Cr.P.C.")* filed by two applicants Smt. Anshu Goel and Sri Ambhuj Goel, both are huband and wife, with a prayer to quash charge-sheet no.38 of 2010 dated 31.03.2010 in Case Crime No.51 of 2010 dated 17.02.2010 and to quash order dated 22.04.2010 passed by Additional Chief Judicial Magistrate IIIrd, Lucknow taking cognizance, issuing process and registering as Case No.1908 of 2010, under Sections 498-A, 427, 506 IPC read with Sections 3/4 of Dowry Prohibition Act, 1961 *(hereinafter referred to as "Act, 1961")* and the entire criminal proceedings therein.

2. The First Information Report *(hereinafter referred to as "FIR")* was lodged by OP-2 *(hereinafter referred to as "OP-2")* Smt. Garima Goel, who is wife of Rohit Agarwal and daughter of Gopal Krishna Goel, against accused Rohit Agarwal (husband), Dinesh Chandra Agarwal (father-in-law), Smt. Manjul Agarwal (mother-in-law), Smt. Anshu Goel (sister-in-law i.e. *Nanand*) and Sri Ambhuj Goel (brother-in-law i.e. *Nandoi*) at Police Station Vikas Nagar, Lucknow registering as Case Crime No.51 of 2010 dated 17.02.2010, under Sections 498-A, 427, 506 IPC read with Sections 3/4 of Act, 1961. FIR version actually contained is a copy of complaint made by OP-2 to Director General of Police, U.P. Lucknow *(hereinafter referred to as "D.G.P., U.P.")* and the allegations contained therein are as under:-

"निवेदन है कि मेरी शादी दिनांक 17.2.2009 को रोहित अग्रवाल पुत्र श्री दिनेश चन्द्र अग्रवाल निवासी ए–003 ब्लैक गोल्ड अपार्टमेट (सीनियर सिटीजन सोसाइटी) ओमेगा–2 पाकेट यू0पी0–02 ग्रेटर नोएडा, गौतम बुद्ध नगर के साथ

मंगलम गेस्ट हाउस सी–784 सिला नगर लखनऊ से सम्पन्न हुई थी। दिनांक 18.2.09 को विदा होकर मैं अपने ससुराल ग्रेटर नोएडा आ गई। ***शादी के बाद से ही मेरे ससुर मेरी सास मंजुल अग्रवाल, ननद श्रीमती अंशु गोयल, ननदोई श्री अम्बुज*** *गोयल, निवासी Suswee Apartment Flat No.8, 15 Main Road, 17 J.P.Nagar Phase75 Banglore* ***का ठीक नहीं रहा।*** *परम्परा के अनुसार लड़की की पहली होली मैके में होती है लेकिन मेरे सास ससुर एवं मेरे पति ने मुझे होली में घर नहीं जाने दिया, जबकि मेरे पिता ने मेरे भाई गौरव एवं बहन गुंजन को मुझे लेने के लिए ग्रेटर नोएडा भेजा था तथा दिनांक 10.03.09 को मेरा Reservation मेरे पिता जी ने लखनऊ के लिए कराकर भेजा था शादी के बाद से ही ये लोग मुझे घर वालो से फोन से बात नहीं करने देते थे तथा मेरे घर से फोन आता था तो ये लोग मझे बताते नहीं थे या फिर किसी बहाने से घर वालों को टाल देते थे या काट देते थे। मेरे पापा ने जो मोबाइल मय सिम के फोन दिया था उसका स्विच आफ करवाकर मेरी सास ने रखवा दिया तथा एक दिन रोहित ने मेरी सास के कहने पर फोन का सिम व बैटरी निकाल कर फोन पटक कर तोड दिया। शादी के दूसरे दिन ही मेरी सास ने मैके से मिले सभी गहने व उनके द्वारा दिये गये गहने उतरवा लिये थे।* ***मेरे ननद अंशु गोयल कहती थी कि मेरे भाई की शादी 15 लाख की थी मेरे नन्दोई श्री अम्बुज गोयल ने कहा कि मेरी रोक में 10 ग्रा0 की सोने की गिन्नी मिली थी परन्तु तुम्हारे पापा ने तो केवल 5 ग्राम की गिन्नी दी।*** *मेरे ससुर मुझसे कहते थे कि तुमने और तुम्हारे पिता जी ने डिग्री पीछे से ली है, ऐसी शादी तो फोर्थ क्लास इम्पलाई भी नहीं करता है, जैसी शादी तुम्हारे पापा ने की है, हमारे यहा फोर्थ क्लास इम्पलाई भी साइकिल, मोटर साईकिल देते हैं, तुम्हारे पापा कैसे Joint Director हैं जो गाडी क्या गाडी का पहिया भी नहीं दिया। एक बार फ्रीजर का ढक्कन टूट गया तो मेरी सास ने कहा कि एक तो फि्रज नहीं लाई तथा मेरा फ्रिज भी तोड दिया।* ***इस प्रकार ये सभी लोग मेरी लम्बाई कद काठी व रंग को लेकर अक्सर व्यंग व कटाक्ष किया करते थे,*** *जबकि इन लोगों ने मुझे देखकर व पसन्द कर के शादी की थी,* ***लेकिन इन्हे मेरे पापा से कार एवं दहेज की काफी उम्मीद थी जो न पूरी होने पर ये उत्पीड़न करने का कोई मौका नहीं चूकते थे।*** *इन लोगों ने मुझे शादी के बाद से 5 महीने तक, मां बाप, भाई, बहन के साथ कुछ दिन तक रहने के लिए नहीं भेजा तथा हमेशा इनका प्रयास रहा कि मेरी बात मेरे मैके वाले से न होने पाये। मैं श्रनसल माह से अपने मैके में हूं लेकिन ये सभी लोग मुझे विदा कराने नहीं आ रहे हैं।* ***शादी के दिन ही सुबह मेरे नन्दोई ने रू0 5539/– की पर्ची दी एवं मेरे ससुर ने रू0 47391/– का चेक लिया। मेरे पिता जी ने 55000/– नगद मेरे नन्दोई को दे दिया,*** *ऐ चेक चि0 रोहित अग्रवाल के नाम का इन लोगों ने लिया Cheque No. 04110 HSBC Lko का है जो कि दिनांक 22. 2.09 को मेरे पापा के खाते से खारिज हुआ। (55391–00 की पर्ची की फोटो कापी, एवं पापा के A/C से खारिज रोहित अग्रवाल के नाम से उपरोक्त Cheque के Statement की फोटो प्रति संलग्न है)*

अतः मेरा निवेदन है कि उपरोक्त की प्रथम सूचना रिपोर्ट करवाकर कार्यवाही करने की कृपा करें।''

3. Police after making investigation, submitted charge-sheet no.38 of 2010 dated 31.03.2010. Thereupon Magistrate took cognizance and issued process by summoning applicants and other three accused as named above vide order dated 22.07.2010.

4. It is further pleaded by applicants that a divorce petition dated 14.01.2010 under Section 13 of Hindu Marriage Act, 1955 *(hereinafter referred to as "Act, 1955")* was also filed by Rohit Agarwal, husband of OP-2, in the Court of Civil Judge (Senior Division), Gautambudh Nagar which was presented in the Court on 24.02.2010. In order to harass applicants, OP-2 subsequently filed aforesaid report on the basis of false and incorrect facts, hence, entire proceedings are malicious and liable to be set aside.

5. Learned counsel for applicants submitted that applicants are brother-in-law i.e. *Nandoi* and sister-in-law i.e. *Nanand* of OP-2. They are not residing with other

accused persons since after marriage of applicant-1 with applicant-2. They are residing at Bangalore. Allegations levelled against applicants are patently false. It is said that applicant-2 Ambhuj Goel is a software engineer working at HCL Technologies, Bangalore since March, 2009 and stayed there till 12.07.2009. In FIR itself, address of husband of OP-2 and her father and mother-in-law have been given as A-OO3 Black Gold Apartment (Senior Citizen Society) Omega-2 Pocket U.P.-02, Greater Noida, Gautambudh Nagar and address of applicants has been given as Suswee Apartment, Flat No.8, 15 Main Road, 17 J.P. Nagar, Phase-5, Bangalore which shows that applicants were residing at a different place, hence, there was no occasion on their part to harass and commit cruelty or torture upon OP-2 as stated in the FIR and the entire proceedings are vitiated in law and wholly malicious.

6. It is further said that the only allegations made against applicants are that applicant-1 used to comment that in the marriage of her brother, 15 lakhs were settled and applicant-2 used to comment that he got 10 gram gold coin but father of OP-2 gave a gold coin of only 5 gram. There is no allegation so as to attract offences under Sections 498-A, 427, 506 IPC read with Sections 3/4 of Act, 1961 and, hence, entire proceedings are vitiated in law, malicious, illegal and liable to be set aside. Sri Saurabh Mishra, Advocate appearing on behalf of applicants, in support of his submission, has placed reliance on the judgements of Supreme Court in **Ramesh and Others Vs. State of Tamil Nadu 2005 Crl.L.J. 1732; U. Suvetha Vs. State by Inspector of Police and Another (2009) Cri.L.J. 2974; Preeti Gupta and Another Vs. State of Jharkhand and Another 2010 AIR SCW 4975** and **Geeta Mehrotra and Another Vs. State of U.P. and Another AIR 2013 (SC) 181**. He has also relied on certain judgements rendered by Single Judges of different High Courts in **Smt. Rani and Another Vs. State of U.P. and Another 2010 (7) ADJ 72 (Ald.)**; Patna High Court's decision in **Sunil Kumar Singh and Another Vs. State of Bihar and Another 2006 Cr.L.J. 3527 (Patna)**; Rajasthan High Court's decision in **Khuman Chand Vs. State of Rajasthan 1998 Cr.L.J. 1670**; Delhi High Court's decision in **Savitri Devi Vs. Ramesh Chand and Others 2003 Cr.L.J. 2759** and Punjab and Haryana High Court's decision in **Lakhwinder Singh Vs. State of Punjab 2000 Cr.L.J. 4751.**

7. Besides, applicants have also filed a Misc. Application with a request to accept on record judgement dated 05.02.2016 passed by Sri Suresh Chand, IVth Family Judge, Family Court, Lucknow in Matrimonial Suit No.0001077 of 2013, Rohit Agarwal Vs. Smt. Garima Goel passing a decree of divorce under Section 13 of Act, 1955; and, order dated 28.08.2019 passed in First Appeal No. 20 of 2016, Smt. Garima Goel Vs. Principal Judge Family Court Lucknow and Another to show that judgement of Principal Judge Family Court is pending in appeal before this Court.

8. Sri Manish Kumar II, learned counsel for OP-2 has contended that charge-sheet has been submitted by police after making investigation and collecting evidence during investigation and on that basis cognizance has been taken by Magistrate. At this stage, defence of accused persons and their evidence neither was before Court below nor in the

proceedings under Section 482 Cr.P.C., such defence of accused persons can be looked into by this Court and, therefore, it cannot be said that there is no evidence whatsoever and proceedings are malicious which again is a question of fact and can be decided after evidence is adduced before Trial Court, hence, no interference under Section 482 Cr.P.C. is justified in the present case.

9. Learned AGA appearing on behalf of State supports and adopts the arguments of learned counsel for Informant/OP-2.

10. In the present case, stage at which applicants have come before this Court is when charge-sheet was submitted by police after investigation and thereupon Magistrate took cognizance and issued process summoning accused applicants along with three accused persons for trial for the offence under Sections 498-A, 427, 506 IPC read with Sections 3/4 of Act, 1961. Admittedly, no evidence has been recorded by Trial Court at the stage when applicants have come to this Court to challenge charge-sheet, order of cognizance and process.

11. Scope of judicial review at this stage to interfere under Section 482 Cr.P.C. is very limited. If allegations contained in FIR taken to be true, and evidence collected by police is looked into, can it be said that offences under aforesaid Sections in respect whereof cognizance has been taken and process has been issued, are not made out only the Court would interfere otherwise not. Scope of judicial review in such matters has been laid down by Supreme Court time and again and it would be fruitful to have a retrospect of some authorities on the subject.

12. At the stage of charge sheet factual query and assessment of defence evidence is beyond purview of scrutiny under Section 482 Cr.P.C. The allegations being factual in nature can be decided only subject to evidence. In view of settled legal proposition, no findings can be recorded about veracity of allegations at this juncture in absence of evidence. Supreme Court has highlighted that jurisdiction under Section 482 Cr.P.C. be sparingly/rarely invoked with complete circumspection and caution. In **Md. Allauddin Khan Vs. The State of Bihar & Others 2019 (6) SCC 107**, Supreme Court observed as to what should be examined by High Court in an application under Section 482 Cr.P.C. and in paras 15, 16 and 17 said as under :

"15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379 read with Section 34 IPC, ***then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not.*** *In other words,* ***in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint.*** *In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.*

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. In our view, the ***High Court had no jurisdiction to appreciate the***

evidence of the proceedings under Section 482 *of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.")* ***because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties.*** *That stage is yet to come in this case."*

(emphasis added)

13. Recently, above view has been reiterated by Supreme Court in **Criminal Appeal No.175 of 2020 (State of Madhya Pradesh Vs. Yogendra Singh Jadaun and another)** decided vide judgment dated 31.01.2020.

14. The principles which justify interference by Court under Section 482 Cr.P.C. have been laid down in various authorities in which Supreme Court's judgment in **State of Haryana vs. Bhajan Lal and others, 1992 Supp (1) SCC 335** is leading precedent and thereafter matter has also been examined by even Larger Benches.

15. In **State of Haryana vs. Bhajan Lal and others (supra)** issue of jurisdiction of this Court under Section 482 Cr.P.C. has been considered and what is laid down therein in paragraph 102, has been repeatedly followed and reiterated consistently. In a very recent judgment in **Google India Private Limited Vs. Visakha Industries and Ors., AIR 2020 SC 350**, guidelines laid down in paragraph 102 in **Bhajal Lal's case (supra)** have been reproduced as under :

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power Under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the ***following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice****, though it may* ***not be possible to lay down any precise, clearly defined and sufficiently*** *channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*

(1) Where the ***allegations made in the first information report*** *or the complaint,* ***even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the Accused.***

(2) Where the ***allegations*** *in the first information report and other materials, if any, accompanying the FIR* ***do not disclose a cognizable offence****, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

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

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

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

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

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

16. Court has also reproduced note of caution given in paragraph 103 in **Bhajan Lal's case (supra)** which reads as under :

*"103. We also give a note of caution to the effect that the **power of quashing a criminal proceeding should be exercised very sparingly and with circumspection** and that **too in the rarest of rare cases**; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice." (emphasis added)*

17. What would be the scope of expression "rarest of rare cases" referred to in para 103 in **State of Haryana vs. Bhajan Lal (supra)** has been considered in **Jeffrey J. Diermeier and Ors. Vs. State of West Bengal and Ors. , 2010 (6) SCC 243**, Court has said that words "rarest of rare cases" are used after the words 'sparingly and with circumspection' while describing scope of Section 482 CrPC. Those words merely emphasize and reiterate what is intended to be conveyed by the words 'sparingly and with circumspection'. They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasize that the power under Section 482 Cr.P.C. to quash FIR or criminal proceedings should be used sparingly and with circumspection.

18. Supreme Court in **Jeffrey J. Diermeier (supra)** infact referred to an earlier Three Judges' Bench judgment in **Som Mittal Vs. State of Karnataka, 2008 (3) SCC 753**, to explain phrase "rarest of rare cases". In **Som Mittal (supra)**, Court also said that exercise of inherent power under Section 482 CrPC is not a rule but exception. Exception is applied only when it is brought to notice of Court that grave miscarriage of justice would be added if trial is allowed to proceed where accused would be harassed unnecessarily or if trial is allowed to linger when prima facie it appears to Court that trial would likely to be ended in acquittal. Whenever question of fact is raised which requires evidence, Courts always said that at pre trial stage i.e. at the stage of cognizance taken by

Magistrate power under Section 482 CrPC would not be appropriate to be utilized, since, question of fact has to be decided in the light of evidence which are yet to be adduced by parties.

19. In **Lakshman vs. State of Karnataka and others, 2019 (9) SCC 677** Court said that it is not permissible for High Court in application under Section 482 CrPC to record any finding wherever there are factual disputes. Court also held that even in dispute of civil nature where there is allegation of breach of contract, if there is any element of breach of trust with mens rea, it gives rise to criminal prosecution as well and merely on the ground that there was civil dispute, criminality involved in the matter cannot be ignored. Further whether there is any mens rea on part of accused or not, is a matter required to be considered having regard to facts and circumstances and contents of complaint and evidence etc, therefore, it cannot be said pre judged in a petition under Section 482 CrPC.

20. In **Chilakamarthi Venkateswarlu and Ors. Vs. State of Andhra Pradesh and Ors., AIR 2019 SC 3913**, Court reiterated that inherent jurisdiction though wide and expansive has to be exercised sparingly, carefully and with caution and only when such exercise would justify by tests specifically laid down in Section itself. In paragraph 14 of judgment, Court said :

"14. For interference Under Section 482, three conditions are to be fulfilled. The ***injustice which comes to light should be of a grave, and not of a trivial character; it should be palpable and clear and not doubtful and there should exist no other provision of law by which the party aggrieved could have sought relief.****"*

(emphasis added)

21. Court also said that in exercise of jurisdiction under Section 482 CrPC it is not permissible for the Court to act as if it were Trial Court. Court has only to be prima facie satisfied about existence of sufficient ground for proceeding against accused. For that limited purpose, Court can evaluate material and documents on record but it cannot appreciate evidence to conclude whether materials produced are sufficient or not for convicting accused. High Court should not exercise jurisdiction under Section 482 CrPC embarking upon an enquiry into whether evidence is reliable or not or whether on reasonable apprehension of evidence, allegations are not sustainable, or decide function of Trial Judge. For the above proposition, Court relied on its earlier authority in **Zandu Pharmaceuticals Works Limited and others vs Mohd. Sharaful Haque and others, 2005 (1) SCC 122.**

22. Power under section 482 CrPC should not be exercised to stifle legitimate prosecution. At the same time, if basic ingredients of offfences alleged are altogether absent, criminal proceedings can be quashed under Section 482 CrPC. Relying on **M.A.A. Annamalai Vs. State of Karnataka and Ors. , 2010 (8) SCC 524, Sharda Prasad Sinha Vs. State of Bihar, AIR 1977 SC 1754** and **Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Ors., 1976 AIR 1976 SC 1947,** Court in **Chilakamarthi Venkateswarlu and Ors. (supra)** said that where allegations set out in complaint or charge sheet do not constitute any offence, it is open to High Court exercising its inherent jurisdiction under Section 482 CrPC to quash order passed by Magistrate taking cognizance of offence. Inherent power under Section 482 CrPC is intended to prevent abuse of process of Court and to clear ends of justice. Such power cannot be exercised to

do something which is expressly barred under CrPC. Magistrate also has to take cognizance applying judicial mind only to see whether prima facie case is made out for summoning accused persons or not. At this stage, Magistrate is neither required to consider FIR version nor he is required to evaluate value of materials or evidence of complainant find out at this stage whether evidence would lead to conviction or not.

23. It has also been so observed in **Rakhi Mishra Vs. State of Bihar and Ors., 2017 (16) SCC 772** and **Sonu Gupta Vs. Deepak Gupta and Ors. , 2015 (3) SC 424** and followed recently in **Roshni Chopra and others vs. State of U.P. and others, 2019 (7) Scale 152.** Here Court also referred to judgment in **Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal and Ors., (2003) 4 SCC 139**, wherein paragraph 9, Court said that in determining the question whether any process has to be issued or not, Magistrate has to be satisfied whether there is sufficient ground for proceeding or not and whether there is sufficient ground for conviction; whether the evidence is adequate for supporting conviction, can be determined only at the trial and not at the stage of inquiry.

24. However, it is also true that at the stage of issuing process to the accused, Magistrate is not required to record detailed reasons. In **U.P. Pollution Control Board vs. Mohan Meaking Limited and others, 2000 (3) SCC 745**, after referring to a decision in **Kanti Bhadra Shah Vs State of West Bengal 2001 SCC 722**, Court said :

"Legislature has stressed the need to record reasons in certain situations such as dismissal of complaint without issuing process. There is ***no such requirement imposed on a Magistrate for passed detailed order while issuing summons. Process issued to accused cannot be quashed merely on the ground that Magistrate had not passed a speaking order."*** *(emphasis added)*

25. Same proposition was reiterated in **Nupur Talwar Vs Central Bureau of Investigation and others, 2012 (11) SCC 465.**

26. In a Three Judges' Bench in **Parbatbhai Aahir and Ors. Vs State of Gujarat and Ors, 2017 (9) SCC 641**, Court has observed that Section 482 CrPC is prefaced with an overriding provision. It saves inherent power of High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any court; or (ii) otherwise to secure the ends of justice. In Paragraph 15 of the judgment Court summarized as under :

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

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

Under Section 482 is attracted even if the offence is non-compoundable.

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

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

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

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

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

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

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

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

27. Above observations have been reiterated in **Arun Singh and other Vs State of U.P. passed in Criminal Appeal no.250 of 2020 (arising out of Special Leave Petition (Crl.) No. 5224 of 2017)**, decided by Supreme Court on 10.02.2020.

28. Now, considering the facts in the light of aforesaid exposition of law, I find that first allegation against applicants is that their behavior was not cordial with applicants. It is not disputed that both the applicants were residing at Bangalore while OP-2 was married to Sri Rohit Agarwal residing at Greater Noida, District

Gautambudh Nagar. Admittedly, marriage of OP-2 with Rohit Agarwal was solemnized on 17.02.2009 at Lucknow but thereafter she came to reside with Rohit Agarwal at his residence at Greater Noida, District Gautambudh Nagar and was residing thereat. The second allegation against applicant-1 is that she used to said that his brother's marriage was of 15 lakh and applicant-2 said that in his engagement, he got 10 gram gold coin while father of OP-2 gave gold coin only of 5 gram. The third allegation against applicant-2 is that he gave a slip of Rs.5539/- and father of Informant-OP-2 gave Rs.55,000/- cash to him.

29. Police recorded statement of Informant-OP-2 under Section 161 Cr.P.C., copy whereof has been filed as Annexure-6 wherein FIR version has been reiterated. Some more facts in respect of other accused persons have been stated but there is no change by way of addition, alteration or modification in respect of allegations made against applicants in the FIR.

30. Statement of father of OP-2 is Annexure-7 to the affidavit who has made a general allegation that applicants and other accused persons used to harass and torture OP-2 and left no occasion to make comments for bringing less dowry in the marriage. He did not make any statement that he paid any amount of cash to applicant-2.

31. Statement of Smt. Kumkum Goel, mother of OP-2 is Annexure-8 to the affidavit and here also, I find that general allegation of harassment has been made against applicants along with other accused persons and there is no averment that any amount was paid to applicant-2 in cash by husband of Smt. Kumkum Goel i.e. Gopal Krishna Goel.

32. The statement of OP-2 is that applicant-1 said that marriage of her brother was of Rs.15 lakh and applicant-2 said that father of OP-2 gave a gold coin of 5 gram though applicant-2 receives in his marriage a gold coin of 10 grams. This statement is of no consequences. Mere comment or taunt, cannot amount to a cruelty as to attract 498-A IPC or Section 3 and 4 of Act, 1961. Even if the allegations of Rs.55,000/- paid cash by father of OP-2 is treated to be correct but it is not stated anywhere that applicant-2 has demanded any dowry and said dowry was paid to him. The assertion is that he gave a slip of Rs.5539/- and their payment was made. It appears to be some payment towards some expenses.

33. Taking the aforesaid averments to be correct and also considering the fact that applicant-1 has married with applicant-2 long back, they had a 7 year old son, and residing at Bangalore for several years and no specific date and time of their presence at Greater Noida, District Gautambudh Nagar has been mentioned, I find that apparently offences under Sections 498-A, 427, 506 IPC read with Sections 3/4 of Act, 1961 are not made out.

34. We now proceed to examine the above sections in detail. First of all, I propose to consider Section 498-A IPC which reads as under:-

35. **Section 498-A**. Husband or relative of husband of a woman subjecting her to cruelty.--

"Whoever, being the husband or the relative of the husband of a woman, ***subjects such woman to cruelty*** *shall be punished with imprisonment for a term*

which may extend to three years and shall also be liable to fine.

***Explanation.**--For the purpose of this section, "**cruelty**" means--*

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

36. In order to attract Section 498-A I.P.C., essential ingredients are:

"(a) that the victim was a married lady (she may also be a widow),

*(b) that she has been subjected to **cruelty by her husband** or **the relative of her husband,***

*(c) that such **cruelty consisted of either (1) harassment of the woman with a view to coerce meeting a demand of dowry, or** (2) a wilful conduct by the husband or the relative of her husband of such a nature as **is likely to lead the lady to commit suicide or to cause grave injury to her life, limb or health;***

*(d) that such **injury aforesaid may be physical or mental.** When the husband or the relative of a husband of a woman subjects such woman to cruelty, he or they shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."*

37. Thus, the emphasis is on 'cruelty' which is the core element of Section 498-A IPC and this 'cruelty' has also been defined in the Section itself. The word 'cruelty' encompasses any of the following elements:-

(i) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide; or

(ii) any wilful conduct which is to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman.

38. The Explanation (b) of Section 498-A IPC defines 'cruelty' embraces which is in fold harassment. Criminality attached to what harassment is punishable in the following circumstances:-

(i) where harassment of woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security; or

(ii) where harassment is on account of failure by her or any person related to her to meet such demand.

39. It is thus evident that every cruelty or every wilful conduct for harassment do not have the element of criminal culpability. If there has been any physical violation or infliction of injury, the position may be different but that is not the case here. Some allegation of demand etc. have been levelled against other accused but in respect of applicants, even such allegations have not been made.

40. In this context, I find that facts of this case are broadly similar to an authority of Supreme Court in **Ramesh Vs. State of Tamil Nadu (supra)**. Therein application under Section 482 Cr.P.C. filed by Ramesh and Another was dismissed by Madras High Court and thereafter matter was taken

up to Supreme Court. Wife of Ramesh filed a complaint dated 23.06.1999 with All Women Police Station, Trichy alleging commission of offences under Section 498-A and 406 IPC and Sections 3/4 of Act, 1961. Allegations made therein against husband, in-laws, including brother and sister of husband. After registration of report, investigation was conducted and charge-sheet was submitted by police on 28.12.2001 in the Court of Judicial Magistrate-III, Trichy. Magistrate taken cognizance, issued warrants against accused persons on 13.02.2002. Accused persons filed Criminal Misc. Writ Petition No.593 of 2002 in Bombay High Court for quashing FIR or in the alternative to transfer the FIR to Mumbai. Initially, proceedings were stayed but ultimately writ petition was dismissed as withdrawn on 02.06.2003 with a prayer to approach Madras High Court for appropriate relief. Thereafter, accused filed application under Section 482 Cr.P.C. challenging charge-sheet as also the cognizance order passed by Magistrate but the same was dismissed by Court. The matter was taken in Supreme Court and basically proceedings were challenged by raising following three grounds:-

(i) Allegations are frivolous and without any basis;

(ii) Even according to FIR, no incriminating act has been done within the jurisdiction of Trichy Police Station and Court at Trichy and, therefore, learned Magistrate lacked territorial jurisdiction to take cognizance.

(iii) Taking cognizance of the alleged offence is barred under Section 468(1) Cr.P.C. as it was beyond the period of limitation prescribed under Section 468(2).

41. In this case, we are concerned with respect to first question which has been considered by Supreme Court in para-6 of the judgement and it has held that from the FIR and contents of charge-sheet, Court did not find that offence under Section 498-A, 406 IPC and Section 4 of Act, 1961 are made out against sister-in-law i.e. *Nanand*. She is a married sister of Informant's husband who is undisputedly living with her family. Assuming that during relevant time, i.e., between March and October, 1997, when Informant lived in Mumbai in her marital home, the said lady stayed with them for some days, there is nothing in the complaint which connects her with an offence under Section 498-Aor any other offence of which cognizance was taken.

42. Court further said:-

"Certain acts of taunting and ill-treatment of Informant by her sister-in- law (appellant) were alleged but they did not pertain to dowry demand or entrustment and misappropriation of property belonging to Informant. What was said against her in the F.I.R. is that on some occasions, she directed complainant to wash W.C. and she used to abuse her and used to pass remarks such as "even if you have got much jewellery, you are our slave."

43. It is further stated in the report that Gowri would make wrong imputations to provoke her husband and would warn her that nobody could do anything to her family. These allegations, even if true, do not amount to harassment with a view to coercing the Informant or her relation to meet an unlawful demand for any property or valuable security. At the most, the allegations reveal that her sister-in-law Gowri was insulting and making derogatory remarks against her and behaving rudely against her. Even acts of abetment in connection with unlawful

demand for property/dowry are not alleged against her. The bald allegations made against her sister-in-law seem to suggest the anxiety of Informant to rope in as many of the husband's relations as possible. Neither the FIR nor the charge-sheet furnished the legal basis to the Magistrate to take cognizance of the offences alleged against appellant Gowri Ramaswamy. High Court ought not to have relegated her to the ordeal of trial.

44. Following the above decision, a similar view has been taken by learned Single Judge Hon'ble Navin Sinha, J. (as His Lordship then was) in **Sunil Kumar Singh and Another Vs. State of Bihar and Another (supra).**

45. A similar situation has also come up for consideration in **Geeta Mehrotra and Another vs. State of U.P. and Another (supra)**. Therein application under Section 482 Cr.P.C. filed by accused appellants was disposed of by this Court observing that the issue on territorial jurisdiction was raised which may be raised before Trial Court and till then, interim protection was allowed not to take coercive process against applicants. Accused applicants instead of approaching Magistrate filed appeal before Supreme Court. Facts are that one Shipra Mehrotra (before marriage Shipra Seth) filed FIR against her husband, father-in-law, mother-in-law, brother-in-law and sister-in-law under Sections 498-A, 323, 504, 506 IPC read with Sections 3/4 of Act, 1961. It was registered as FIR No.54 of 2004 at Mahila Thana Daraganj, Allahabad. Complainant levelled allegation is that she was married with Shyamji Mehrotra s/o Balbir Saran who was living at Eros Garden, Charmswood Village, Faridabad, Suraj Kund Road at Faridabad Haryana. Prior to marriage, Informant/complainant and her family members were told by Shyamji Mehrotra and his elder brother Ramji Mehrotra, their mother Smt. Kamla Mehrotra and sister Geeta Mehrotra that Shyamji is employed as a Team Leader in a top I.T. Company in Chennai and is getting salary of Rs.45,000/- per month. After negotiation between the parents of the complainant and the accused, marriage of the complainant Shipra Seth (later Shipra Mehrotra) and Shyamji Mehrotra was performed whereafter complainant left her house to live at the marital home. Atmosphere of marital house was peaceful for sometime but soon after marriage, when other relatives left, the maid who cooked meals was first of all paid-off by aforesaid four persons who then told complainant that from now onwards, complainant will have to prepare food for the family. In addition, the above four accused started taunting and scolding her on trivial issues. Complainant/Informant also came to know that Shyamji was not employed anywhere and always stayed in the house. Shyamji gradually took away all the money which the complainant had with her and then told her that her father had not given dowry properly, therefore, she should get Rupees five lakhs from her father in order to enable him to start business, because he was not getting any job. Complainant declined and said that she will not ask her parents for money whereupon Shyamji, on instigation of other accused-family members, started beating her occasionally. To escape every day torture and to upkeep financial stars of the family, complainant took up a job in a Call Centre at Convergys on 17.2.2003 where complainant had to do night shifts due to which she used to come back home at around 3 a.m. in the morning. Just on her return from work, the household people started playing bhajan cassettes after which

she had to getup at 7'o clock in the morning to prepare and serve food to all the members in the family. Often on falling asleep in the morning, Shyamji, Kamla Devi and Geeta Mehrotra tortured complainant every day mentally and physically. Ramji Mehrotra often provoked the other three family members to torture and often used to make complainant feel sad by making inappropriate statements about the complainant and her parents. Her husband Shyamji also took away the salary from complainant.

46. After persistent efforts, Shyamji finally got a job in Chennai and he went to Chennai for the job in May, 2003. However, there was no change in his behaviour even after going to Chennai. Complainant often called him on phone to talk to him but he always did irrelevant talks and conversation. He never spoke properly with complainant whenever he visited home and often used to hurl filthy abuses. Complainant states that she often wept and tolerated the tortures of accused persons for a long time but made no complain to her family members and that would make them feel sad. At last, when Complainant realized that even her life is in danger, she compelled to tell everything to her father on phone who was very upset on hearing her woes. On 15.7.2003, Complainant heard some conversation of her mother-in-law and sister-in-law and she had apprehension that they want to kill her in the night only. She apprised the situation to her father on phone who told that he will call back her father-in-law and she should go with him immediately and he will come in the morning. The father-in-law Satish Dhawan and his wife who were living in Noida came in the night and ultimately she came back and lodged report. Investigation was made by police and thereafter submitted charge-sheet against all the accused family members including husband and sister-in-law of Informant/complainant.

47. Sister and brother of Complainant's husband Shyamji Mehrotra filed an application under Section 482Cr.P.C. praying for quashing of charge-sheet and entire criminal proceedings on the ground of being malicious and only to rope entire family members without any actual foundation or truth. It was also challenged that incident in any case had taken place at Faridabad and investigation could have been done there only, while investigation in the matter has been done by police at Allahabad who had no jurisdiction in the matter. High Court non-suited the applicants on the ground that issue of territorial jurisdiction cannot be decided by it and the applicants may take up this plea before Trial Court. Thereafter, applicants Geeta Mehrotra and her brother Ramji Mehrotra filed appeal before Supreme Court. Their contention was that High Court was not examined whether any case was made out against sister-in-law and brother-in-law of Complainant/Informant. Even if the allegations and facts stated in the FIR are taken to be true, on the face of it, there was no specific allegation against sister and brother of Informant's husband and they were falsely and illegally implicated.

48. Relying on its earlier judgement in **Ramesh Vs. State of Tamil Nadu (supra)**, Court in **Gita Mehrotra (supra)** said as under:-

"Coming to the facts of this case, when the contents of the FIR is perused, it is apparent that there are no allegations against Kumari Geeta Mehrotra and Ramji Mehrotra except casual reference of their

names who have been included in the FIR but mere casual reference of the names of the family members in a matrimonial dispute without allegation of active involvement in the matter would not justify taking cognizance against them overlooking the fact borne out of experience that there is a tendency to involve the entire family members of the household in the domestic quarrel taking place in a matrimonial dispute specially if it happens soon after the wedding."

49. It also relied on an earlier decision in **G.V. Rao Vs. L.H.V. Prasad and Others 2000 (3) SCC 693**, wherein Court held that there has been an outburst of matrimonial dispute in recent times. Marriage is a sacred ceremony to enable young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in heinous crimes in which elders of the family are also involved who were counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate the disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their cases in different Courts.

50. Court reminded a well settled proposition that if FIR do not disclose a commission of offence by an individual accused, it would be justified to quash the proceedings against him/ her so as to prevent abuse of process of law. No one can be allowed to undergo an ordeal of illegal, malicious or false prosecution and undergo a physical and mental torture so long as such proceedings continue.

51. In **Preeti Gupta and Another Vs. State of Jharkhand and Another (supra)**, Court held as under:-

"The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and nevervisited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful."

52. Learned counsel for applicants has relied on a judgement in **U.Suvetha Vs. State by Inspector of Police and Another**

(supra). Therein the basis issue raised and decided is whether a concubine or a girl friend can be said to be relative so as to attract Section 498-A IPC and the same has been answered in negative. Therefore, aforesaid judgement, in my view, has no authority on the point of issue in the present application.

53. Thus, so far as applicants are concerned, Section 498-A IPC is not attracted in the present case if the allegation made in FIR, which we have already notice above, are taken to be true.

54. Now, I come to Section 427 IPC which deals with the offence of "Mischief". The word "Mischief" defines in Section 425 IPC, therefore, both sections are reproduced as under:-

"**Section 427.** Mischief causing damage to the amount of fifty rupees.--

Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

55. In order to attract Section 427 I.P.C., essential ingredients are:

"(i) That the accused committed mischief;

(ii) That he thereby caused loss or damage to the amount of fifty rupees or more."

56. **Section 425 IPC** defines the word "Mischief".

"Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

***Explanation 1.**--It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.*

***Explanation 2.**--Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly."*

57. Having gone through the entire FIR repeatedly and also enquired from learned counsel for OP-2 but neither I could find anything therein nor counsel for Informant/Complainant could show as to how Section 427 IPC is attracted in this case as there is no such allegation whatsoever against applicants in the entire report so as to attract offence of Section 427 IPC against applicants. There is no allegation that applicants have caused any wrongful loss or damage or destruction or destroy or diminishes its value or utility or affects to any property of Complainant/Informant i.e. OP-2 and, therefore, there is no mischief at all, hence, Section 427 IPC is not attracted at all.

58. Section 506 IPC deals with an offence of 'Criminal Intimidation' which is defined in Section 503 IPC and both are reproduced as under:-

*"**Section 506.** Punishment for criminal intimidation.--*

Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for

a term which may extend to two years, or with fine, or with both;

If threat be to cause death or grievous hurt, etc.--And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

59. Ingredients essential to attract Section 506 IPC are as follows:-

"1. Accused threatened complainant, his person, property or reputation or the person or reputation of any one in whom he is interested.

2. Such threat was with some injury.

3. Threat was with intent to (1) cause alarm to complainant, (2) to cause complainant to do any act which he was not legally bound to do, (3) to cause to omit to do any act which he was legally entitled to do.

4. Threat given was (1) to cause death, (2) to cause grievous hurt, (3) to cause destruction of any property, (4) to cause an offence punishable with death, imprisonment for life, imprisonment for a term which may extend to 7 years or to impute unchastity to a woman.

5. Accused intended complainant so threatened or alarmed to do any act which he was not legally bound to do or to omit to do any act which the complainant was legally entitled to do as the means of avoiding the execution of such threat."

***"Section 503 IPC.** Criminal intimidation.--*

Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

***Explanation**.--*

A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section."

60. When questioned, learned counsel for OP-2 could not dispute that no allegation whatsoever has been made in the complaint/report which may amount to an offence of Criminal Intimidation on the part of applicants, therefore, Section 506 read with Section 503 IPC is also not attracted in the case in hand.

61. Now, I come to remaining two Sections i.e. Sections 3 and 4 of Act, 1961 and both sections are also reproduced as under:-

*"**Section 3 of Act, 1961.** Penalty for giving or taking dowry.-- (1) If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more:*

Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than five years.

(2) Nothing in sub-section (1) shall apply to, or in relation to,-- (a) presents which are given at the time of a

marriage to the bride (without any demand having been made in that behalf):

Provided that such presents are entered in a list maintained in accordance with the rules made under this Act;

(b) presents which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf):

Provided that such presents are entered in a list maintained in accordance with the rules made under this Act:

Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given."

*"**Section 4 of Act, 1961.** Penalty for demanding dowry.--"If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees:*

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months."

62. Section 3 of Act, 1961 deals with offence "giving or taking dowry" or abeting the offence of giving or taking dowry. Section 4 of Act, 1961 deals with offence of "demand of dowry".

63. The term "Dowry" has been defined in Section 2 of Act, 1961 and it reads as under:-

*"**2 Definition of "dowry'.** --In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly--*

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

[***]

Explanation II.-- The expression "valuable security" has the same meaning as in section 30 of the Indian Penal Code (45 of 1860)."

64. If anyone is involved in the most heinous social evil of dowry, I have no manner of doubt that law must be allowed to take it course with full swing and there should not be any sympathy, compassion or leniency for such person who is indulged in such crime but only on whims and caprice someone who is not accused of any such offence, should not be implicated and undergo an ordeal criminal trial merely for the reason that he or she is relative of the husband and every relative of the husband should be made to teach a lesson. After all, performance of marriage by itself is no offence and if any one is relative of one of the spouse who is alleged to be a guilty of offence of dowry, mere relationship should not be a reason to implicate such person in a criminal proceedings.

65. Hon'ble S.S. Nijjar, J. (as His Lordship then was) in **Lakhwinder Singh Vs. State of Punjab (supra)**, dealing with slightly a similar matter

and observed that it is generally seen that when any marriage goes in rough weather the tendency of bride is to insinuate as many members of the family of her husband as possible with the allegation of laying demand for dowry and also treating her with cruelty when their demand for dowry is not being fulfilled. Allegations of misappropriation of dowry are also made some times against those members of the family of the husband who do not have anything with the dowry which is the basic concern of the bride and bridegroom and at best parents of the bridegroom. If there is no entrustment of any article of dowry to anyone and the ingredients of definition of dowry under Section 2 of Act, 1961 are not satisfied, offence of Section 3/4 of Act, 1961 will also not be attracted.

66. In these circumstances, it cannot be said that offences under Section 3/4 of Act, 1961 against applicants are made out and, in my view, proceedings, if allowed against applicants will be nothing except but a gross abuse of process of law and ends of justice required that the same must be quashed against applicants.

67. In the result, application is allowed. Impugned Charge-sheet No.38 of 2010 dated 31.03.2010 in Case Crime No.51 of 2010 dated 17.02.2010 and also order dated 22.04.2010 passed by Additional Chief Judicial Magistrate IIIrd, Lucknow taking cognizance, issuing process and registering as Case No.1908 of 2010, under Sections 498-A, 427, 506 IPC read with Sections 3/4 of Act, 1961 as well as subsequent proceedings thereto are hereby quashed.

(2020)03-05ILR A1617
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.02.2020

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 Cr.P.C. No. 3761 of 2020

Geeta Devi ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Sri Om Prakash Vishwakarma

Counsel for the Respondents:
A.G.A.

(A) Criminal law- Code of criminal procedure, 1973 - Sections 482 – Inherent jurisdiction - police can investigate into matters relating to commission of 'cognizable offences' brought to its notice under section 154 Cr.P.C. - Officer-in-charge of police station has power to investigate U/S 156(1) - Magistrate has power to take cognizance u/s 190 Cr.P.C. on receiving the 'complaint' - matter relating to section 156 (3) Cr.P.C. relates to power of Magistrate to order investigation by police in matters relating to cognizable offences brought before it through complaint - Sections 154 and 156 Cr.P.C. provide procedure for registration and investigation of complaint - Order dated 30.10.2019 passed by the Special Judge, S.C./S.T (Prevention of Atrocities) Act - Set aside.(Para-9,10)

Application under Section 156(3) Cr.P.C. filed by the applicant has been directed to be treated as complaint case - right and interest of the

applicant is involved in the present case as the property of applicant has been looted - allegations made in the application filed under section 156 (3) Cr. P. C. are not only serious, but also show the commission of a cognizable offence. (Para-2,3,7)

HELD:- Accused persons have no right to be heard at pre-cognizance stage - Special Judge, S.C./S.T (Prevention of Atrocities) Act, directed to exercise his discretionary power and decide afresh the application under section 156(3) Cr.P.C. moved by the applicant and to pass appropriate order, in accordance with law. (Para-14,15)

Application u/s 482 Cr.P.C. allowed. (E-7)

List Of Cases Cited:-

1. Lalita Kumari Vs. Government of U.P. and others , 2014 (2) SCC 1

2. Lalita Kumari Vs Goverment of Uttar Pradesh and another, 2014 (2) SCC 1

3. Sukhwasi v. State of U.P. , 2007(59) ACC 739

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

1. Heard Mr. Om Prakash Vishwakarma, learned counsel for the applicant, and the learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been filed challenging the order dated 30.10.2019, passed by the Special Judge, S.C./S.T (Prevention of Atrocities) Act, Jaunpur in Misc. Case No. 117 of 2019 (Geeta Devi vs. Satya Narayan and others), under Section 156(3) Cr.P.C., Police Station-Sikrara, District-Jaunpur by which the application under Section 156(3) Cr.P.C. filed by the applicant has been directed to be treated as complaint case.

3. Learned counsel for the applicant submits that a perusal of the complaint filed by the applicant clearly discloses the commission of a cognizable offence. He, therefore, submits that once the application filed by the applicant under Section 156 (3) Cr.P.C. disclosed the commission of a cognizable offence, the Magistrate has erred in law in directing to proceed with the application as a complaint case. He further submits that the right and interest of the applicant is involved in the present case as the property of applicant has been looted. The learned counsel for the applicant has contended with vehemence that the court below has passed the impugned order in a mechanical manner and has ignored the judgement of the Apex Court rendered in the case of ***Lalita Kumari Vs. Government of U.P. and others reported in 2014 (2) SCC 1.***

4. Learned A.G.A. on the other hand has supported the impugned order and has pointed out that the grievance of the applicant has not gone unattended by the court below. The court below after taking into consideration the entire gamut of the facts and circumstances of the case has rightly concluded to treat the application filed by the applicant under Section 156 (3) Cr.P.C. as a complaint. The applicant shall still have an opportunity to prove his case before the court below.

5. Considered the rival submissions made by the learned counsel for the parties.

6. A perusal of the impugned order shows that no sufficient reason has been disclosed, on the basis of which, the Magistrate has proceeded to treat the application under section 156(3) Cr.P.C. as a complaint.

7. From the record, it transpires that in the present case, the right and interest of the applicant in her property is involved. The allegations made in the application filed under section 156 (3) Cr. P. C. are not only serious, but also show the commission of a cognizable offence. The applicant has alleged in the complaint that on 19.06.2019 at about 09:00 p.m., the accused persons came at the house of applicant and destroyed her house and when the applicant objected the same, accused-Sunil Mishra and Anil Mishra threatened the applicant by putting gun on applicant's chest and, thereafter, Sunil Mishra entered into the house of applicant and misbehaved with the daughter-in-law of applicant. They also forcefully took away several properties of the applicant. However, the Magistrate vide order dated 30.10.2019 directed that the said application shall be treated as a complaint. A perusal of the order impugned passed by the Magistrate shows that the Magistrate was of the view that since all the evidence required in respect of the incident which occurred on the alleged date can be given by the applicant, there is no necessity of police investigation in the matter.

8. In view of the nature of the allegations made by the applicant in the application filed under Section 156 (3) Cr.P.C., the Special Judge, S.C./S.T (Prevention of Atrocities) Act, Jaunpur ought to have allowed the application and directed the police of Police Station Sikrara, Jaunpur to investigate into the matter and, thereafter, submit a report.

9. Sections 154 and 156 Cr.P.C. provide procedure for registration and investigation of complaint. The same are quoted herein under:-

"154. Information in cognizable cases- *(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.:*

[Provided that if the information is given by the woman against whom an offence under section 326A, Section 326B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E or Section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that -

(a) in the event that the person against whom an offence under section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E or Section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5A) of Section 164 as soon as possible].

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

10. From the perusal of the aforesaid provisions, it is evident that the police can investigate into matters relating to commission of 'cognizable offences' brought to its notice under section 154 Cr.P.C. Officer-in-charge of police station has power to investigate U/S 156(1) in such case. Magistrate has power to take cognizance u/s 190 Cr.P.C. on receiving the 'complaint'. Thus the matter relating to section 156 (3) Cr.P.C. relates to power of Magistrate to order investigation by police in matters relating to cognizable offences brought before it through complaint. Complaint has been defined in section 2(d) Cr.P.C. of as follows : "complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but does not include a Police report." Code of Criminal Procedure has given different type of powers to deal with such matters relating to commission of cognizable offences when brought before it.

11. A Division bench of this Court in the case of ***''Sukhwasi v. State of U.P., 2007(59) ACC 739"*** held as under:

"Applications under section 156(3) Cr.P.C. are coming in torrents. Provisions under section 156(3) Cr.P.C. should be used sparingly. They should not be used unless there is something unusual and extra ordinary like miscarriage of justice which warrants a direction to the Police to register a case. Such application should not be allowed because the law provides them with an alternative remedy of filing a complaint, therefore, recourse should not normally be permitted for availing the provisions of section 156(3) Cr.P.C.

The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application section 156(3) Cr.P.C. and there is no such legal mandate".

12. However, the said judgement does not provide any reason as to why F.I.R. should not be registered in respect of a cognizable offence.

13. Learned counsel for the applicant has placed reliance upon the judgement of the Apex Court in the case of ***Lalita Kumari Vs Goverment of Uttar Pradesh and another, reported in 2014 (2) SCC 1.*** He has relied upon paragraph 111 of the aforesaid judgement, which is reproduced herein under:-

"111) In view of the aforesaid discussion, we hold:

"i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/ family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

14. In view of the aforesaid, the orders dated 30.10.2019 passed by Special Judge, S.C./S.T (Prevention of Atrocities) Act, Jaunpur cannot be sustained. Accordingly, the present criminal misc. application succeeds and is allowed at the admission stage without issuing notice to the prospective accused persons as they have no right to be heard at pre-cognizance stage. The order dated 30.10.2019 passed by the Special Judge, S.C./S.T (Prevention of Atrocities) Act, Jaunpur are consequently **set aside.**

15. The concerned court below i.e. Special Judge, S.C./S.T (Prevention of Atrocities) Act, Jaunpur is directed to exercise his discretionary power and decide afresh the application under section 156(3) Cr.P.C. moved by the applicant and to pass appropriate order, in accordance with law, keeping in view the observations made by this court, within a period of **one month** from the date of production of a certified copy of this order.

16. With the aforesaid directions, the present application is **allowed**.

(2020)03-05ILR A1622
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 Cr.P.C. No. 3821 of 2020

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

Counsel for the Applicant:
Sri Mohammad Waseem

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

(A) Criminal law - Code of criminal procedure, 1973 - Sections 482 – Inherent jurisdiction - Indian Penal Code, 1860 - Sections 323, 504, 506, 354, 354A, 354B IPC – taking cognizance - when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any person regarding an offence - summoning order has to be passed after considering relevant material and showing appropriate reasons. (Para- 11,14)

Summoning order passed in a cyclostyled proforma and only the case number, name of accused and Sections of IPC were written by pen and rest of the contents are on a printed proforma order. (Para-14)

HELD:- It is apparent that there is nothing to indicate that the impugned order has been passed after applying judicial mind and thus, the impugned summoning order is not sustainable and, accordingly, the impugned summoning order is, hereby, set aside and learned trial court is directed to pass order afresh, in accordance with law. (Para-15)

Application u/s 482 Cr.P.C. disposed of finally. (E-7)

List Of Cases Cited:-

1. Akash Garg Vs. St. of U.P., 2011 (11) ADJ 849

2. Ankit vs. St. of U.P. & anr., JIC 2010 (1) 432

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Heard learned counsel for the applicant and learned A.G.A. for the State.

2. This application under Section 482, Cr.P.C. has been filed for quashing the entire criminal proceedings of case No. 1505 of 2019 (State vs. Kaushal Kumar

Gupta & others), arising out of case crime No. 304 of 2018, under Sections 323, 504, 506, 354, 354A, 354B IPC, Police Station-Adampur, District Varanasi, as well as charge sheet dated 02.05.2019 and cognizance order dated 07.11.2019, pending in the court of Additional Chief Judicial Magistrate, Court No. 7, District Varanasi.

3. The contention of the counsel for the applicants is that the applicants have been falsely implicated in this case and on the basis of false and frivolous allegation, the present FIR was lodged against the applicant. He further submitted that there is dispute between opposite party no. 2 and the applicant regarding residential house. He further submitted that no offence against the applicant is disclosed and the present prosecution has been instituted with a malafide intention for the purposes of harassment, the Investigating officer without collecting sufficient evidence submitted charge sheet under section 354 IPC against the applicant. He further submitted that learned Magistrate has not applied his judicial mind while in passing the cognizance order as the order has been made on a printed proforma, in which the name of the accused has been filled up by hand. This Court in the case of ***Ankit vs. State of U.P. and another, JIC 2010 (1) 432***, has held that cognizance order being on a printed proforma is clearly without application of judicial mind and henc is liable to quash on this ground alone.

4. Learned counsel for the applicant also relied upon paragraph Nos. 6 and 12 of the judgement passed by Hon'ble Allahabad High Court in the case of ***Akash Garg Vs. State of U.P. reported in [2011 (11) ADJ 849].***

"6. It is well settled that the Magistrate is not bound by the conclusion of the Investigating Officer. He is competent under law to form his own independent opinion on the basis of the materials collected during the investigation. The Magistrate may or may not agree with the conclusion of the Investigating Officer. If the Investigating Officer submits charge sheet, in that eventuality the Magistrate may differ from the charge sheet and refuse to take cognizance by holding that no case is made out. In a case where the final report is submitted the Magistrate may on perusal of the materials placed in support of the final report opine that the conclusion of the Investigating Officer is not correct and the offence is made out. In that eventuality, the Magistrate may reject the final report and take cognizance of the offence.

12. It is also well settled that at the stage of taking cognizance of an offence, the Magistrate is not required to examine thoroughly the merits and demerits of the case and to record a final verdict. At that stage he is not required to record even reasons, as expression of reasons in support of the cognizance may result in causing prejudice to the rights of the parties (complainant or accused) and may also in due course result in prejudicing the trial. However, the order of the Magistrate must reflect that he has applied his mind to the facts of the case. In other words at the stage of taking cognizance what is required from the Magistrate is to apply his mind to the facts of the case including the evidence collected during the investigation and to see whether or not there is sufficient ground (prima facie case) to proceed with the case. The law does not require the Magistrate to record reasons for taking cognizance of an offence."

5. What is meant by 'taking cognizance' in regard to an offence by a competent Magistrate is not defined or described in the Code of Criminal Procedure, 1973 (Cr.P.C.) or any other act. However the term has acquired a definite connotation through well settled judicial pronouncements.

6. The term 'taking cognizance' actually means 'become aware of', but in reference to a Court or a Judge, it means 'to take notice of judicially'. The term has no mystic significance in criminal law. In practice 'taking cognizance' means taking notice of an offence for initiation of proceedings under Section 190 Cr.P.C.

7. 'Cognizance' refers to the point when the court first takes judicial notice of an offence by not only applying its mind to the contents of the complaint/police report, but also proceeding further as provided further in Chapter XIV of the Cr.P.C.

8. Taking cognizance includes either taking steps to see whether there is basis for initiating a judicial proceeding or initiating a judicial proceeding against an offender by the Magistrate.

9. Ordinarily, a citizen can initiate criminal proceedings against an offence by two means. He may either lodge an FIR before the Police Officer (Station House Officer) if the offence is a cognizable one, or he may lodge complaint before a competent Judicial Magistrate irrespective of whether the offence is cognizable or non-cognizable. Any Magistrate of the first class and the duly empowered second class Magistrate may take cognizance of any offence for further proceedings.

10. As per Section 190(1) an empowered Magistrate may take cognizance of any offence-

a). Upon receiving a complaint of facts which constitute such an offence.

b). Upon a police report of such facts.

c). Upon information received from any person other than a police officer, or upon his own knowledge, that such an offence has been committed."

11. Thus the cognizance is taken when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any person regarding an offence.

12. The issuance of process by the court occurs at a subsequent stage duly after considering the materials placed before it. It happens when the Magistrate decides to proceed against the offender whom a prima facie case is clearly made out. Taking cognizance of an offence is not equivalent to issuance of process: issuance of process takes place only after taking cognizance of the offence. When a Magistrate applies his mind for issue of process, he must be held to have taken cognizance of the offences the complaint put forth.

13. The cognizance and summoning order passed by learned Magistrate dated 07.11.2019 is read as under:-

"आज आरोप पत्र प्राप्त हुआ। समस्त अभियोजन प्रपत्रों का अवलोकन किया। संज्ञान लिया गया दर्ज रजिस्टर हो। पत्रावली में मूल अभियोजन प्रपत्र शामिल मिशिल किया गया। अभियुक्त जरिये सम्मन तलब हो पत्रावली वास्ते हाजिरी मुल्जिम दिनांक 28.01.20 को पेश हो।"

14. Perusal of the record shows that impugned summoning order dated 07.11.2019 has been passed in a cyclostyled proforma and only the case

number, name of accused and Sections of IPC were written by pen and rest of the contents are on a printed proforma order. It is well settled that summoning order has to be passed after considering relevant material and showing appropriate reasons.

15. Considering the above-stated facts and law as referred above, it is apparent that there is nothing to indicate that the said impugned order has been passed after applying judicial mind and thus, the impugned summoning order dated 07.11.2019 is not sustainable and, accordingly, the impugned summoning order dated 07.11.2019 is, hereby, set aside and learned trial court is directed to pass order afresh, in accordance with law.

16. With the aforesaid observations, the instant application is disposed of finally.

(2020)03-05ILR A1625
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 4285 of 2012

Smt. Pooja ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Shyam Babu Vaish, Sri J.B. Kesharwani, Sri Rama Shanker Mishra

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

(A) Criminal Law-Code of criminal procedure, 1973 - Sections 482 – Inherent jurisdiction - Section 227 – Discharge – Section 228 Cr.P.C. – Framing of charge - Indian Penal Code, 1860 – Sections 302 and 201 I.P.C. - exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits. (Para-10)

Statement of accused, made to police, while in custody, is not admissible - statement of accomplices and statements in close proximity of time and their conduct are to be seen at the time of making of judicial decision making - learned trial court concluded for framing of charge for offence of conspiracy for murder, followed by murder of neighbour, against applicant and this was on the basis of evidence, on the basis of which charge sheet was filed and cognizance was taken by Magistrate - there was sufficient reason and evidence on record.(Para-6)

HELD:- Trial court at the stage of disposal of application under Section 227, 228 Cr.P.C. need not to make meticulous analysis of evidence on record. Rather a prima facie case is to be seen as to whether there exist prima facie case for framing of charge and prima facie case is to be decided in view of guidelines given by apex court in Sajjan Kumar Vs. Central Bureau of Investigation, JT 2010 (10) SC 413. (Para-5)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Sajjan Kumar Vs. C.B.I., JT 2010 (10) SC 413

2. Palwinder Singh Vs. Balwinder Singh & ors., (2008) 14 Supreme Court Cases 504

3. Shoraj Singh Ahlawat & Ors Vs St. Of U.P. & anr., AIR 2013 Supreme Court 52.

4. St. of A.P. Vs Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

5. Hamida Vs Rashid, (2008) 1 SCC 474

6. Monica Kumar Vs St. of U.P., (2008) 8 SCC 781,

7. Popular Muthiah Vs. State, Represented by Inspector of Police, (2006) 7 SCC 296

8. St. of Bihar Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

9. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicant, by means of this application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of this Court with prayer to quash the impugned order dated 18.01.2012, passed by Additional Sessions Judge, Court No. 3, Bulandshahar in Session Trial No. 579 of 2011, arising out of Case Crime No.175 of 2010, State Versus Madan and others, under Sections 302 and 201 I.P.C., Police Station Ahmedgarh, District Bulandshahar.

2. Heard learned counsel for applicant, learned A.G.A. for State and perused the record.

3. Learned counsel for applicant argued that applicant is of no concern with offence of murder of Sonu. There is no connecting evidence against her. On the basis of her confessional statement, charge sheet has been filed, whereas prosecution version is that she was under illicit relation with Anil. It was witnessed by Sonu and Ganesh, who were residing with husband of applicant at his home. They protested this illicit relation. Applicant entered in conspiracy with Anil for getting rid from Ganesh and Sonu. In between, Anil was murdered, wherein Ganesh and Sonu were accused for offence of murder. Ganesh was detained in judicial custody. Sonu was subsequently murdered. For this offence of murder, case was got registered against one Madan. Subsequently, Madan and Deepak were added as party and on the basis of alleged illicit relation, charge sheet has been filed against applicant. Learned Additional Sessions Judge opined and framed charge for offence punishable under Section 302, 201 I.P.C., which was challenged before this Court in Application U/S 482 No. 26741 of 2011 and this Court vide order dated 21.11.2011 allowed above application, thereby quashed order of framing of charge against applicant. The file was remanded back to trial court for hearing afresh and passing order over application moved under Section 227 Cr.P.C., in view of discussions, made by this Court, in above order. After hearing both sides, application under Section 227 Cr.P.C. was rejected and subsequently an order for framing of charge for offence punishable under Section 302 I.P.C. and its conspiracy punishable under Section 201 I.P.C. was passed, which has been assailed in this proceeding.

4. Learned A.G.A. has vehemently opposed the application with this contention that there is a prima facie case for filing of charge sheet and cognizance taken over it. At the time of framing of charge, meticulous and detailed analysis of facts is not to be made by trial court. Even on the basis of strong suspicion, charge may be framed and it has been rightly been framed by trial court. Hence, this application be dismissed.

5. Having heard learned counsel for both sides and gone through material placed on record coupled with order of this Court, passed in Application U/S 482 No. 26741 of 2011 (supra), it is apparent that trial court at the stage of disposal of application under Section 227, 228 Cr.P.C. need not to make meticulous analysis of evidence on record. Rather a prima facie

case is to be seen as to whether there exist prima facie case for framing of charge and prima facie case is to be decided in view of guidelines given by apex court in **Sajjan Kumar Vs. Central Bureau of Investigation, JT 2010 (10) SC 413.** The apex court in **Palwinder Singh Vs. Balwinder Singh and others; (2008) 14 Supreme Court Cases 504** has propounded that jurisdiction of learned Sessions Judge, while exercising power under Section 227 Cr.P.C. is limited. Charge can be framed also on the basis of strong suspicion. Marshaling and appreciation of evidence is not in the domain of court at that point of time. Pre-trial acquittal not permitted. Pre-trial charge acquittal is never accepted. The Court cannot appreciate evidence at the stage of framing of charge. The same law has been propounded by apex court in **Shoraj Singh Ahlawat & Ors vs State Of U.P. & Anr; AIR 2013 Supreme Court 52.**

6. In present case, initially charge was framed for offence under Sections 302, 201 I.P.C. and this order was set aside by Court, as above, with a direction for deciding the same afresh. The accusations since the lodging of first information report was that Smt. Pooja was under illicit relations with Anil and it was seen by her Dewar (brother-in-law) and Sonu (neighbour), who had protested it. This compelled Pooja for hatching conspiracy with Anil for getting rid from Ganesh and Sonu. Ganesh and Sonu were taken by Anil to the shop of Deepak at Delhi. They were present in company in close proximity of time when Anil was found dead and a case was got lodged for offence of murder of Anil against Ganesh and Sonu, wherein Ganesh is in judicial custody. For getting rid of Sonu and for getting the revenge of above murder, Madan and Deepak hatched conspiracy with Smt. Pooja, wherein Sonu was taken by Madan and Deepak and under close proximity of time he remained with them. Subsequently, his dead body was found. Autopsy examination followed by inquest proceeding established death of Sonu as a result of anti mortem injuries. Meaning thereby, it was not a suicide or accidental death. Rather it was a homicide death and this homicide death was instantly complained by his father to be a murder by Smt. Pooja under conspiracy with Madan and Deepak and motive for this conspiracy was said to be illicit relation in between Anil and Pooja, for which there was persistent resistance by Ganesh and Sonu. Last seen evidence of Sonu being in company of Deepak and Madan; the motive for this murder; hatching of conspiracy for elimination of Ganesh and Sonu by Pooja in connivance with Anil; subsequently with Deepak and Madan was therein case diary. The other witnesses, examined under Section 161 Cr.P.C., have reiterated those ingredients. It was coupled with statement of those co-accused persons as well as of Smt. Pooja. Though, statement of accused, made to police, while in custody, is not admissible, but it being a statement of accomplices and statements in close proximity of time and their conduct are to be seen at the time of making of judicial decision making, but under all those facts and circumstances, learned trial court concluded for framing of charge for offence of conspiracy for murder, followed by murder of Sonu, against applicant Pooja and this was on the basis of evidence, on the basis of

which charge sheet was filed and cognizance was taken by Magistrate. Hence, for this order, there was sufficient reason and evidence on record.

7. Moreso, this Court, in exercise of inherent jurisdiction under Section 482 Cr.P.C., is not to embark upon factual matrix, because it may prejudice fair trial.

8. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

9. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**, Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not*

embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

10. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above. Accordingly, this application merits its dismissal. The application is **dismissed** as such.

(2020)03-05ILR A1629
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.02.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 4487 of 2020

Deepak Jha ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Mahesh Kumar Tripathi

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

(A) Criminal Law- Negotiable Instruments Act, 1881 - Section 138- Printed proforma - Code of Criminal Procedure, 1973 - Section 482 - Inherent jurisdiction - - Magistrate not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet - does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma - apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner – impugned order quashed. (Para – 9)

Complaint under section 138 of the Negotiable Instrument Act - Magistrate after recording the statement of the complainant as well as witnesses under Sections 200 and 202 Cr.P.C. - summoned the applicant - Magistrate not applied judicial mind in passing the summoning order - order made on a printed proforma - where only information of case number, name of parties, section, date and next date is to be filled by Magistrate in handwriting. (Para -3,4)

HELD:- The conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated - The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto. (Para – 10)

Application u/s 482 Cr.P.C. allowed. (E-7)

List Of Cases Cited:-

1. Ankit Vs. St. of U.P. & anr., JIC 2010 (1) 432,

2. Megh Nath Guptas & anr. Vs. St. of U.P. & anr., 2008 (62) ACC 826

3. Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC)

4. UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456

5. Kanti Bhadra Vs St. of W.B., 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC)

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

1. Heard learned counsel for the applicant and learned AGA for the State.

2. This application has been filed for setting aside the entire proceeding of Complaint Case No.1946 of 2016 (Pawan Kumar Vs. Deepak Jha), under Section 138 of Negotiable Instruments Act, Police Station Prem Nagar, District Jhansi, arising

out of impugned summoning order dated 22.02.2019 passed by learned Additional Chief Judicial Magistrate, Court No.2, Jhansi as well as to set aside the impugned summoning order dated 22.02.2019.

3. Record reflects that a complaint under section 138 of the Negotiable Instrument Act was filed on 15.12.2016 by opposite party no. 2- Pawan Kumar Jain against the applicant herein alleging dishonoring of cheque, on the ground of insufficiency of fund. The Magistrate concerned after recording the statement of the complainant as well as witnesses under Sections 200 and 202 Cr.P.C., vide impugned order dated 22.02.2019 has summoned the applicant.

4. While assailing the impugned summoning order, contention of learned counsel for the applicant is that the Magistrate has not applied judicial mind in passing the summoning order as the order has been made on a printed proforma, in which the name of the accused has been filled up by hand.

5. Relying upon the decision of this Court in **Ankit Vs. State of U.P. and another, JIC 2010 (1) 432,** submission of the learned counsel for the applicants is that the order impugned being on a printed proforma is clearly without application of judicial mind and hence is liable to be quashed on this ground alone.

6. `Learned AGA has also admitted that the order impugned has been passed on the printed proforma and therefore, keeping in view the decision in the case of Ankit (supra), the Magistrate concerned may be directed to pass a fresh order.

7. I have considered the arguments so advanced by learned counsel for the applicant and learned A.G.A. and also perused the record.

8. The certified copy of the order summoning the accused has been appended as Annexure-3. From a perusal of the above order, it is evident that it is a typed proforma where only information of case number, name of parties, section, date and next date is to be filled by Magistrate in handwriting. It appears that the blanks in the printed proforma have been filled up by some court employee and the Magistrate namely Sri Manoj Kumar Tiwari, Additional Chief Judicial Magistrate, Court No.2, Jhansi, has thereafter just put his initial, which leads to the conclusion that the Magistrate has passed the order in a mechanical manner without application of judicial mind.

9. Despite there being a series of decisions of the Apex Court and this Court disapproving such practice of passing orders on printed proforma by the judicial officers, it is very painful and unfortunate to see that applicant in the present case has been summoned by the Magistrate by an order in which blanks have been filled in on a printed proforma without applying judicial mind. This type of order has already been held unsustainable by this Court in the case of Ankit (supra) relying on in a number of decisions of the Apex Court. The relevant portion of the said decision, is extracted below:

"Although as held by this Court in the case of Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826, in which reference has been made to the

cases of Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4^) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC), the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."(Emphasis supplied)

10. In view of the above, the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto.

11. In view of what has been stated above, the present application is allowed. The order impugned dated 22.02.2019 passed by Additional Chief Judicial Magistrate, Jhansi is hereby quashed. The Magistrate is directed to pass fresh order after applying the judicial mind.

(2020)03-05ILR A1631
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 4914 of 2020

Shahnawaz ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Mohd. Afzal

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

(A) Criminal law- Negotiable Instruments Act, 1881 - Section 138- Code of Criminal Procedure, 1973 - Section 482 - Inherent jurisdiction – applicant summoned without following the procedure laid down in the case of *J V Baharuni, Giriraj Proteins Pvt. Ltd. Baldevbhai Ramjibhai Patel vs. State of Gujarat, D M Finance, Vishnubhai Hargovinddas Patel* - In a prosecution under the Negotiable Instruments Act, the compensatory aspect of remedy must be given priority over the punitive aspect - impugned summoning order - set aside. (Para-5)

Complaint filed under section 138 of negotiable instrument Act - allegation - applicant and opposite party no.2 were having friendly relations to each other, due to this the applicant borrowed Rs.5,10,000/- - assurance that the same will be returned after two months - time period of two months elapsed and the applicant did not return the aforesaid money taken by him – cheque issued – returned due to "insufficient funds" - legal notice to the accused - neither

the reply was given nor any money was returned - complaint filed . (Para-2)

HELD:- The matter is remanded to the Judge, Additional Court to decide the summoning of the applicant afresh in light of the judgment of the Apex Court in the case of **J V Baharuni, Giriraj Proteins Pvt. Ltd. Baldevbhai Ramjibhai Patel** within a period of one month. (Para-9)

Application u/s 482 Cr.P.C. allowed. (E-7)

List Of Cases Cited:-

J V Baharuni, Giriraj Proteins Pvt. Ltd. Baldevbhai Ramjibhai Patel vs. St. of Guj., D M Finance, Vishnubhai Hargovinddas Patel , 2014 (10) SCC 494.

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

1. Supplementary affidavit filed today is taken on record.

2. Heard Sri Mohd. Afzal learned counsel for the applicant, Sri Amit Singh Chauhan, learned A.G.A. for the State and perused the entire record.

3. This application under Section 482 Cr.P.C. has been filed with a prayer to quash the proceedings of Complaint Case No.1047/2017, under Section 138 of Negotiable Instrument Act (in short, 'N.I. Act'), Police Station Kotwali City, District Bijnor as well as impugned summoning order dated 19.04.2018 passed by Judge Additional Court, Bijnor.

4. Brief facts of the case are that a complaint has been filed with the allegation that the applicant and opposite party no.2 were having friendly relations to each other, due to this the applicant borrowed Rs.5,10,000/- in the month of April-May, 2016 from opposite party no.2. The money was given with the assurance that the same will be returned after two months. The time period of two months elapsed and the applicant did not return the aforesaid money taken by him. A cheque no.384965 dated 04.05.2017 issued from U.P. Gramin Bank from Account No.92810100195567 of Rs.2,00,000/- was given by the applicant to the complainant. However, the date on the cheque was filled as 25.09.2017. The applicant asked the complainant to present the cheque stating that by that time he will be having the said amount in his account. Believing the applicant, the cheque was presented on 25.09.2017 at Kotak Mahindra Bank, but the same was returned on 11.10.2017 due to "insufficient funds". When the complainant inquired about the same, no specific reply was given, therefore, notice was given on 07.11.2017 to the accused and since neither the reply was given nor any money was returned, after the legal notice being given to the accused the complaint was filed.

5. It has been contended by learned counsel for the applicant that the applicant has been summoned without following the procedure as laid down in the case of **J V Baharuni, Giriraj Proteins Pvt. Ltd. Baldevbhai Ramjibhai Patel vs. State of Gujarat, D M Finance, Vishnubhai Hargovinddas Patel reported in 2014 (10) SCC 494.** It has further been submitted that the order sheet of the trial court, which has been appended as Annexure no.SA-1 to this supplementary affidavit in support of this petition, reflects that the procedure has not been followed. He has referred to Paragraph No. 61 of the aforesaid judgment, which is reproduced herein below:-

"61. However, to summarise and answer the issues raised herein, following directions are issued for the Courts seized off with similar cases:

1. All the subordinate Courts must make an endeavour to expedite the hearing of cases in a time bound manner which in turn will restore the confidence of the common man in the justice delivery system. When law expects something to be done within prescribed time limit, some efforts are required to be made to obey the mandate of law.

2. The learned Magistrate has the discretion under Section 143 of the N.I. Act either to follow a summary trial or summons trial. In case the Magistrate wants to conduct a summons trial, he should record the reasons after hearing the parties and proceed with the trial in the manner provided under the second proviso to Section 143 of the N.I. Act. Such reasons should necessarily be recorded by the Trial Court so that further litigation arraigning the mode of trial can be avoided.

3. The learned Judicial Magistrate should make all possible attempts to encourage compounding of offence at an early stage of litigation. In a prosecution under the Negotiable Instruments Act, the compensatory aspect of remedy must be given priority over the punitive aspect.

4. All the subordinate Courts should follow the directives of the Supreme Court issued in several cases scrupulously for effective conduct of trials and speedy disposal of cases.

5. Remitting the matter for de novo trial should be exercised as a last resort and should be used sparingly when there is grave miscarriage of justice in the light of illegality, irregularity, incompetence or any other defect which cannot be cured at an appellate stage. The appellate Court should be very cautious and exercise the discretion judiciously while remanding the matter for de novo trial.

6. While examining the nature of the trial conducted by the Trial Court for the purpose of determining whether it was summary trial or summons trial, the primary and predominant test to be adopted by the appellate Court should be whether it was only the substance of the evidence that was recorded or whether the complete record of the deposition of the witness in their chief examination, cross examination and re-examination in verbatim was faithfully placed on record. The appellate Court has to go through each and every minute detail of the Trial Court record and then examine the same independently and thoroughly to reach at a just and reasonable conclusion."

6. It has further been contended by learned counsel for the applicant that the concerned court below, while passing the summoning order dated 19.04.2018, treated the complaint filed by the complainant-opposite party no.2 as a complaint case and proceeded with the same as a complaint case. However, no reason has been recorded in the order dated 19.04.2018 as to why a departure has been made from the procedure provided under Section 138 of N.I. Act. Although the petitioner had filed a discharge application, which has been rejected by the court below vide order dated 19.04.2018 but the learned counsel for the petitioner submits that the petitioner should not suffer for fault on the part of lawyers, who had not taken such a ground before the court concerned. Learned counsel for the petitioner, therefore, submits that once the Apex Court in the case of **J V Baharuni, Giriraj Proteins Pvt. Ltd. Baldevbhai Ramjibhai Patel (Supra)** has issued direction to all the

courts in India to strictly comply with the directions contained in the aforesaid case, no exception can be carved out by the court below to the same. It is, thus, contended that since the summoning order passed by the court below without following the procedure as laid down in the case of **J V Baharuni, Giriraj Proteins Pvt. Ltd. Baldevbhai Ramjibhai Patel (Supra),** the same cannot be sustained and is, therefore, liable to be quashed.

7. In support of his contention, learned counsel for the applicant has also relied upon the judgment passed in Application u/s 482 No.30953 of 2018 (Bali Ram @ Vinod Kumar Vs. State of U.P. & others) and Matter under Article 227 No.9655 of 2019 (Atausalam @ Chhote Vs. State of U.P. & another).

8. Per contra, learned A.G.A. for the State has opposed the contention raised by the learned counsel for the applicant by submitting that the disputed cheque was issued by the applicant but the same have been dishonoured. Therefore, the opposite party no.2 was right in proceeding against the applicant by filing a complaint under Section 138 N.I. Act.

9. Consequently, the present criminal misc. application succeeds and is allowed. The impugned summoning order dated 19.04..2018 passed by Judge, Additional Court, Bijnor is hereby, set aside. The matter is remanded to the Judge, Additional Court, Bijnor to decide the summoning of the applicant afresh in light of the judgment of the Apex Court in the case of **J V Baharuni, Giriraj Proteins Pvt. Ltd. Baldevbhai Ramjibhai Patel (Supra)** within a period of one month from the date of production of a certified copy of this order.

(2020)03-05ILR A1634
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.02.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 5028 of 2020

Sunil Soni & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Pt. S.P. Sharma

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

(A) Criminal Law- Dowry Prohibition Act - Section 3/4-Code of criminal procedure, 1973 - Sections 482 – Inherent jurisdiction – Indian Penal Code, 1860 - Sections-498-A and 304-B - read with opinion and finding of Investigating Officer is not binding upon the Magistrate - Magistrate has to take a decision on the basis of the evidence, collected and contained in the Case Diary, prepared, during investigation - No additional document of fact is to be taken at that juncture of taking cognizance - exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits. (Para-8,15)

In present case, statement of informant and other witnesses, were fully intact and accusation of first information report was reiterated in those statements - conclusion drawn by the Magistrate was in accordance with the evidence collected by the Investigating Officer, as contained in the Case Diary- Therefore, while passing impugned summoning order, learned Magistrate has not committed any abuse of process of law. (Para-8)

HELD:- Question of fact is to be seen by the Trial court - High Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to embark upon factual matrix because it may prejudice a fair trial - Trial court has to make trial as per evidence to be led before it and the law of Legislation as well as precedents on the subject and not to be influenced by any observations or findings made. (Para-13,16)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Geeta Mehrotra & anr. Vs. St. of U.P. & anr., (2012) 10 SCC 741

2. Dhanlakshmi v. R.Prasana Kumar , (1990) Cr LJ 320 (DB): AIR 1990 SC 494

3. Bihar v. Murad Ali Khan , (1989) Cr LJ 1005: AIR 1989 SC 1

4. Lal Kamlendra Pratap Singh Vs. St. of U.P. , 2009 (3) ADJ 322 (SC)

5. Amrawati & anr. Vs. St. of U.P. , 2004 (57) ALR 290

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, (Hereinafter, in short, referred to as 'Cr.P.C.'), has been filed by the Applicants, Sunil Soni (Brother-in-law and Smt. Pooja Soni (Sister-in-law), with a prayer for setting aside impugned summoning order, dated 27.9.2019, and for quashing of entire proceeding of Case No.115 of 2019, re-registered as Case No.1158 of 2019 (State vs. Mukesh Soni and others), arising out of Case Crime No.366 of 2019, under Sections-498-A and 304-B of Indian Penal Code, 1860 (Hereinafter, in short, referred to as 'IPC'), read with Section 3/4 of Dowry Prohibition Act, Police Station-Kotwali Jhansi, District-Jhansi, pending before the Chief Judicial Magistrate, Jhansi.

2. Learned counsel for applicants argued that both of the applicants were married eight years before the occurrence. They were residing at a remote place, which is at a distance of more than eighty kilometers, in Madhya Pradesh and are having no concern with the affairs of the family of the deceased and also are having no concern with regard to demand of dowry, if any, or cruelty, with regard to it or, for that matter, dowry death of the deceased. Pursuant to general allegations, levelled against them, they have been roped in this case for above offences, just to harass them, whereas, Investigating Officer has not chargesheeted them because of the fact that they were not concerned with the occurrence, but, the informant submitted an application before learned Magistrate, at the time of taking of cognizance, wherein, cognizance, for offences, punishable, under various Sections, has been taken against the applicants, too, and, thereby, process of summoning has been issued. It was under abuse of process of law, in view of law laid down by the Apex Court, in the case of Geeta Mehrotra and another vs. State of U.P. and another, (2012) 10 SCC 741. Hence, for avoiding abuse of process of law and to secure ends of justice, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. First information report reveals that it was got lodged, upon a report of Jagdish Prasad Soni, under Sections 498A and 304B of IPC, read with Section 3/4 of Dowry Prohibition Act, against Mukesh

Soni, Ashok Soni, Munna Soni, Smt. Bina Bai, Smt. Pooja Devi and Sunil Soni. Accusation, therein, was with regard to demand of dowry and cruelty, with regard to it. Marriage was performed on 18.2.2018 and since very beginning, above demand of dowry, coupled with cruelty for it, being made by all those named accused persons. It has been specifically mentioned that present applicants were also amongst them, who were not satisfied with dowry, and were demanding additional dowry, resulting in cruelty with regard to it.

5. Investigation proceeded, wherein, statements of informant and other witnesses were got recorded. It culminated in submission of chargesheet against Mukesh Soni, Ashok Soni, Munna Soni and Smt. Bina Bai, for offences, under Sections 498A and 304B of IPC, read with Section 3/4 of Dowry Prohibition Act, leaving behind Smt. Pooja Devi and Sunil Soni. An application, by the informant, was moved before the Magistrate that there had been evidence in the statements, recorded, under Section 161 of Cr.P.C., as of informant and other witnesses, too, wherein specific accusation of demand of a four wheeler, as additional dowry, coupled with cruelty, with regard to it, against accused persons, including, Smt. Pooja Devi and Sunil Soni, present applicants, herein, was there and even after it, the chargesheet has been filed in this case, leaving behind them (present applicants herein).

6. Learned Magistrate heard both sides and found that there were statements, recorded, under Section 161 of Cr.P.C., as of informant and other witnesses, who were fully intact, even then, the Investigating Officer, without any reasons, has left those two accused persons (present applicants herein), and as such, on the basis of the evidence, collected in the chargesheet, itself, those two accused persons, applicants herein, were also summoned.

7. Repeated propositions of law, as has been propounded by the Apex Court, is that the Court is not bound by the conclusion drawn by the Investigating Officer, while submitting chargesheet, rather, application of judicial mind, at the stage of cognizance taking, is to be made by the Court and if some other conclusion is being drawn, on he basis of evidence collected by the Investigating Officer, then, the Court may take a decision otherwise also, as above.

8. Meaning thereby, the opinion and finding of Investigating Officer is not binding upon the Magistrate, but, the Magistrate has to take a decision on the basis of the evidence, collected and contained in the Case Diary, prepared, during investigation. No additional document of fact is to be taken at that juncture of taking cognizance and in present case, statement of informant, Jagdish Prasad Soni and other witnesses, namely, Devendra Kumar, Smt. Bharati Devi, Ramesh Chandra and Dharmendra Kumar, were fully intact and accusation of first information report was reiterated in those statements. Hence, conclusion drawn by the Magistrate was in accordance with the evidence collected by the Investigating Officer, as contained in the Case Diary. Therefore, while passing impugned summoning order, learned Magistrate has not committed any abuse of process of law.

9. Section 304B of Indian Penal Code, 1860, reads as under:

"304B. Dowry death.-*(1) Where death of a woman is caused by any burns*

or bodily injury or occurs otherwise than under normal circumstances, within seven years of her marriage and it is shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

(2) Whoever commits dowry death shall be punished with imprisonment for a term, which shall not be less than seven years, but which may extend to imprisonment for life."

10. Meaning thereby, the essential ingredients for offence of dowry death and punishment therof is death of a woman caused by any burns or bodily injury or occurs otherwise than under normal circumstances. This unnatural death of deceased, within seven years of marriage, appears to have shown that soon before her death, deceased was subjected to cruelty or harassment by husband or any relative of her husband and this cruelty was in connection with any demand of dowry. This will be a "dowry death", punishable, under sub-section (2) of Section 304B of IPC, as above.

11. In present case in hand, death of the deceased is within one and a half years of marriage at nuptial house, by burn and bodily injuries, coupled with accusation of demand of dowry since very beginning of marriage against husband, father, mother, brother, sister and brother-in-law is there. Present applicants are the real sister of the husband and the husband of real sister of husband. Both of them come within the the category of relative of husband. Hence, charges for those offences were made out against the applicants, too, and on the basis of evidence, collected in the Case Diary, by the Investigating Officer, cognizance was taken by the learned Magistrate, which was perfectly a valid and legal order, passed in accordance with law, and as such, there was no abuse of process of law, warranting interference of this Court, in exercise of inherent power, conferred upon it by Section 482 of Cr.P.C.

12. So far as law, as laid down by the Apex Court, in the case of Geeta Mehrotra and another vs. State of U.P. and another (Supra), cited by the learned counsel for the applicants is concerned, the facts of above case and the facts of present case are entirely different. In Geeta Mehrotra's case (Supra), the unmarried sister-in-law, i.e., Nand and Jeth (Elder brother of husband and brother-in-law) were arrayed as the accused and they were of no concern with the occurrence. Hence, in such circumstances, law was laid by the Apex Court, whereas, in present case, learned Magistrate has applied its judicial mind and on the application of judicial mind, on the basis of evidences, collected by the Investigating Officer, in the Case Diary, impugned summoning order has been passed.

13. Remaining argument of present applicants of having no concern with the occurrence of dowry death, is a question of fact to be seen by the Trial court and this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to embark upon factual matrix because it may prejudice a fair trial.

14. Regarding prevention of abuse of process of Court, Apex Court, in the case of Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494, has propounded "To prevent abuse of the

process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in the case of State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

15. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

16. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands dismissed accordingly. However, it is made clear that the Trial court has to make trial as per evidence to be led before it and the law of Legislation as well as precedents on the subject and not to be influenced by any observations or findings made, hereinabove, in this judgment because the same was pertaining to this proceeding only.

17. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290 as well as judgement passed by Hon'ble Apex Court reported in 2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.

18. For a period of 30 days from today, no coercive action shall be taken against the applicants.

19. In case, if the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)03-05ILR A1638
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE

THE HON'BLE SANAY KUMAR SINGH, J.

Application U/S 482 Cr.P.C. No. 5137 of 2020

Sri Prakash Mishra ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Siddhartha Kumar Mishra, Sri Indra Kumar Chaturvedi

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

(A) Criminal Law-Code of Criminal Procedure, 1973 - Section 482 – Inherent jurisdiction - Section 173 – Report of police officer on completion of investigation - Section 207 – Supply to the accused of copy of police report and other documents - Indian Penal Code, 1860 - Section 376 IPC - Compliance of provisions of section 207 Cr.P.C. is condition precedent for commitment of the case to the court of sessions - accused is entitled to have copies of the statements and documents accompanying the police report, which the prosecution may use

against him as evidence during the trial. (Para-18,24)

Applicant moved an application under section 207 Cr.P.C. - for providing copies of F.I.R. , X-ray Report, Pathology Report, Supplementary Report and Statement of witnesses - rejected by the trial court vide impugned order dated 19.12.2019 - ground of challenge - case is pending since 2010. (Para - 12)

(B) Criminal law- Code of Criminal Procedure, 1973 - Section 482 - Section 207 Cr.P.C. – Supply to the accused of copy of police report and other documents - Section 91- Summons to produce document or other thing - Section 233 - Entering upon defence – Section 243 - Evidence for defence - The right of accused with regard to disclosure of documents is limited at the stage of supplying copies to him in view of Section 207 of Cr.P.C. (Para-28)

HELD:- At the stage of compliance of provisions of Section 207 Cr.P.C. accused is not entitled to get copy of such document, which is neither part of case diary nor police report and on which prosecution does not propose to rely against the accused. (Para - 31)

(C) Code of Criminal Procedure, 1973 - Section 482 - Section 207 Cr.P.C. - Supply to the accused of copy of police report and other documents - no person shall be deprived of his life and liberty except by procedure established by law is constitutionally guaranteed to every one -(Para-33)

HELD:- Compliance of principles of natural justice incorporated in Section 207 Cr.P.C., cannot be limited up to the committal court or up to the commitment of the case to the Court of Sessions - documents can be supplied to him even after commitment of the case to the court of sessions in order to ensure principles of natural justice and fair trial. (Para – 33)

Application under section 482 Cr.P.C. partly allowed (E-7)

List Of Cases Cited:-

1. Ramesh Vs. St. of Maharashtra, 1995 Cr.L.J. 3424

2. St. of Kerala Vs. Babu, 1999 (4) SCC 621

3. Prakash, Ravi Karan Vs. St. of U.P., 2019 Supreme (All) 2405

4. Ramesh vs St. of Mah., 1995 Cr.L.J. 3424

5. St. of Kerala vs Babu, 1999 (4) SCC 621

6. Prakash, Ravi Karan vs St. of U.P., 2019 Supreme (All) 2405,

7. P. Gopalkrishnan @ Dileep Vs. St. of Kerala & anr., AIR 2020 SC 1

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

1. Heard Mr. Indra Kumar Chaturvedi, learned Senior Advocate assisted by Mr. Siddhartha Kumar Mishra, learned counsel for applicant and Mr. Virendra Kumar Maurya, learned Additional Government Advocate, assisted by Mr. Vikash Chandra Tewari, learned brief holder for the State of U.P./opposite party No.1 and perused the record with the assistance of learned counsel for the parties.

2. This application under section 482 of Code of Criminal Procedure, (herein-after referred to as 'Cr.P.C'.) has been preferred by the applicant against the order dated 19.12.2019 passed by the learned Additional Sessions Judge (Fast Track Court-I), Bhadohi-Gyanpur in Sessions

Trial No. 87 of 2018 (State vs Shri Prakash Mishra) arising out of Case Crime No. 94 of 2010, under section 376 IPC, police station Aurai, district Bhadohi, whereby application No. 6 Kha, dated 10.04.2018 under section 207 Cr.P.C. moved on behalf of the applicant has been rejected. Further prayer has been made to direct the trial court to supply the copy of relevant documents as mentioned in the application dated 10.04.2018 as per provision of section 207 Cr.P.C.

3. The main issues, which have arisen for consideration in the present case, are as under:

(i) "Whether any document which is neither part of case diary nor police report under section 173 Cr.P.C., on which the prosecution does not propose to rely can be given to accused in compliance of provisions contained under section 207 of Code of Criminal Procedure ?"

(ii) "Whether documents as mentioned in section 207 of Code of Criminal Procedure can be supplied to accused even after commitment of case to the Court of Sessions, in case same has not been supplied to accused either in full or in part before commitment of case to the Court of Sessions?"

4. After going through the record of this case, I find that this is an old case of the year 2010 and is being unnecessarily dragged since long on the issue of compliance of the provisions provided under section 207 of Cr.P.C. Since, this case has a chequered history in this regard, therefore, before delving into the issue, it is necessary to mention factual matrix of the case in brief. The occurrence is alleged to have been taken place on 26.03.2010 at village Sikarha, police station Handia, district Allahabad and the first information report was lodged by victim on 27.03.2010 registered at Book No. 036427 at police station Aurai district Sant Ravidas Nagar (Bhadohi). The investigation of the case was conducted by the police of police station Aurai, district Sant Ravidas Nagar and the charge sheet was submitted on 14.06.2010 against the applicant, on which cognizance had already been taken by the Magistrate concerned on 22.06.2010.

5. As per the case of the accused-applicant, same first information report was also registered at Book No. 036428, but on account of some irregularities, original copy of the same was not forwarded to court. On 05.11.2011, 06.06.2011, 08.09.2015 and 12.05.2016, applications were moved on behalf of the applicant to provide copy of all the documents/police papers along with copy of first information report registered at Book No. 036428. The aforesaid applications of the applicant has been decided vide order dated 28.05.2016 directing the concerned clerk to prepare copy of all the documents, on which prosecution proposes to rely and to provide the same to the applicant, but so far as the prayer of the applicant for providing copy of first information report registered at Book No. 036428 is concerned, the same was rejected by the same order dated 28.05.2016 observing that as per report submitted by police, the first information report dated 27.03.2010 of this case was registered at Book No. 036427, original copy of said first information report is available on record and considering the same, cognizance of this case was taken by the Magistrate. It is also observed that due to inadvertent mistake, on the basis of same information, another first information report was also registered at Book No. 036428, therefore, it is not justified to give

copy of the same to the applicant for the purpose of this case.

6. The aforesaid order dated 28.05.2016 had been challenged by the applicant in Criminal Revision No. 39 of 2016 before the Sessions Judge, Bhadohi, which has been dismissed by order dated 03.06.2016. Both the aforesaid orders dated 28.5.2016 and 03.06.2016 have not been further challenged by the applicant, and as such same have attained finality.

7. The applicant again on 09.06.2016 and 14.06.2016 moved applications for providing copy of first information report registered at Book Nos. 036427 and 036428, but the said applications were again rejected vide order dated 18.06.2016 by the Additional Chief Judicial Magistrate, Bhadohi observing that the same prayer was earlier made by the applicant through the applications dated 05.11.2011, 06.06.2011, 08.09.2015 and 12.05.2016, which have already been decided vide order dated 28.05.2016, therefore, moving of another application with same prayer is not liable to be accepted.

8. In the order dated 18.06.2016, it is also mentioned that so far as registration of first information report at Book No. 036428 is concerned, an explanation has already been tendered by the concerned police station on 07.06.2016. Case is of the year 2010, but committal of the case is being lingered on due to non cooperation of the applicant on one ground or the other. The Magistrate concerned while deciding application dated 14.06.2016 has also directed the applicant to co-operate in the proceedings of committal with further direction to the concerned clerk to get the copy of all the police papers prepared afresh fixing 02.07.2016 for providing the same to the applicant. On 02.07.2016, learned Magistrate again directed the concerned clerk to get the copy of all prosecution papers prepared fixing 23.07.2016 for supply of copies and committal of case. At that stage, the applicant moved an application dated 02.07.2016 praying therein to pass an order under section 173(8) of Cr.P.C. for further investigation in the matter by the police of police station Handia, district Allahabad. Thereafter, the applicant started sending adjournment applications seeking exemption of his personal appearance before the trial court on 23.07.2016, 09.08.2016, 12.08.2016, 24.08.2016, 02.09.2016, 03.10.2016, 14.10.2016, 20.10.2016, 28.10.2016, 24.11.2016, 03.12.2016, 09.12.2016, 13.12.2016. 03.01.2017, 11.01.2017, 19.01.2017, 31.01.2017, 15.03.2017, 24.04.2017, 18.05.2017, 03.06.2017, 17.06.2017, 26.07.2017, 26.08.2017, 11.09.2017, 28.10.2017, 22.11.2017, 23.12.2017, 11.01.2018, 24.01.2018, 15.02.2018, 15.03.2018, 19.03.2018, 20.03.2018.

9. On 21.03.2018, the applicant moved an application praying therein that an explanation be called for from the police station Aurai in respect of F.I.R. registered at Book No. 36428. On 24.03.2018 when the case was fixed for committal of the case, the applicant moved another application challenging the validity of cognizance taken in the matter. All the aforesaid applications dated 02.07.2016, 21.03.2018 and 24.03.2018 were decided and rejected by common order dated 24.03.2018 and further date was fixed on 27.03.2018 for committal of the case to the court of sessions.

10. On 27.03.2018, learned counsel for accused was present, but again application was moved on behalf of accused-applicant for exemption of his

personal appearance. On the said date, copies of all the documents/police papers were ready for being supplied to the accused, but learned counsel for accused refused to receive the same and was insisting to provide copy of Chik F.I.R. registered at Book No. 036428 after getting the original copy summoned from the police station, Aurai, district Sant Ravidas Nagar.

11. Under the circumstances, on 27.03.2018 before committing the case to the court of sessions, a detailed order was passed before lunch hours by the Additional Chief Judicial Magistrate concerned mentioning that all the prayer and objections raised on behalf of applicant by means of several applications, as mentioned above, have already been decided. However, one more opportunity was given to the accused to receive the copy of all the documents/police papers, otherwise it shall be presumed that accused-applicant is not cooperating in the proceedings of the court. Case was posted after lunch hour for committal of case. After lunch hour, the court of Additional Chief Judicial Magistrate, Bhadohi, Gyanpur was informed that copy of some documents of the prosecution have been provided to the accused-applicant as per direction of the court, in view of provision of section 207 Cr.P.C., but he has refused to receive the other documents. Under the circumstances, the Additional Chief Judicial Magistrate, Bhadohi, Gyanpur after recording the said fact, passed separate order dated 27.03.2018 committing the case to the court of sessions.

12. On 10.04.2018, the applicant again moved an application under section 207 Cr.P.C. for providing copies of F.I.R. registered at Book No. 036428, X-ray Report, Pathology Report, Supplementary Report and Statement of witnesses, which has been rejected by the trial court vide impugned order dated 19.12.2019, which is the subject matter of challenge in the present application.

13. Since, pure legal question regarding compliance of section 207 Cr.P.C. is involved in the present case, therefore, it is not necessary to issue notice to opposite party No. 2, as the matter is pending since 2010 and till date charges have not been framed in the trial proceedings.

14. Assailing the impugned order dated 19.12.2019, main substratum of argument of learned counsel for the applicant is that the application dated 10.04.2018 under section 207 Cr.P.C. moved on behalf of the applicant for providing copy of F.I.R registered at Book No. 036428 and other documents of the prosecution, which are part of the case diary and police report, on which prosecution is relying, has been illegally rejected by the trial court. It is next submitted by the learned counsel for the applicant that without complying the provision of section 207 Cr.P.C., case could not be committed to the court of sessions, therefore, impugned order dated 19.12.2019 is not sustainable in the eye of law and is liable to be quashed.

15. Learned counsel for the applicant in support of his submission, placed reliance upon the following judgments:

1. ***Ramesh vs State of Maharashtra***, 1995 Cr.L.J. 3424

2. ***State of Kerala vs Babu***, 1999 (4) SCC 621

3. ***Prakash, Ravi Karan vs State of U.P.***, 2019 Supreme (All) 2405

16. Per contra, learned Additional Government Advocate vehemently opposed and refuted the submissions advanced on behalf of the applicant, submitted that from perusal of the order sheet of this case, which is on record as annexure-4 to the application, it is apparently clear that provision of section 207 Cr.P.C. has already been complied with. It is also submitted that from the order sheet of this case, it is clear that best efforts have been made by the court to provide the copy of all the relevant documents of the prosecution to the accused-applicant, but he accepted some documents and refused to receive remaining documents deliberately with ulterior motive just to delay the proceedings of the trial. So far as demand of copy of F.I.R. registered at Book No. 036428 is concerned, the same has no concern with this case as first information report dated 27.03.2010 of this case was registered vide Chik F.I.R. registered at Book No. 036427, on which investigation proceeded and charge sheet has been submitted. Much emphasis has been given that the prayer for providing copy of Chik F.I.R. registered at Book No. 036428 to the applicant has already been refused by the Magistrate concerned vide order dated 28.05.2016, which has attained finality as revision preferred against the same by the applicant, was also dismissed on 03.06.2016, therefore, there is no illegality in the impugned order dated 19.12.2019. Lastly, it is submitted that since, liberty has been granted to the applicant for inspection of any documents, therefore present application is liable to be dismissed.

17. After having heard the argument of learned counsel for the parties as mentioned above, this Court is of the view that every case turns on its own facts, therefore, before delving into the issue, it would be useful to set out sections 173 and 207 of Code of Criminal Procedure, which reads as under:

"173. Report of police officer on completion of investigation.

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offense appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f)whether he has been released on his bond and, if so, weather with or without sureties;

(g) whether he has been forwarded in custody under section 170;

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 376, 376-A, 376-B, 376-C, 376-D or section 376-E of the Indian Penal Code;

(ii)The officer shall also communicate, In such manner as may be

prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3)Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4)Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order- for the discharge of such bond or otherwise as he thinks fit.

(5)When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject- matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub- section (5).

(8)Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2)."

*"**207. Supply to the accused of copy of police report and other documents.**- In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-*

(I) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a

statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

18. Aforesaid provisions are applicable to all types of cases instituted upon police reports. Compliance of provisions of section 207 Cr.P.C. is condition precedent for commitment of the case to the court of sessions. If copy of documents mentioned in section 207 Cr.P.C. are not supplied to accused either in full or in part, he cannot effectively defend himself before the trial court/sessions court. The first proviso to section 207 Cr.P.C. empowers the court to exclude from the copies to be furnished to the accused such portion as may be covered by section 173 (6) Cr.P.C. The second proviso to section 207 Cr.P.C. empowers the court to provide to the accused an inspection of the documents instead of copies thereof, if in the opinion of the court, it is not practicable to furnish to the accused, the copies of the documents because of voluminous contents thereof. The provisions of section 173 (5) Cr.P.C. makes it incumbent on the investigating agency to forward/transmit to the court concerned all documents/statements, etc., on which the prosecution proposes to rely in the course of trial. Section 173 (5) Cr.P.C., however, is subject to the provisions of section 173 (6) Cr.P.C., which confers a power on the investigating officer to request the court concerned to exclude any part of the statement or documents forwarded under section 173 (5) Cr.P.C. from the copies to be granted to the accused.

19. In the light of facts and issues involved in this case, it is relevant to deal with the judgments relied upon on behalf of the applicant.

20. In the case of ***Ramesh vs State of Maharashtra***, reported in 1995 Cr.L.J. 3424, application of the accused for directing the prosecution to produce the dying declaration of the deceased and also for supply of statements of witnesses recorded by the police was rejected. In the said case, it was admitted fact that dying declaration of the deceased was recorded and was part of police papers, but prosecution was not relying on the same. The High Court while deciding the issue has directed the Additional Sessions Judge to get it ascertained as to whether such dying declarations are in existence or not, if they are in existence, copies thereof shall be supplied to accused. The relevant observation and finding recorded in paragraphs 15 and 16 of the said judgment, are reproduced herein below:

"15. If such a dying declaration is recorded during investigation and is kept back from the accused, Merely because it helps the accused, to deny the copy thereof to him for the purposes of defence would be highly prejudicial to him. The said dying declaration, if existing on record, would undoubtedly provide a material to the defence to effectively cross-examine regarding the nature of investigation. Even the investigating officer could be subjected to a cross-examination on the basis of such dying declaration. Apart from that, such

dying declaration could be used for unearthing the truth of the prosecution story, because it might affect the evidentiary value of the other dying declarations on account of the contradictions. Under such circumstances, it will not be fair to deny the copy of the dying declaration to the accused on the spacious ground that it forms a part of the case diary. If such dying declaration is proved to be in existence, it will be the right of the accused to have the copy thereof. The trial Court was, therefore, in error in not establishing as to whether such dying declaration exists or not. It has already been pointed out that there is no denial that there are no such dying declarations. The impugned order is, therefore clearly incorrect and will have to be set aside.

16. In the result, the learned Additional Sessions Judge is directed to get it established as to whether such dying declarations are in existence or not. If they are in existence, copies thereof shall be supplied to the applicant-accused. With these observations the instant Criminal Application stands disposed of."

21. In the case of ***State of Kerala vs Babu***, reported in 1999 (4) SCC 621, applications were moved on behalf of accused persons to summon case diary of another case for confronting the witness with his previous statement as found in the said case diary and to recall the said witness. The Sessions Judge, allowed the said applications, which came to be challenged before the High Court by the State as well as brother of the deceased. The said petitions came to be dismissed by the High Court by holding that there is no bar in law to summon the case diary of case even other than one, which is being tried, for the purpose of contradicting the evidence of prosecution witness. On filing appeal by special leave, the Apex Court has held that a case diary of another case, not pertaining to the trial in hand can be summoned if the court trying the case considers that production of such a case diary is necessary or desirable for the purpose of trial, under section 91 of the Code.

22. In the case of ***Prakash, Ravi Karan vs State of U.P.***, reported in 2019 Supreme (All) 2405, judgment and order dated 30.04.2015 passed by trial court, by which accused has been convicted, was challenged, wherein the Division Bench of this Court while deciding the case has made an observation with regard to compliance of provision of section 207 Cr.P.C. in paragraph 31 of the judgment, which is reproduced herein below:

"31. Section 238 of Cr.P.C. unequivocally provided that a solemn duty is cast on the Magistrate to satisfy himself that he has strictly complied with the provisions of Section 207 Cr.P.C. viz. furnishing the accused, free of cost, copies of documents as prayed for by him and referred to in that section itself without delay and such satisfaction has to be invariably judicial satisfaction. An omission to comply with the mandatory provision of law as enshrined in Section 207 Cr.P.C. read with Section 238 Cr.P.C is bound to cause serious prejudice to the accused and such a situation may even vitiate the criminal trial. The supply of documents and statements prepared at the investigating stage as mandated under Section 207Cr.P.C. cannot be treated a mere superfluity or empty formality. It is highly improper and irregular on the part of the Court to shirk its responsibility in this regard and put the accused at the

mercy of prosecution by merely observing inter alia that it is the duty of prosecution "to follow the rules of natural justice'. Thus, it can safely be held that accused could not be refused to supply copies of documents even at the stage of trial, if relied upon by the prosecution per statutory provisions of Section 207 Cr.P.C. and also as per the provisions of Section 238 Cr.P.C. If we go carefully through the ratio laid down in V.K. Sasikala Vs. State (2012) 9 SCC 771, we get clear idea about the solemn duty of the Court to supply copies of documents to the accused. It is the duty of the Court to supply to the accused, copies of the police report, the first information report recorded under Section 154 Cr.P.C., the statements recorded under Section 161 (3) the confessions and statements, if any, recorded under Section 164 and any other documents or relevant extract thereof, which is forwarded to the Magistrate along with police report."

23. In view of aforesaid discussion, it is apparent that the judgments relied upon on behalf of the accused-applicant are of no help to the applicant as applicant's demand of first information report registered at Book No. 036428, on which neither investigation was done nor same was made part of case diary/police report and prosecution does not propose to rely on the same.

24. Here, it is apposite to mention that even one additional or different fact may make big difference between the conclusion in two cases. Each case depends on its own facts and a close similarity between one case and another is not enough, because even a single significant detail may alter entire aspect. It is well settled that accused is entitled to have copies of the statements and documents accompanying the police report, which the prosecution may use against him as evidence during the trial.

25. Recently, the Apex Court in the case of ***P. Gopalkrishnan @ Dileep Vs. State of Kerala and another***, reported in AIR 2020 SC 1, has also discussed the scope and object of Section 207 Cr.P.C. In the said case, basic facts was that two police reports were submitted on 17.04.2017 and 22.11.2017 respectively. When the appellant was supplied a copy of the second police report on 15.12.2017, all documents noted in the said report, on which the prosecution proposed to rely, were not supplied to the appellant, namely, (i) electronic record (contents of memory card); (ii) Forensic Science Laboratory (for short, "the FSL') reports and the findings attached thereto in C.D./D.V.D.; (iii) medical reports; C.C.T.V. footages and (iv) Call data records of accused and various witnesses etc. It is noted by the concerned Magistrate that the visuals copied and documented by the forensic experts during the forensic examination of the memory card were allowed to be perused by the appellant's counsel in the presence of the regular cadre Assistant Public Prosecutor of the Court, in the Court itself. After watching the said visuals, some doubts cropped up, which propelled the appellant to file a formal application before the Judicial First Class Magistrate, Angamaly for a direction to the prosecution to furnish a cloned copy of the contents of memory card containing the video and audio footage/clipping, in the same format as obtained in the memory card, along with the transcript of the human voices, both male and female recorded in it. The Magistrate vide order dated 7.2.2018, rejected the said application, essentially on the ground that acceding to the request of

the appellant would be impinging upon the esteem, decency, chastity, dignity and reputation of the victim and also against public interest. Aggrieved by above order dated 7.2.2018, the appellant preferred petition before High Court, which came to be dismissed observing that the seized memory card was only the medium on which the alleged incident was recorded and hence that itself is the product of the crime. Further, it being a material object and not documentary evidence, is excluded from the purview of Section 207 of the 1973 Code. The matter came to Apex Court and appeal has been allowed. The relevant observations made by the Apex Court in paragraph nos. 41, 42, 43 and 44 are being reproduced herein-below:-

"41. We are conscious of the fact that Section 207 of the 1973 Code permits withholding of document(s) by the Magistrate only if it is voluminous and for no other reason. If it is an "electronic record", certainly the ground predicated in the second proviso in 42 (2018) 17 SCC 324Section 207, of being voluminous, ordinarily, cannot be invoked and will be unavailable. We are also conscious of the dictum in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Satyen Bhowmick & Ors.43, wherein this Court has restated the cardinal principle that accused is entitled to have copies of the statements and documents accompanying the police report, which the prosecution may use against him during the trial.

42. Nevertheless, the Court cannot be oblivious to the nature of offence and the principle underlying the amendment to Section 327 of the 1973 Code, in particular sub Section (2) thereof and insertion of Section 228A of the 1860 Code, for securing the privacy of the victim and her identity. Thus understood, the Court is obliged to evolve a mechanism to enable the accused to reassure himself about the genuineness and credibility of the contents of the memory card/pendrive from an independent agency referred to above, so as to effectively defend himself during the trial. Thus, balancing the rights of both parties is imperative, as has been held in Asha Ranjan (supra) and 43 (1981) 2 SCC 109Mazdoor Kisan Shakti Sangathan (supra). The Court is duty bound to issue suitable directions. Even the High Court, in exercise of inherent power under Section 482 of the 1973 Code, is competent to issue suitable directions to meet the ends of justice.

43. If the accused or his lawyer himself, additionally, intends to inspect the contents of the memory card/pen drive in question, he can request the Magistrate to provide him inspection in Court, if necessary, even for more than once along with his lawyer and I.T. expert to enable him to effectively defend himself during the trial. If such an application is filed, the Magistrate must consider the same appropriately and exercise judicious discretion with objectivity while ensuring that it is not an attempt by the accused to protract the trial. While allowing the accused and his lawyer or authorized I.T. expert, all care must be taken that they do not carry any devices much less electronic devices, including mobile phone which may have the capability of copying or transferring the electronic record thereof or mutating the contents of the memory card/pendrive in any manner. Such multipronged approach may subserve the ends of justice and also effectuate the right of accused to a fair trial guaranteed under Article 2 1of the Constitution.

44. In conclusion, we hold that the contents of the memory card/pen drive

being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial."

26. On perusal of impugned order dated 19.01.2019, I find that the application dated 10.04.2018 under Section 207 Cr.P.C. of the accused-applicant has been rejected mainly on the ground that the case is pending since 2010. The request for providing copy of Chik F.I.R. registered at Book No. 036428 has already been refused by a detailed order dated 28.05.2016 and the same has attained finality, because Criminal Revision No. 39 of 2016 preferred by the applicant against the said order dated 28.05.2016 before the Sessions Judge, Bhadohi, has been dismissed at admission stage on 03.06.2016, which has not been further challenged. On 27.03.2018, the case has been committed to the court of sessions. In the committal order dated 27.03.2018, it is clearly mentioned that some documents of the prosecution case have been given to the accused, but the accused has refused to receive the remaining documents. It has also been observed that on account of delaying tactics adopted by the applicant, till date charge could not be framed in this case despite lapse of about ten years from the date of incident. Applicant cannot be permitted to raise similar issue again and again, which has already been rejected on 28.05.2016. However, liberty has been granted to applicant to inspect any document in the court.

27. Now, I proceed to decide **issue No.1.**

28. The aim and object of section 207 of Cr.P.C. is to provide copy of police report along with documents appended thereto, on which prosecution proposes to rely against the accused, is only to give a fair opportunity to the accused to defend himself otherwise accused will not be able to defend himself in true sense. The right of accused with regard to disclosure of documents is limited at the stage of supplying copies to him in view of Section 207 of Cr.P.C. At that stage, the accused cannot claim an indefeasible legal right to claim every document, on which prosecution does not propose to rely. In the present case, it is admitted fact that F.I.R. dated 27.03.2010 was registered at Book No. 036427 and investigation was done and charge-sheet was submitted pursuant to said F.I.R. It has come on record that due to inadvertent mistake, on the basis of F.I.R. registered at Book No. 036427, another F.I.R. was registered at Book No. 036428, which has not been given effect to. The police of concerned police station has also submitted explanation in this regard on 07.06.2016. The F.I.R. registered at Book No. 036428 is neither part of case diary nor part of police report. The prosecution also does not propose to rely on the same, therefore, in the opinion of the Court no prejudice is being caused to the accused-applicant at this stage. The case, which is pending since 2010 without framing charge, ought not to be lingered on by raising aforesaid issue at the stage of compliance of Section 207 of Cr.P.C. It is also relevant to mention that section 91 of Cr.P.C. empowers the Court to summon production of any document or other things, which the Court considers it necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under the provisions of Code of Criminal Procedure. In a trial, before a court of sessions, the accused has also legal right under section 233(3) of Cr.P.C. to apply for the issue of any process for compelling the attendance of any witness or the production of any document or thing. Similarly, in a trial of warrant cases by Magistrate legal right has been given to accused under section 243(2) of Cr.P.C. to apply to the Magistrate to issue any process for compelling the attendance of any

witness for the purpose of examination or cross examination, or the production of any document or other thing, for which the Court has to pass reasoned order.

29. The provisions of sections 91, 233 & 243 Cr.P.C. are reproduced herein below:-

"***91. Summons to produce document or other thing.-***

(1)Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

"233. Entering upon defence.-

(1)Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2)If the accused puts in any written statement, the Judge shall file it with the record.

(3)If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

"243. Evidence for defence.-

(1)The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such. process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:

Provided that, when the accused has cross- examined or had the opportunity of cross- examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.

(3) The Magistrate may, before summoning any witness on an application under sub- section (2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court."

30. The Apex Court in the case of ***P. Gopalkrishnan @ Dileep (supra)*** has also held that accused is entitled to have copies of statements and documents accompanying police report, which prosecution may use against him during the trial.

31. In view of above, this Court is of the view that at the stage of compliance of provisions of Section 207 Cr.P.C. accused is not entitled to get copy of such document, which is neither part of case diary nor police report and on which prosecution does not propose to rely against the accused. Accordingly, first issue is decided against the accused-applicant. As such, applicant is not entitled to get copy of F.I.R., which was inadvertently registered at Book No. 036428 on the basis of main F.I.R. registered at Book No. 036427.

32. Now I proceed to decide **issue no.2.**

33. It is well settled that no person shall be deprived of his life and liberty except by procedure established by law is constitutionally guaranteed to every one. Only after following a fair, reasonable and equitable procedure, liberty of a person can be curtailed in accordance with law. Right of accused to defend himself as against the accusations made against him is also a constitutional right. No one shall be condemned unheard. Before condemning a person a reasonable opportunity must be given to him. Without furnishing and disclosing copies of the incriminating materials asking the accused to defend himself will be an empty formality. In the present case, the trial court, in the committal order dated 27.03.2018, has mentioned that some documents of the prosecution have been given to the accused, but the accused himself refused to receive remaining documents. From the order-sheet of the case, it is not clear that which documents of the case have been given to accused-applicant and which documents have been refused by the applicant to receive. As such, at least it appears that full compliance of provisions of section 207 Cr.P.C. has not been made. Here, it would be useful to mention that under Section 207 Cr.P.C. the expression "Magistrate" has been used instead of expression "Court", but the provisions of section 207 Cr.P.C. will have to be given a liberal and relevant meaning so as to achieve its object, because under various special enactment requirement of commitment of a case to court of Sessions by the Magistrate as mandated by the Court has been dispensed with and the Special Courts constituted under the special statute have been empowered to receive the report of the investigation along with the relevant documents directly from the investigating agency and thereafter to take cognizance of the offence, if so required. There is no limitation or prohibition that after commitment of the case to the court of Sessions or during the trial before the Sessions Court those copies cannot be asked for. Compliance of principles of natural justice incorporated in Section 207 Cr.P.C., cannot be limited upto the committal court or up to the commitment of the case to the Court of Sessions. If copies of documents as provided under Section 207 Cr.P.C., which ought to have been furnished to the accused were not furnished to him by the committal court or the trial court before framing of the charge, the accused cannot defend himself effectively. Therefore, those documents can be supplied to him even after commitment of the case to the court of sessions in order to

ensure principles of natural justice and fair trial.

34. In view of above discussion, the second issue is decided in favour of accused-applicant.

35. Order sheet reveals that cognizance in this case was taken on 20.06.2010 and on 02.07.2016 the Magistrate concerned directed the concerned clerk to get the copies of all prosecution documents prepared fixing 23.07.2016 for supply of those copies to the accused and committal of case, but from that day till 20.03.2018 applicant started sending adjournment application seeking exemption of his personal appearance on 34 dates and thereafter the accused-applicant adopting different modus operandi by hook or by crook delayed the trial proceedings. The valuable time of the court below has been wasted only in deciding applications under Section 207 Cr.P.C. moved by the applicant on one ground or others.

36. In view of above, impugned order dated 19.12.2019 is quashed only to the extent, whereby prayer of the accused-applicant for providing documents accompanied police report under Section 173 Cr.P.C. has been refused. So far as applicant's request for demand of copy of F.I.R., which was inadvertently registered at Book No 036428 as mentioned above is concerned, the same is hereby rejected.

37. As a fallout and consequence of aforesaid discussion, this application under section 482 Cr.P.C. is **partly allowed** with a direction to the trial court to provide copy of all the documents accompanied police report to the accused applicant, on which prosecution proposes to rely against the applicant within two weeks from the date of production of certified copy of this order before it. It is made clear that in case accused-applicant or his counsel refuses to receive the same, the trial court after recording the said facts in the order sheet shall send above mentioned documents to the address of the accused-applicant by registered post within a week thereafter, and will proceed with the trial, in accordance with law, making all endeavour to conclude the trial, expeditiously, without granting any unnecessary adjournments to either of the parties, preferably within a period of one year, keeping in mind that this case is pending since 2010. Applicant is also directed to co-operate with the trial proceeding.

38. Office is directed to communicate this order to the concerned court below.

(2020)03-05ILR A1652
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 Cr.P.C. No. 5525 of 2020

Sudesh Bhadauria ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Ashutosh Sharma

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

Criminal Law-Criminal Procedure Code (2 of 1974) - Section 482 - Quashing of summoning order - use of blank printed proforma in passing the judicial order not

proper - Held - Certain places in the impugned summoning order left blank which shows that there was total non application of mind while passing the summoning order - Summoning order quashed (Para 5, 8)

Application allowed (E-5)

List of case cited :

Ankit Vs. St. of U.P. & anr. reported in 2009 (9) ADJ 778

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

1. Heard Sri Ashutosh Sharma, learned counsel for the applicant and Sri Amit Singh Chauhan, learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been filed for quashing the impugned summoning order dated 20.02.2019 as well as subsequent orders and the entire proceedings of Complaint Case No.3073 of 2018 (Shriram Transport Vs. Sudesh), Police Station Navabad, District Jhansi, pending in the court of A.C.J.M.-II, Jhansi.

3. It has been submitted by learned counsel for the applicant that the Judicial Magistrate did not apply his judicial mind at the time of passing the summoning order against the applicant as the impugned summoning order has been passed on a printed proforma, which is not permissible under law. In support of his contention, learned counsel for the applicant has relied upon the judgment in the case of **Ankit Vs. State of U.P. & another reported in 2009 (9) ADJ 778.**

4. Certified copy of the impugned summoning order is annexed as Annexure 1 to the affidavit which goes to show that the order has been passed on a printed proforma by filling up the blanks. Blanks on the printed proforma appear to have been filled by the court employee. Learned Magistrate has simply put his initial over his name without applying his judicial mind before passing the said order.

5. He has further submitted that the learned Magistrate has simply signed the summoning order which in fact is the reproduction of a rubber stamp. The entire language of the order consists of a rubber stamp which was already typed with blank spaces at certain places. Certain places in the impugned summoning order are left blank which shows that there was total non-application of mind while passing the summoning order.

6. Learned counsel for the applicant has confined his argument only to the extent that the impugned summoning order is a printed proforma order, which has been passed without applying its judicial mind, and the same is illegal and liable to be quashed.

7. On the other hand, learned A.G.A. submits that the impugned summoning order, which has been prepared and passed by filling up the blanks on the printed proforma, is wholly illegal and invalid.

8. The argument advanced on behalf of applicant has substance. The use of blanks printed proforma in passing the judicial order is not proper and the order of summoning the applicant has been passed without application of judicial mind, which is substantiated by the fact that even the date has not been mentioned filling up the blanks which has been left in the rubber stamp for mentioning the date of appearance.

9. In view of the facts and circumstances of the case, stated above, the

impugned summoning order dated 20.02.2019 is hereby quashed. Learned court below is directed to pass a fresh order on the complaint after applying his judicial mind.

10. The application stands allowed.

11. Let a copy of this order be sent to the court concerned for compliance.

12. Register General of this Court is directed to send a copy of this order to the concerned court taking into consideration the fact that all the Presiding Officer shall restrain themselves from using such printed proforma in judicial work. The blank printed proformas available in the court below will be seized.

(2020)03-05ILR A1654
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482 Cr.P.C. No. 5721 of 2020

Jaswant ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ashok Nath Tripathi, Sri Gopal Krishna, Sri Rakesh Nath Tripathi

Counsel for the Opposite Parties:
A.G.A., Sri Ajay Sengar

Criminal Law-Criminal Procedure Code, 1973 - Section 319 - Power to proceed against other persons appearing to be guilty of offence - Degree of Satisfaction - degree of satisfaction before summoning u/s 319 CrPC must be *more than prima facie*, which is warranted at the time of framing of charges - power u/s 319 CrPC can be exercised where *strong & cogent evidence* are found against a person

In FIR specific allegation of firing against the applicant - which hit deceased & thereby he died - statement of informant PW 1 recorded during trial consistent - PW-2 also gave same statement against the applicant - which is much more than prima facie evidence - cross examination of PW-1, PW-2 already completed - Held - no illegality in summoning applicant u/s 319 CrPC (Para 31)

Application dismissed (E-5)

List of cases cited :

1.Labhuji Amratji Thakor & ors. Vs. St. of Guj & ors., AIR 2019 SC 734

2.Hardeep Singh Vs St. of Pun & ors., 2014 (3) SCC 92

3.Shiv Prakash Mishra Vs St. of U.P. & anr. 2019 (7) SCC 806

4.Vikas Vs St. of Raj (2014)3 SCC 321
5.Brijendra Singh & Ors Vs St. of Raj., 2017(7) SCC 706

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

1. Mr. Ajay Sengar, learned Advocate has filed his appearance slip today on behalf of opposite party No. 2/informant, which is taken on record.

2. Heard Mr. Ashok Nath Tripathi, Mr. Gopal Krishna, Mr. Rakesh Nath Tripathi, learned counsel appearing for the applicant, Mr. Ajay Sengar, learned counsel for the opposite party No. 2/informant and Mr. Shiv Sewak Ram Dwivedi, learned Additional Government Advocate assisted by Mr. Raj Mani Yadav, learned brief holder representing the State

and perused the materials available on record.

3. By means of this application under section 482 of the Code of Criminal Procedure, herein after referred as "Cr.P.C" the applicant has invoked the inherent jurisdiction of this Court for quashing of the order dated 26.11.2019 passed by learned Sessions Judge, Jalaun at Orai in Sessions Trial No. 30 of 2019 (Lakhan and others vs. State of U.P. and another) arising out of Case Crime No. 326 of 2018, police station Kotwali, district Jalaun, whereby the application No. 16-Kha dated 3.7.2019 moved by the informant, Premnarayan under section 319 Cr.P.C. was allowed and applicant, Jaswant was summoned to face the trial for the offence punishable under Sections 147, 148, 302/149, 323/149, 504 and 506 IPC as well as entire proceedings of aforesaid case.

4. In short compass, the facts of the case are that a written report was lodged by the informant of the case, namely, Premnarayan on 09.11.2018 at the police station Kotwali Koanch, district Jalaun against accused-persons, Lakhan, Man Singh, Sahab Singh, Jaswant (present applicant) and Yatendra to the effect that on 08.11.2018 at 5.00 p.m., while he was sitting along with his brother, Sundar (deceased), and witnesses, Mahendra, Gajendra, Karan Singh and Sitaram at the door platform (Chabootra) of Gajendra situated in front of his house, the accused, Man Singh came there and abused the aforesaid persons that they were laughing at him. Thereafter, accused, Man Singh left the place giving threat to the persons sitting there, and after some time, he along with accused, Lakhan, Sahab Singh, Jaswant (applicant) and Yatendra came there and with an intention to kill, accused Lakhan and Man Singh caught hold of deceased, Sundar and accused Jaswant (applicant) fired at him by his country made pistol (Katta), as a result thereof, he received pellet injuries on his forehead and succumbed to the injury. The accused Sahab Singh also fired at the deceased by his weapon, but his shot did not hit the deceased. The accused persons also cordoned the aforesaid persons with a common intention and started beating them with lathi and danda, due to which, witnesses Gajendra, Mahendra, Karan and Sitaram also received grievous injuries. It is further mentioned in the report that there was old enmity between the parties.

5. On the basis of the aforesaid written report, a case was registered at Case Crime No. 326 of 2018, under Sections 147, 148, 149, 323, 504, 506 and 302 IPC, police station Kotwali, district Jalaun,

6. On 09.11.2018 post-mortem of deceased, Sundar was conducted and following injuries were found on his person:-

1. Wound of entry 3 cm X 1.5 cm on right parietal region oval shaped 2 cm medial from right ear & 5 cm lateral to Rt. Orbit. Margins are lacerated. Edges are inverted and irregular. No blackening, scorching, tattooing seen.

2. No other external visible injury seen.

3. No exit wound present.

7. During Investigation, statements under Section 161 Cr.P.C. of informant, Premnarayan and Mahendra Singh have been recorded, in which they have reiterated the prosecution version as mentioned in the first information report in which specific allegations have been

levelled against the applicant, Jaswant that while the deceased was caught hold of by Man Singh and Lakhan Singh, Jaswant fired at the deceased, hitting on his forehead. Due to the injury received by the deceased he died. However, in their statements recorded under Section 161 Cr.P.C. other witnesses, namely, Gajendra Singh, Karan Singh, Anil Kumar Kori, Deep Narayan Pal, Ramesh Singh Pal and Shyam Kishore Rathore have stated that co-accused, Jahar Singh fired at deceased, Sundar, causing his death.

8. After the culmination of investigation, the Investigating Officer submitted charge sheet dated 18.1.2019 against Lakhan Singh, Man Singh, Sahab Singh, Yatendra and Jahar Singh under Sections 147, 148, 302/149, 323/149, 504 and 506 IPC and exonerated the present applicant, Jaswant from all the charges.

9. It is also pointed out that Ramesh Kumar has also lodged first information report dated 09.11.2018 at 10.33 PM with regard to alleged incident dated 08.11.2018 at 5.00 PM against Sundar, Mahendra Singh, Premnarayan, Gajendra, Parichat, Sitaram and Purshuram, which was registered as Case Crime No. 334 of 2018, under Sections 147, 148, 149, 323, 504, 506 and 308 IPC, police station Kotwali Konch, district Jalaun with the allegation of causing injuries to Surajpal, Jitendra, Man Singh and Sahab Singh, in which also charge sheet dated 22.1.2019 has been submitted by the Investigating Officer against Mahendra Singh, Premarayan, Gajendra Singh and Sitaram for the offence under Sections 147, 148, 149, 323, 504, 506 and 325 IPC as no offence against Mahendra Singh, Premarayan, Gajendra Singh and Sitaram was made out under Section 308 IPC.

10. As the case against the applicant at Case Crime No. 326 of 2018, police station Kotwali, district Jalaun was exclusively triable by the court of Sessions, the learned Magistrate committed the case to the court of sessions, where case was registered as Sessions Trial No. 30 of 2019.

11. In the trial, evidence of informant, Premnarayan, who was examined as PW-1 and injured Mahendra Singh, who was examined as PW-2 has been recorded. Both the aforesaid prosecution witnesses in their evidence have specifically stated that the deceased was caught hold by accused, Man Singh and Lakhan Singh, whereas Jaswant fired at the deceased, which hit on forehead of the deceased The relevant part of statements of PW-1 and PW-2, which is against the present applicant is reproduced herein below:-

Statement of PW-1 Premnarayan

xxxx इसके बाद लाखन और मान सिंह ने सुन्दर को पकड़ लिया। जसवन्त ने अपने तमंचे से फायर कर दिया।

उसके बाद साहब सिंह ने भी गोली चलायी। लेकिन जसवन्त की गोली भाई सुन्दर को लगी और लाठी डण्डों से सभी लोग मारने लगे। हम लोग लब बचाने के लिए पहुंचे तो हम लोगों के साथ भी मारपीट की जिसमें महेन्द्र, सीताराम, गजेन्द्र, करन सिंह इन सभी को गम्भीर चोटें आयीं।

Statement of PW-2, Mahendra Singh

xxxx

तभी मान सिंह व लाखन सिंह ने मेरे पिता सुन्दर सिंह को पकड़ लिया। जसवन्त सिंह ने अपने तमंचे से मेरे पिता सुन्दर सिंह को गोली मार दी जो मेरे पिता सुन्दर सिंह के सिर पर लगी। तभी साहब सिंह ने भी गोली चलायी। तब हम लोग बचाने आये। तब हम लोगों की भी मारपीट की करन सिंह, सीताराम, गजेन्द्र सिंह व मेरी मारपीट की । मुझे भी चोटें आयी थीं।

12. On the basis of aforesaid evidence, application under Section 319 Cr.P.C. dated 37.2019 was moved by the

informant/opposite party No. 2, which has been allowed by the trial court. The said impugned order dated 26.11.2019 is under challenge in the present case.

13. Assailing the impugned order dated 26.11.2019, the main substratum of argument of learned counsel for the applicant is that merely on the basis of statements of PW-1 and PW-2, applicant cannot be summoned as an additional accused to face trial unless entire prosecution witnesses are examined.

14. It is next submitted by learned counsel for the applicant that merely by taking the name of applicant, he cannot be summoned. It is also submitted by learned counsel for the applicant that during investigation some of the witnesses have stated that fire was made by Jahar Singh, therefore, charge sheet was not submitted against the applicant, Jaswant. PW-1 and PW-2 deliberately taken his name assigning the role of firing on deceased with ulterior motive, which cannot said to be more than prima facie, therefore, impugned order dated 26.11.2019 is not sustainable in the eye of law and liable to be quashed by this Court.

15. Learned counsel for the applicant has placed reliance upon the judments of Hon'ble the Apex Court in the cases of ***Labhuji Amratji Thakor and others vs. State of Gujarat and others***; AIR 2019 SC 734 and ***Hardeep Singh vs. State of Punjab and others***; 2014 (3) SCC 92 or ***Shiv Prakash Mishra vs. State of Uttar Pradesh and another***; 2019 (7) SCC 806 to contend that the power under Section 319 Cr.P.C. can be exercised only where strong and cogent evidence are found against a person and not in a casual and cavalier manner. The decree of satisfaction before summoning the offence under Section 319 Cr.P.C. must be more than prima facie, which is warranted at the time of framing of charges against the accused.

16. Per contra, learned Additional Government Advocate supported the order of the court below and vehemently opposed the aforesaid submissions of learned counsel for the applicant by contending that in the first information report there is specific allegation of firing against the applicant, which hit the deceased and thereby he died. The statement of informant, recorded during trial as PW-1 is consistent. PW-2 has also given same statement against the applicant, which is much more than prima facie evidence against the applicant. It is also submitted by learned Additional Government Advocate that the cross-examination of PW-1 and PW-2 has already been completed.

17. In the present case there was specific allegations against the applicant and the enmity between the accused and the complainant was existing. It is a broad day light murder, which took place at 5.00 p.m. in front of the house of the informant. It is not expected from the injured to depose wrong facts and frame a false case against the applicant leaving the real culprits to go scot free.

18. Before adverting to the claim of the parties, it would be useful to quote Section 319 Cr.P.C.

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

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any

offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

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

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

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

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

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

19. From the perusal of Section 319 Cr.P.C., it is clear that it is the duty of the Court to see that no accused is left unpunished. Where the investigating agency for any reason does not array the real culprit as accused, the Court is empowered to call the said accused to face the trial.

20. The moot question involved in the present case is as to at which stage the power should be exercised in respect of a person named in the FIR, but not charge sheeted and the degree of satisfaction that is required for invoking the powers under Section 319 Cr.P.C.

21. These two questions, where specifically dealt with by the Constitution Bench of Hon'ble Supreme Court in ***Hardeep Singh and others (Supra)***, where the Court held as under:

"Thus, in view of the above, we hold that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence"

xxxxxx

"At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter."

22. The Court further held as under:

"Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not

necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not "for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C.. to form any opinion as to the guilt of the accused."

23. The Division Bench of Hon'ble Supreme Court in **Vikas Vs. State of Rajasthan** (2014)3 SCC 321 has held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

24. While dealing with the duty and power of the Court under Section 319 Cr.P.C., Hon'ble Supreme Court in ***Brijendra Singh and others Vs. State of Rajasthan***, 2017(7) SCC 706 has held as under:

"It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C."

xx xx xx

"The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence." It also goes without saying that Section 319 Cr.P.C., which is an enabling provision empowering the Court to take appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Section 207/208 Cr.P.C., the committal etc., which is only a pre-trial stage intended to put the process into motion."

25. The aforesaid principles have further followed by Hon'ble the Supreme Court in the cases of ***Periyasami and others Vs. S. Nallasamy;*** *2019 (4) SCC 342,* ***Sugreev Kumar vs. State of Punjab and others;*** AIR 2019 SC 2903***, Shiv Prakash Mishra vs. State of Uttar Pradesh;*** 2019 (7) SCC 806 ***and Mani Pushpak Joshi vs. State of Uttrakhand and another***; AIR 2019 SC 5263.

26. In the instant case the first information report has been lodged on 09.11.2018 with the allegations that on 08.11.2018 at about 5.00 P.M., while the

informant was sitting along with his brother Sundar (deceased) and witnesses Mahendra, Gajendra, Karan Singh and Sitaram at the platform of Gajendra in front of his house, after some altercation, accused Lakhan, and Man Singh caught hold of his brother (deceased) whereas accused Jaswant (the present applicant) fired at him by the country made pistol, due to which he died. The version of the FIR was categorically reiterated by the first informant in his statement recorded under Section 161 Cr.P.C. Witnesses Mahendra Singh and Sita Ram have also stated that it was Jaswant (the applicant), who had fired at the deceased. However, some of the witnesses namely Gajendra, Karan, Anil Kumar Kori, Deep Narayan Pal, Ramesh Singh Pal and Shyam Kishore Rathore in their statements under Section 161 Cr.P.C have stated that it was co-accused Jahar Singh, who fired at the deceased. The investigating officer on the basis of the statements of Gajendra, Karan, Anil Kumar Kori, Deep Narayan Pal, Ramesh Singh Pal and Shyam Kishore Rathore has exonerated Jaswant and in his place name of Jahar Singh has been introduced as accued, whereas the name of Jahar Singh did not find place in the FIR lodged by the first informant.

27. In the trial, the first informant Premnarayan was examined as PW-1 and injured Mahendra Pal has been examined as PW-2. Both the witnesses in their examination-in-chief have clearly deposed that accused Lakhan and Man Singh have caught hold of the deceased-Sundar, whereas accused-Jaswant (the present applicant) fired from his country made pistol, which hit the deceased. At this stage the evidence of PW-1, the first informant of the case, who was also an eyewitness of the case and PW-2, Mahendra Pal, who is an injured witness cannot be discarded.

28. In view of above, it can safely be hold that the learned Sessions Judge while passing the impugned order dated 26.11.2019 was fully satisfied that there are strong and cogent evidence against the applicant and has not passed the order in a casual manner.

29. The order passed by the learned Sessions Judge was in consonance with the law laid down by Hon'ble Supreme Court in ***Hardeep Singh; Labhuji Amratji Thakor and others; Shiv Prakash Mishra; Vikas; and Brijendra Singh and others (Supra)*** and it cannot be said that the order of the learned Sessions Judge is in the teeth of the order of Hon'ble Supreme Court indicated referred to above.

30. Each case must be decided on its own facts and merit. Even one additional or different fact may make big difference between the conclusion in two cases, because even a single significant detail may alter entire aspect.

31. Considering the facts, materials on record as well as statements of PW-1 and PW-2, as mentioned above, this Court is also of the view that the evidence which has come on record against the applicant are much more than prima facie and are sufficient to proceed against the applicant in exercise of power under Section 319 Cr.P.C.

32. In view of what has been indicated herein above, I do not find any illegality or irregularity in the order dated 26.11.2019 passed by the learned Sessions Judge, Jalaun at Orai summoning the applicant under Section 319 Cr.P.C. to face the trial under Sections 147, 148, 302/149, 323/149, 504 and 506 IPC along with other accused.

33. The application is bereft of merit. It is accordingly rejected.

(2020)03-05ILR A1661
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.02.2020

BEFORE

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

Application U/S 482 Cr.P.C. No. 6939 of 2006

Avinash Mishra ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Sri Vinay Saran, Sri Nandit K. Srivastava, Sri Prashant Shukla, Sri Raghav Dev Garg, Sri Vinay Saran, Sri Mohan Singh, Sri Praveen Tripathi

Counsel for the Respondents:
G.A., Sri Anurag Khanna, Sri Gyan Prakas, Sri Nazrul Islam Jafri, Sri Sanjay Kumar Yadav

A. Criminal Law-Criminal Procedure Code (2 of 1974) , Section 197 - Sanction for prosecution - Government power to review its earlier order granting or refusing sanction to prosecute - when permissible - only if matter is reconsidered in the light of *fresh materials* - however it is not permissible for the sanctioning authority to review or reconsider the matter *on the same materials* again

In the earlier order refusing sanction - order of Supreme Court for investigation by C.B.I., was not taken into consideration - subsequently - that additional material was placed before Government - at the subsequent stage sanction accorded on the basis of that additional material - Held - No violation of law made by the Government by according the said sanction (Para 23)

B. Criminal Law- Criminal Procedure Code (2 of 1974) , Section 197 - Sanction for prosecution - Fake Encounter by police – to eliminate offender cannot be held to fall in official duty - Offence alleged have no nexus or/and relation with discharge of official duties as a Govt. Officer - Sanction not necessary (Para 24)

Application dismissed (E-5)

List of cases cited :
1.St. of Punjab & anr. Vs Md Iqbal Bhatti 2009 (67) ACC 350

2.Suresh Kumar Bhikamchand Jain Vs Pandey Ajay Bhushan & ors., 1998 CRI

3.St. of Ori & ors. Vs Ganesh Chandra Jew 2004 AIR SCW 1296

4.St. of Maha Vs Dr. Budhikota Subbard (1993) 3 SCC 339

5.St. through C.B.I. Vs B.L. Verma & anr., (1997) 10 SCC 772

6.St. thru C.B.I. Vs B.L. Verma & anr., (1997) 10 SCC 772

7.Amrik Singh Vs St .of Pepsu AIR 1955 SC 309

8.Mansukhlal Vithaldas Chauhan Vs St. of Guj (1997) 7 SCC 622

9.R.S. Nayak Vs A.R. Antulay 1984 SCC (Cri) 172

10.Devendra Prasad Singh Vs St. of Bihar & anr. AIR 2019 SC 1671

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

1. Heard Sri Nandit K. Srivastava, learned Senior Counsel assisted by Sri Prashant Shukla, learned counsel for the applicant and Sri Gyan Prakash, learned Senior Counsel assisted by Sri Sanjay Kumar Yadav, learned counsel for the C.B.I.

2. This present application has been filed with a prayer to quash the order dated 26.4.2006 passed by Special Chief Judicial Magistrate (CBI) Ghaziabad in Case No. 3140 of 2005, under Section 364, 120B, 302, 201, 220 IPC, P.S. Medical, District, Meerut.

3. As per F.I.R., the prosecution version is that on 26.2.1994, at about 10:15 O' clock, informant- Krishnapal Singh was going to Shastri Nagar on scooter and when he reached near supply depot at about 10:30 O' clock where existed a speed breaker he slowed down his scooter then all of a sudden two men stopped him showing a country made pistol and snatched away his scooter and fled towards Commissioner Chauraha, right then police of P.S. Lal Kurti reached there and he (informant) told them that two miscreants had fled from there after having snatched his scooter and thereafter they gave a chase to the miscreants. The registration number of scooter of the informant was DL3SC0326. He had borrowed the said scooter from one of his friends and that he could recognize the miscreants. The case crime no. 64 of 1994, under Section 392 was registered against two unknown persons.

4. On the same day, another F.I.R. was lodged being crime no. 82 of 94, under Section 307 and 412 IPC, P.S. Medical College, in which Station Officer- Avinash Mishra along with his team mates had proceeded in search of the accused persons. When he was in Tajgarh at about 10:35 pm, on 26.2.1994 he received an information from control room on RT Set that two miscreants had snatched scooter no. DL 3 SC 0326 from a person near supply depot, P.S. Lal Kurti, Meerut and had turned towards jail chungi and that the Inspector-Lal Kurti was following them. Upon this information, he proceeded on a Government Jeep in search of the miscreants and when reached near road bend towards Samrat Palace he saw the scooter bearing no. DL 3 SC 0326 coming from the side of jail Chungi which took turn towards Samrat Palace. His police team followed scooter, at that time, Shyam Lal Kashyap, S.O., Nauchandi was coming from the side of Samrat Palace. Having seen his vehicle, at about 10:30 pm, the miscreants turned towards his side (side of the S.O. Avinash Mishra) and when they found themselves surrounded, they fired upon them/police with an intent to kill. The police team challenged the miscreants and thereafter the miscreants having left the scooter on rough land, on the side of the road, made fires upon the police personnel. Thereafter the police challenged them that they were surrounded by the police and that they should throw their arms and surrender. Several round of fires were made by the police personnel in their defence in which one of the miscreants (unknown) died on the spot and the other succeeded in fleeing away taking benefit of cover of darkness. He was given chase by S.I., Mahesh Chauhan, S.O. Nauchandi and Constable 583 Harendra but could not be apprehended. The scooter was lying there which was looted from the area of P.S., Lal Kurti. The dead body of the unknown miscreant, who was having ammunition near his right hand and empty cartridges as well as looted scooter, were lying on the spot. In this encounter, the empty cartridges used by the police personnel of 38 bore and two empty cartridges fired by the Inspector in-charge P.S. Lal Kurti and by Station in-charge Nauchandi of 38 bore and empty cartridges fired by S.S.I., Sanjay Sirohi of 38 bore and two empty cartridges of 38 bore fired by S.I. Mahesh Chauhan had been brought by him (Avinash Mishra),

which were deposited in sealed condition with specimen seal. No police personnel was injured in this encounter.

5. Thereafter on 22.12.1995, an F.I.R. was registered against the applicant, details of which are that a Writ Petition (Crl.) No. 93 of 1994 was filed before the Hon'ble Supreme Court of India by Smt. Munni Devi, wife of Om Prakash Maheshwari alleging therein that her son Gopal Maheshwari and his maternal uncle Suresh Chandra were illegally taken away in the morning on 25.2.1994 by U.P. Police from the house of Suresh Chandra of Mohalla, Jai Jairam, Kasganj and she apprehended fake encounter and liquidation of Gopal Maheshwari by police. The Hon'ble Supreme Court directed that the District and Sessions Judge, Meerut shall conduct an inquiry and submit his report within three months, which was submitted on 14.12.1995 before the Hon'ble Apex Court and gist of the said report was as follows. Gopal Maheshwari and Suresh Chandra were picked up by Meerut police (Avinash Mishra, applicant, the then S.O., P.S. Medical College, Meerut, Sanjay Sirohi, Chandra Pal Singh, Mahesh Singh, companion police officials) from the house of Suresh Chandra in Kasganj in the intervening night of 24/25.2.1994 and he was brought to Meerut. Suresh Chandra was locked in the room of first floor of P.S. Medical College, Meerut and Gopal Maheshwari was whisked away to an unknown destination but later on he was killed in the night of 26/27.2.1994 by the accused-applicant along with other named co-accused and some other persons in custody. A fake encounter was shown by local police in the case with a view to liquidate Gopal Maheshwari putting up a theory of looting a scooter by Gopal Maheshwari and subsequently encounter was fabricated by police in conspiracy with Krishnapal Singh, a private person. The identity of the deceased Gopal Maheshwari was known to the accused persons including applicant and deliberately they did not disclose it to the Prabhat Kumar Sharma (City Magistrate, Meerut), who prepared panchayatnama of the dead body and the dead body of the deceased was deliberately cremated as unclaimed. The Hon'ble Supreme Court vide order dated 15.12.1995 directed further investigation to be made in this matter by C.B.I., hence the case was registered under Sections 120B, 302, 201, 218 IPC against above named accused persons which includes applicant and regular case was registered and investigation was entrusted to Kishore Kumar, Deputy S.P., C.B.I., SIC-IV, New Delhi for investigation.

6. After investigation into this case, charge sheet was submitted on 6.12.2000 against the accused-applicant mentioning therein that deceased Gopal Maheshwari and Suresh Chandra were picked up by Meerut Police along with accused-applicant and other co-accused from the house of Suresh Chandra in Kasganj in the intervening night of 25.2.1994 and were brought to Meerut. Suresh Chandra was locked up in a room on the first floor of the P.S. while the deceased Gopal Maheshwari was taken away to an unknown destination but later on he was killed in the intervening night of 26/27.2.1994 by applicant and other co-accused, while he was in custody. A fake encounter was shown by the applicant in order to liquidate the deceased putting up a theory of looting of a scooter by the deceased and subsequently encounter was fabricated by police in conspiracy with co-accused Krishnapal Singh. The identity of the deceased was known to the applicant and his teammates

but they concealed the same and did not disclose it to Prabhat Kumar Sharma, Additional City Magistrate, Meerut who prepared panchayatnama and cremated the dead body as unclaimed. Thereafter the Apex Court passed order dated 15.12.1995 directing C.B.I. to investigate the matter. It was further found in the investigation that Om Prakash Maheshwari was living with his family in his house at 33 Hari Nagar in Meerut in February 1994, who was a broker in Sarrafa market and his son Gopal Maheshwari (deceased) was also working with him and was a Meena Artisan. The deceased some time in January, 1994 reached Kasganj, District Etah and started living and working there with his maternal uncle Suresh Chandra due to constant harassment by Meerut Police to involve him in a cases falsely. It also emerged in the investigation that applicant along with other co-accused named above entered into a criminal conspiracy during the period 1994 in Meerut to eliminate the deceased by making a fake police encounter at Meerut on 26.2.1994 and causing disappearance of evidence to cover up the theory of fake encounter. In pursuance of the said conspiracy, the accused applicant along with co-accused fabricated the theory of police encounter that constable Lalit Kumar of P.S. Medical College, while he was on patrol duty, died in a road accident on 11.2.1994 and his service rifle went missing with regard to which a case crime no. 63 of 1994, under Section 279, 304-A, 427, 379 IPC was registered at P.S. Medical College on 12.2.1994 against unknown. Accused applicant Avinash Mishra was the I.O. of the said case. An anonymous letter was received disclosing availability of the aforesaid missing service rifle in the house of Suresh Chandra of Kasganj, which was endorsed by Sri Shiv Sagar Singh, C.O. Civil Lines, Meerut on 21.2.1994 to the accused-applicant to enquire and report. The accused-applicant and other co-accused left the Police Station, Medical College vide G.D. entry no. 49 at 8:30 pm on 24.2.1994 and reached Kasganj from Meerut by Maruti Car No. dDQ 8590 at about 3:15 am on 25.2.1994 for investigation of the aforesaid case for recovery of the missing service rifle. The accused applicant and other teammates took assistance of S.I. Bahadur Ali, Constables Ramesh Chandra and Shiv Shankar Mishra of P.S. Kasganj. Thereafter the applicant and other teammates reached house of Suresh Chandra (maternal uncle of the deceased) in Mohalla Jaijai Ram, Kasganj for recovery of the said missing rifle. The search of his house was made but nothing was recovered. The applicant and co-accused picked up Suresh Chandra and deceased Gopal Maheshwari (as he were already available there) under the garb of investigation/interrogation. The applicant along with Suresh Chandra and Gopal Maheshwari, SI Bahadur Ali and two constables Ramesh Chandra and Shiv Shankar Mishra came back to the P.S. Kasganj, there S.I. Bahadur Ali took accused-applicant to C.O. ML Ghai. The applicant informed M.L. Ghai that he was taking two persons namely, Suresh Chandra and deceased Gopal Maheshwari for the purposes of interrogation. S.I. Bahadur Ali also informed this fact to Govind Singh, S.O. P.S. Kasganj that the accused-applicant had taken away the aforesaid two persons in custody. The S.I. Bahadur Ali and two other Constables Ramesh Chandra and Shiv Shankar Mishra on seeing the photograph of Gopal Maheshwari (deceased) confirmed that the said deceased was picked up by the applicant along with other co-accused from the house of Suresh Chandra, Mohalla Jaijai Ram, Kasganj in the early morning of

25.2.1994. Thereafter applicant and other co-accused returned to P.S. Medical College, Meerut by the said Maruti car. Suresh Chandra was locked in a room of the first floor of P.S. Medical College, Meerut and deceased Gopal Maheshwari was taken away to an unknown destination and later on Suresh Chandra was released on 26/27.2.1994. Further it is revealed in investigation that accused Krishnapal Singh took Bajaj scooter bearing no. DL 3 SC 0326 from Manoj kumar Mishra at about 9:30 pm on 26.2.1994, whereby he was going to meet his friend Harendra Pal Singh in Meerut for taking some money from him as Krishnapal Singh was doing business of supply of Video Cassetes to various shopkeepers including the Manoj Kumar Mishra. On way to Shashtrinagar, Meerut, he slowed down his scooter due to speed beaker on Mall Road near supply depot at about 10:30 pm on 26.2.1994 and it was then that two miscreants, one having country made pistol, snatched his scooter at pistol point and then both ran away towards commissioner Chauraha. The investigation further discloses that accused- Om Pal Singh along with Sanjay Sirohi reached the place where scooter was looted, immediately by police jeep URI No. 7794. Accused Krishnapal Singh reported accused Om Pal Singh and others about the incident of loot then and there. Krishnapal Singh also pointed out towards the scooter which was being taken away by two miscreants towards commissioner Chauraha, The accused Om Pal Singh directed Krishnapal Singh for lodging a case of loot of scooter at P.S. Lalkurti, Meerut, which was lodged as crime no. 64 of 1994, under Section 392 IPC, against two unknown persons. Further it has come in the investigation that accused- Inspector Om Pal Singh flashed the message on R.T. Set about the incident of loot and chased miscreants along with Sanjay Sirohi and others by police vehicle. Two miscreants along with looted scooter were fleeing towards commissioner chauraha. The accused Om Pal Singh and Sanjay Sirohi were armed with service revolvers. Two miscreants reached Samrat Palace under P.S. Medical College, in open field where scooter skidded and fell. On receipt of the message on R.T. Set, accused Avinash Mishra along with accused Mahesh Kumar Singh, accused Chandra Pal Singh and others and also accused Shyam Lal Kashyap reached Samrat Palace. The accused-applicant along with other accused were armed with service revolvers. The accused inspector Om Pal Singh also chased the miscreants and reached Samrat Palace. Two miscreants started firing upon the police. Finding no way, the aforesaid accused made 12 rounds of fire from their service revolvers and in this cross fire, one miscreant had killed, while other escaped. Out of 12 rounds, the accused Om Pal Singh fired one round, accused Mahesh Singh fired two rounds, while accused-applicant fired four rounds, accused Sanjay Sirohi fired four rounds and Shyam Lal Kashyap fired one round from their service revolvers. The miscreant (Gopal Maheshwari) was thus killed in police encounter, whereas the other miscreant managed to escape. Many other senior police officials also reached the spot on receipt of message of encounter.

7. The case crime no. 82 of 1994, under section 307, 412 IPC being crime no. 83 of 1994, under Sections 25 Arms Act was registered on 26.2.1994 against two unknown at P.S. Medical College on a written report of applicant and investigation was taken up by Ramker Singh, Inspector Civil Lines, Meerut. Further it has come in investigation that Sri Prabhat Kumar

Sharma, Additional City Magistrate conducted Panchayatnama on 26/27.2.1994 of the deceased as an unidentified person of 25 years of age and articles recovered from him were also noted, which are detailed in the said investigation report. Further it has come in investigation that unidentified deceased (Gopal Maheshwari) had received three injuries caused by bullets. Dr. Vinod Kumar Gupta, Reserve Duty Medical Officer, Medical College, Meerut conducted post-mortem report of the deceased as an unidentified man and recorded his cause of death to be shock and hemorrhage due to injuries sustained and also recovered three bullets from the body of the deceased and thereafter the body of the deceased was cremated as unidentified/unclaimed. The accused Om Pal Singh mentioned fact of encounter in G.D. No. 4, dated 27.2.1994 at P.S. Lal Kurti and accused Shyam Lal Kashyap recorded the said fact in G.D. of P.S. Nauchandi at serial no. 36 of 27.2.1994. The accused applicant sealed 12 empties fired by the accused persons and prepared its recovery memo dated 26.2.1994. Subsequently, looted scooter was received back by the accused Krishnapal Singh, who identified the dead miscreant as the same person on the spot, who was one of the two scooter snatchers. Subsequently, the investigation of crime no. 82 and 83/1994, under Section 307/412 and 25-A Arms Act were taken by Sri Raghunath Shukla, Inspector,C.B.C.I.D., Meerut, under the order of Government of U.P. and he submitted final report no. 47, dated 21.12.1995, in the court of ACJM-VI, Meerut recommending closure of the both the said crime numbers and got registered a case under Section 302, 342, 346, 347, 364, 216, 217, 182, 201, 323, 193, 197, 198, 203, 211 and 120B IPC against the accused applicant and others for killing the deceased Gopal Maheshwari in a fake encounter at P.S., Medical College. With a view to proving false presence of the deceased within District Meerut, accused Pratap Singh got registered crime no. 49 of 1994, under section 504, 506 IPC, P.S. Bhasuna, District Meerut on 25.2.1994 against deceased Gopal Maheshari and his brother in pursuance to well planned conspiracy. Further more accused persons managed the surrender application in the name of Gopal Maheshwari in the court of ACJM-4, Meerut on 25.2.1994 in some case falsely. It was also motivated attempt to prove the physical presence of deceased Gopal Maheshwari in Meerut on 25.2.1994. During investigation by C.B.I., the theory of police encounter was found to be absolutely false and concocted by the accused persons and so was the case of surrender application under Section 504 and 506 IPC as mentioned above. Investigation also discloses that on 25.2.1994, Vishnu Kumar sent a telegram to the Hon'ble Chief Justice of India, New Delhi mentioning that Suresh Chandra and Gopal Maheshwari (deceased) had been brought to Meerut, at about 4:00 am on 25.2.1994 from Kasganj for killing them in a fake encounter. Another telegram was also sent to S.S.P., Meerut by Rakesh on 25.2.1994 to the effect that Meerut Police had brought Gopal Maheshwari from Kashganj for fake encounter. Further investigation revealed that Gopal Maheshwari (deceased) was known from before to the accused-applicant and other co-accused, who got his body cremated as unidentified with ulterior motive. Further there was found no speed beaker on the Mall Road on 26.2.1994. Further it has come in investigation that accompanying other police men were not associated with the accused persons at the time of encounter and that the accused-applicant,

co-accused Sanjay Sirohi, Mahesh Singh and Chandra Pal Singh kidnapped the deceased Gopal Maheshwari from Kasganj on 25.2.1994, hence they committed offence under Section 364 IPC and thereafter accused-applicant, Sanjay Sirohi, Mahesh Singh, Chandra Pal Sing, Om Pal Singh, Shyam Lal Kashyap committed his murder on 26.2.1994 and caused disappearance of evidence and fabricated a false police encounter case in conspiracy with co-accused Krishnapal Singh and thus they committed offence under Section 120-B IPC read with Section 302, 201, 220 IPC and substantive offences thereof. Accused-Pratap Singh lodged false crime no. 49 of 1994, under Section 504 and 506 IPC at P.S. Bahsuma, Meerut on 24.2.1994 against deceased Gopal Maheshwari and his brother, whereas deceased was in illegal custody of the aforesaid accused and thus he has committed an offence under Section 201 IPC. Further it is mentioned in the charge sheet that Government of U.P. was requested on 5.4.2019 for according sanction for prosecution against aforesaid accused persons but the same was still awaited. The officers of the C.B.I. of the level of D.S.P., S.P. and D.I.G. pursued matter at various levels including Chief Secretary and many reminders were also issued to the Government and ultimately court was pleased to issue direction to the State Government on 12.7.2001 through Chief Secretary to expedite taking decision to accord sanction for prosecution within 60 days. Government did not respond and then the court issued reminder on 8.11.2001 to the Chief Secretary of U.P. for compliance of the order dated 12.7.2001 of the court. In spite of directions of the court, sanction had yet not been issued by the State Government and prayer was made that cognizance of the offences may be taken against accused persons and they be summoned and be put to trial according to law.

8. The submission made by the learned counsel for the applicant is that admittedly charge sheet was filed on 6.12.2001 awaiting sanction from the State Government, thereafter the case was numbered as 1419 of 2001 in the court of Special Chief Judicial Magistrate (CBI, Dehradun) and applicant was summoned vide order dated 13.8.2002. Prior to the order dated 13.8.2002, the State Government vide its order dated 24.7.2002 refused to grant sanction for prosecution of the applicant and copy thereof was forwarded to DIG (CBI) SIC-IV New Delhi, for appropriate action at their end, which is annexed at annexure- 5 but for the reasons best known to the prosecuting agency despite the official communication of the said order of the State Government dated 24.7.2002 refusing the grant of sanction, the same was never placed before Special Chief Judicial Magistrate (CBI), Dehradun, who has summoned the applicant vide order dated 13.8.2002. The applicant was also not informed about the said order regarding refusing of sanction. Therefore left with no option, the applicant challenged the order dated 13.8.2002 passed in case no. 1419 of 2001 by the Special Chief Judicial Magistrate, CBI, in Crl. Revision No. 94 of 2002 before Additional Sessions Judge/FTC- First Dehradun, stating therein that the applicant could not have been prosecuted without proper sanction. Vide judgment and order dated 17.9.2003, the revisional court allowed the revision and set aside the order dated 13.8.2002 of Special Chief Judicial Magistrate, CBI, Dehradun. Further it is argued that refusal of sanction was deliberately concealed by the prosecuting agency, both at the time of passing

summoning order dated 13.8.2002 and at the time of arguments in criminal revision no. 94 of 2002. The revisional court while allowing the revision observed that in case the sanction for prosecution by the State Government is granted in future, the matter would again revive and thereafter the matter was consigned. The prosecuting agency thereafter clandestinely pursued the matter at the State level and concealed the facts that previously after examining the entire matter, State of U.P. vide order dated 24.7.2002 had refused the sanction to prosecute the applicant and that the summoning order was set aside. It is further submitted that it is apparent that the State thereafter without even going through the record of the case, vide order dated 15.7.2005 accorded sanction for prosecution of the applicant, which is annexure-7 to the application. Immediately thereafter an application was moved by the learned counsel for the C.B.I. before J.M., C.B.I., Dehradun to reopen the matter in the light of subsequent sanction order dated 15.7.2005. The learned Judicial Magistrate, C.B.I., thereafter on the said application, directed that the record be sent to the competent court having jurisdiction in the light of order passed by Uttranchal High Court after creation of new State of Uttaranchal, true copy of the order dated 13.9.2005 is annexure-8 to the application. Thereafter the matter was sent to the court of C.J.M., CBI, Ghaziabad who after going through the record took cognizance and summoned the accused vide order dated 26.4.2006, which is annexed at annexure-9. The said order is bad in law as the same is based on an order which has been obtained by concealment of material facts. No fresh reason have been assigned by the State while deviating from its earlier order dated 24.7.2002. The applicant is a Government servant and due to false implication, his entire career is at stake and he got the knowledge of the summoning order dated 26.4.2006 on 16.6.2006 and the same is nothing but an abuse of process of court therefore the same needs to be quashed.

9. Learned counsel for the applicant has placed reliance upon ***State of Himachal Pradesh, 2010 (14) SCC 527***, in which Hon'ble Apex Court has dealt with power of the Government to review its order granting or refusing sanction to prosecute. In this case, respondent was said to have been caught red-handed accepting bribe from the complainant; upon completion of the investigation, vigilance Department sought sanction under Section 19 from Government to prosecute respondent; Principal Secretary had found no justification in granting sanction to prosecute the respondent and hence the same was refused; thereafter the Vigilance Department took up the matter again with Principal Secretary, Health for grant of sanction; Competent Authority reconsidered the matter and granted the sanction to prosecute the respondent; no fresh material was available for further consideration; it was held that sanction to prosecute public servant may be granted only where fresh materials have been collected by investigating agency subsequent to earlier order and matter is reconsidered by sanctioning authority in the light of fresh materials; power of sanctioning authority, being not of a continuing character, could have been exercised only once on the same materials.

10. Learned counsel for the applicant has placed reliance upon ***State of Punjab and Anr. Vs. Mohammed Iqbal Bhatti, 2009 (67) ACC 350***, in which matter dealt by the Apex Court was whether the State has any power to review the order; it was

held that in the event it appears from the order and record that even if a valid order is not authenticated in terms of article 166 (3) of the Constitution of India, the same would not be vitiated in law; failure to authenticate an executive order is not fatal as the said order is directory and not mandatory, hence no interference was warranted and accordingly, the appeal was dismissed. Paragraph nos. 5 and 6 of the said judgment are quoted hereinbelow:-

5. The respondent is a public servant. The Governor of the State of Punjab is his appointing authority. He is, therefore, not removable from his office save by and with the sanction of the Government and in that view of the matter if he is accused in any offence alleged to have been committed by him while acting or purporting to act in discharging of his official duty, grant of prior sanction is imperative in character in terms of Section 197 of the Code of Criminal Procedure, 1973. The power of the State, as is well known, is performed by an executive authority authorized in this behalf in terms of the Rules of Executive Business framed under Article 166 of the Constitution of India insofar as such a power has to be exercised in terms of Article 162 thereof. Once a sanction is refused to be granted, no appeal lies thereagainst.

11. Learned counsel for the applicant has placed reliance upon ***Suresh Kumar Bhikamchand Jain Vs. Pandey Ajay Bhushan and others, 1998 CRI. L. J. 1242***, in which process was issued by the Magistrate for appearance of the accused on being satisfied that there was ground for proceeding; plea by the accused taken before Magistrate was that offence was committed by him in discharge of official duty and that court had no power to take cognizance in absence of previous sanction of government; it was held that accused can produce relevant materials to establish necessary ingredients for invoking section 197(1) Cr.P.C.

12. Learned counsel for the applicant has placed reliance upon ***State of Orissa & Others Vs. Ganesh Chandra Jew, 2004, AIR SCW 1296***, in which it has been held by Hon'ble Apex Court that the expression 'no court shall take cognizance of such offence except with previous sanction' makes protection mandatory and bars the very cognizance of complaint'. Further it is held that the expression 'any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty'. In the said expression, the expression 'official duty' implies that the act or omission must have been done by public officer in course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty. Further it is held that it has been widened further by extending protection to even those acts or omissions which are done in proposed exercise of official duty. That is under colour of office, Official duty, therefore implies that the act or omission must have been done by a public servant in course of his service and such act or omission must have been performed as part of the duty which further must have been official in nature. The section has thus to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But

once any act or omission has been found to have been committed by a public servant in discharge of his official duty, then it must be given liberal and vide construction so far its official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the section has to be construed narrowly and in a restricted manner but once it is established that act or omission was done by public servant while discharging his duty then the scope of its being official should be construed so as to advance objective of the section in favour of the public servant.

13. Learned counsel for the applicant has placed reliance upon ***State of Maharashtra Vs. Dr. Budhikota Subbard, (1993) 3 SCC 339***, in which it is held by Hon'ble Apex Court that for protection under Section 197 Cr.P.C., the offence must have been committed 'while acting or purporting to act in discharge of his official duty'; further the meaning of official duty has been referred as (1) act or omission must have been done by public servant in course of his service and (2), it should have been done in discharge of his duty.

14. Learned counsel for the applicant has placed reliance upon ***State through C.B.I. Vs. B.L. Verma & another, (1997) 10 SCC 772***. In this case, it is held by the Apex Court that provision of Section 197 Cr.P.C. is mandatory, hence where the actions alleged against public servant to be constituting offences had been done in purported discharge of his duties, even though amounting to abuse of power, it was held that the trial court could not, in absence of sanction under Section 197 Cr.P.C. take cognizance of the said offences and therefore it was held that High Court had rightly directed the dropping of the proceedings, however, it was further held that such an order of the High Court did not have the effect of barring grant of Section subsequently and activating the prosecution thereafter.

15. Learned counsel for the applicant has placed reliance upon ***R.Balakrishna Pillai Vs. state of Kerala & another, (1996) I SCC 478***. In this case, it is held that for extending protection under Section 197 Cr.P.C., it has to be assessed as to whether the act complained of had a direct nexus or relation with the official duties of a public servant and that will depend on facts of each case. It was further held that where the act is directly and reasonably connected with official duty as in the present case the act alleged was directly and reasonably connected with the official duty of a Minister, therefore, it attracted protection under Section 197(1) Cr.P.C. and it is further held that protection under Section 197(1) Cr.P.C. extends to public servant even if the public servant sought to be prosecuted has ceased to be a public servant on the date of taking cognizance of the offence.

16. Learned counsel for the applicant has placed reliance upon **Amrik Singh Vs. State of Pepsu, AIR 1955 Supreme Court 309**. Paragraph no. 11 of the said judgment is as follows:-

11. .....The result then is that whether sanction is necessary to prosecute a public servant on a charge of criminal misappropriation, will depend on whether the acts complained of hinge on his duties as a pubic servant. If they do, then sanction is requisite. But if they are unconnected with such duties, then no sanction is necessary.

17. Learned counsel for the applicant has placed reliance upon ***Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, (1997) 7 SCC 622***. In this case, it is held

that sanction for prosecution requires to be a valid sanction which involves independent application of mind to the facts of the case as also material and evidence collected during investigation by the Authority competent to grant sanction. The sanction issued by an Authority on the directions of the High Court is held to be invalid because there was no independent application of mind by the said authority. The High Court's direction had taken away discretion of the Authority not to grant sanction and it was left with no choice but to mechanically accord sanction in obedience of the mandamus issued by the High Court.

18. Learned counsel for the applicant has placed reliance upon ***R.S. Nayak Vs. A.R. Antulay, 1984 SCC (Cri) 172***. In this case it is held that MLA is not a public servant. It is further held that accused must continue to be a public servant on the date of taking cognizance of the offence and not on the date of commission of the offence which are per-conditions for granting sanction. It is further held that where a accused holds a number of public offices, competent authority to accord sanction would be the one, competent to remove him from office which he is alleged to have misused and abused with corrupt motive. The removing authority has to apply its mind on the question of sanction considering the allegation regarding corrupt use of the official power.

19. From the side of C.B.I., counter affidavit has been filed in which it is stated that case was registered on 22.12.1995 at C.B.I./SIC-IV, New Delhi in pursuance of the order of Apex court dated 15.12.1995 in Writ Petition (Crl.) No. 93 of 1994 (Smt. Muni Devi Vs. State of U.P.) against S.L. Kashyap the then Station Officer, P.S. Nauchandi, Meerut and other co-accused which includes the accused applicant under Section 120-B read with Section 302, 364, 201 and 220 IPC and subsequently investigation was entrusted to C.B.I/S.I.C.-IV, Lucknow on 27.12.1995. The petitioner Munni Devi was mother of the deceased Gopal Maheshwari, who stated that her brother Suresh Chandra and her son Gopal Maheshwari (deceased) were illegally taken away on the morning of 24.2.1994 by police personnel subsequently in the night of 26/27.2.1994 deceased Gopal Maheshwari was killed in fake encounter.

20. In response to the averments made in the affidavit from the side of applicant, it is submitted that in course of investigation, sufficient evidence was gathered to prosecute the applicant along with other co-accused. S.P.'s report dated 19.3.1999 was sent to Government of U.P. requesting to accord sanction for prosecution and for departmental action. Deepti Vilas, Secretary, Government of U.P. vide letter dated 24.7.2002 intimated C.B.I. the decision of the State Government regarding sanction for prosecution against accused officers including the accused-applicant, photo copy of the said letter is annexed at annexure CA-1 to the counter affidavit. C.B.I. filed charge sheet on 7.12.2001 against the accused-applicant and other co-accused in the court of C.J.M., without sanction for prosecution and the trial court took cognizance on 17.1.2002. On 16.7.2004, the same court passed an order that in absence of sanction for prosecution, the proceedings of the case were closed and the same could be resumed if the sanction for prosecution was accorded. Subsequently, the sanction of prosecution against the accused persons was granted under Section 197 Cr.P.C. by the State Government vide order dated 15.7.2005

which is annexed at annexure CA-2. It is further mentioned that the trial has remained held up for last five years and that it is imperative in the interest of justice that the stay order dated 21.6.2006 be vacated so that the trial may proceed.

21. Reliance has been placed by C.B.I. upon ***Devendra Pratap Singh Vs. State of Bihar and Anr., AIR SC 1671***, in which a police officer (S.H.O) was alleged to have committed offences of hurt, theft and criminal intimidation and it was held that the said offences did not have any nexus or relation with discharge of his official duties as Government officers, hence sanction was not necessary.

22. During oral submissions made by the learned counsel for the applicant much emphasis was laid by him that when in earlier vide order dated 24.7.2002, the sanction to prosecute the applicant was not given by the Government then without any fresh material, subsequently vide order dated 15.7.2005 the prosecution sanction could have been given by the State Government as there does not lie any power with Sate Government to review its order and in this regard the pertinent ruling which he has relied is a case of State of Punjab Vs. Bhatti (supra).

23. In this regard, I have gone through both the orders i.e. order dated 24.7.2002, whereby it was conceded by the Government of U.P. that sanction does not require to be accorded and only departmental proceedings were held against the applicant and other co-accused in which it was mentioned that with respect to according sanction, the Government considered the matter and it was found that deceased had died in police encounter in the intervening night of 26/27.2.1994. According to local police, in the night of 26.2.1994 at about 10:30 pm, on Mall Road two unknown persons had looted a scooter of one Krishnapal Singh on the basis of which case of loot was registered at P.S. Lalkurti, Meerut and soon after receiving this information, the police party had reached the spot and at the instance of Krishnapal Singh, chase was given to the miscreants. It is further mentioned that the police of P.S. Medical College, District Meerut had an encounter with miscreants in which police had made firing in their defence and in the same, one miscreant had died on the spot which was found to be deceased Gopal Maheshwari, while the other miscreants had fled from the spot. It is further mentioned in the said order that C.B.I. had concluded that the deceased Gopal Maheshwari was picked up from house in Kasganj in the intervening night of 24/25.2.1994 and that he was kept illegally in police custody till 26.2.1994 and in the intervening night of 26/27.2.1994, he was murdered showing it to be a false encounter, while as per the facts provided from the side of CBI, from the deceased Gopal Maheshwari and other co-accused ticket no. H-27 & H-28 were recovered of Nandan Cinema. Both these tickets were of 26.2.1994 of the evening 6 to 9 pm show by which CBI had concluded that the deceased Gopal Maheshwari was arrested by police of Kasganj in the intervening night of 24/25.2.1994 and after keeping him in illegal custody, he was eliminated in fake encounter in the intervening night of 26/27.2.1994, the said version of the C.B.I. becomes doubtful and hence it was held that there was no justification to grant grant prosecution sanction. In subsequent order dated 15.7.2005, it was recorded by the Government that the opinion has come on record that Gopal Maheshwari (deceased) resident of 33 Harinagar, P.S. Bramhpuri,

Meerut and Suresh Chandra resident of Mohalla Jaijairam, P.S. Kotwali Kasganj, both were caught in the intervening night of 24/25.2.1994 by the accused-applicant along with other co-accused and were detained on the first floor of the Police Station, Medical College, Meerut and thereafter the applicant and the other co-accused had eliminated him in the intervening night of 26/27.2.1994 showing it to be a fake encounter, while it was shown that deceased and Krishnapal Singh were fleeing after looting scooter from Pratap Singh, apart from that a panchayatnama was also prepared by the City Magistrate without identification of the dead body and his body was also cremated. With respect to causing death of the deceased Gopal Maheshwari in fake encounter on 26.2.1994, case crime no. 82 of 1994 was registered at P.S., Meerut, under Sections 307 and 412 IPC and also under crime no. 83 of 1994, under Section 25 of Arms Act, in which the Hon'ble Supreme Court had passed order for investigation on 15.12.1995 and under the order of Apex Court, investigation was handed over to C.B.I. and the C.B.I. after extensive investigation has found prima facie that a case under Section 302/201/218 read with Section 120B IPC is found to be made out against the accused applicant and other co-accused. Further it is recorded that after having gone through the entire evidence, which has been presented before it and after careful consideration of the same, Government is convinced that the applicant along with other accused be prosecuted for the said offence and Hon'ble Governor has been pleased to accord the prosecution sanction. It appears from the perusal of both the orders that in the earlier order material, that there was an order of Supreme Court passed on the writ petition filed by the mother of the deceased for investigation to be held which was handed over to C.B.I., was not taken into consideration as no such mention has been found in the said order, hence it is found that additional material was placed before Government for considering as to whether prosecution sanction be accorded or not and therefore at the subsequent stage, when the same has been accorded on the basis of additional material, it cannot be said that any violation of law has been made by the Government by according the said sanction and therefore above mentioned law which has been cited by the learned counsel for the applicant would not help at all. Further I find that facts of this case are very clear now as have been mentioned above that the accused-applicant is found involved in taking away the deceased and thereafter a fake encounter was made in which he was eliminated and that when the inquest was being conducted by the said City Magistrate, the same was allowed to be done without his identity being disclosed though it has come in evidence that accused-applicant knew full well the identity of the said deceased and thereafter his cremation was also allowed to take place without disclosing his identity, which shows that there is plenty of inculpatory evidence against the applicant.

24. As regards prosecution sanction, much argument was also made that protection under Section 197 Cr.P.C. should be extended to the accused, to which learned counsel for the C.B.I. has relied upon **Devendra Pratap Singh Vs. State of Bihar (supra)** in which it is clearly held that when there is no nexus of the act committed by the accused with his official duty, protection of section 197 Cr.P.C. would not be given. Several citations which have been relied upon by the learned counsel for the applicant

himself clearly speak that there should be nexus of the act allegedly done by the accused with his official duty and if it is not the case then no protection can be granted to the accused. In the present case, it is found that it cannot be held to fall in official duty of the applicant to eliminate the deceased, if he had committed any wrong then judicial process ought to have been resorted to by lodging F.I.R. under the appropriate sections, but this Court finds that question of granting protection under Section 197 Cr.P.C. does not arise, however, it is irrelevant because already prosecution sanction has been granted in this case by the Government. It has also to be made clear here that investigation in this case was handed over to C.B.I. pursuant to the order of Hon'ble Suprme Court therefore Hon'ble Apex Court was fully seized with the matter and a query was made from the learned counsel for the applicant as to why he did not approach the Hon'ble Apex Court when he was feeling aggrieved that this sanction has been granted subsequently by reviewing earlier order. If there was any such grievance to him he could have approached, the Hon'ble Apex Court and mentioned in Writ Petition (Crl.) No. 93 of 1994, which has been disposed of also vide order dated 25.7.2005, in which Hon'ble Apex Court has passed following order:-

In view of the counter affidavit filed on behalf of the State informing this Court that the sanction has now been granted for prosecution of accused no. 1 to accused no. 6, no further orders are called for. The CRLMP stands disposed of.

25. It appears from the order of Hon'ble Apex Court as well that it has disposed of the matter when it found that sanction for prosecution has already been accorded, therefore, I find that no ground to allow this application and the same deserves to be rejected and accordingly, rejected.

26. Interim order stands vacated forthwith.

(2020)03-05ILR A1674
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.02.2020

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 Cr.P.C. No. 12953 of 2015

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

Counsel for the Applicant:
Sri Ronak Chaturvedi

Counsel for the Opposite Parties:
A.G.A., Sri Anand Priya Singh, Sri Ashok Kumar Mishra, Sri Nawal Kishore Deo, Sri Rakesh Chandra Tiwari

Criminal Law - Negotiable Instruments Act (26 of 1881) - Section 138 Proviso (c)- Section142-Cause of Action - *date of service of notice* - one of main ingredient - from which the date the cause of action arises - where the drawer of the cheque fails to make the payment - within 15 days - *of the receipt of the legal demand notice* - cause of action arises for prosecuting drawer for the offence punishable u/s 138 - complaint must be made within one month of the date on which the cause of action arises i.e. within one month of the date *of service of notice*

In summoning order Magistrate only recorded the date on which the alleged cheques were dishonoured i.e. 3rd July, 2014 & date of legal

notice i.e. 14th July, 2014, which was sent to the applicant - but not recorded *the date on which the legal notice has been served* - from which the date the cause of action would arise - Held - one of main ingredient i.e. *date of service of notice* - from which the date the cause of action arises is completely missing - summoning order quashed

Application allowed (E-5)

List of cases cited :

1.Jugesh Sehgal Vs Shamsher Singh Gogi (2009) 14 SCC 683

2.Yogendra Pratap Singh Vs Savitri Pandey & anr. (2014) 14 SCC 812

3.N. Harihara Krishnan Vs J. Thomas (2018) 13 SCC 663

4.D. Vinod Shivappa Vs Nanda Belliappa (2006) 6 SCC 456

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

1. Heard Sri Ronak Chaturvedi, learned counsel for the applicant, Mr. Anand Priya Singh, learned counsel for opposite party no.2 and Mr. Prashant Kumar, learned A.G.A. for the State assisted by Mr. P.K. Sahi, State Law Officer.

2. Learned counsel for the applicant, learned counsel for opposite party no.2 and the learned A.G.A. agree that the present application may be disposed of at this stage without calling for further affidavits in view of the order proposed to be passed today.

3. By means of this 482 Cr.P.C. application, the applicant has questioned order dated 16th September, 2014 summoning the applicant, order dated 21st March, 2015 issuing non-bailable warrant against him as well as the entire proceedings of the Complaint Case No. 1546 of 2014 (Om Construction Vs. M/s. Komal Construction), under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "N.I. Act"), Police Station-Obra, District-Sonbhadra, pending in the Court of .

4. The facts, as borne out from the complaint made by opposite party no.2 against the applicant on 13th August, 2014 under Section 138 N.I. Act in the Court of Additional Chief Judicial Magistrate, Sonebhadra, are as follows:

The company of applicant, in the name and style of "M/s. Komal Construction, under various work orders and tenders of Railaway and other departmnts, extensively undertakes various types of constructions such as pool construction, brick works etc. on huge basis and all the works and other arrangements are done by the applicant. Since the company got two work orders from M/s. Kalendi Raiwaly Construction (Engineering Ltd.) and for completion of the said work on time and on speed, which requires a lot of labor, resources, machines, etc. to speed up the work to complete on an adjusted basis. To fulfill all those works, the applicant needed to assign work to another person or firm and pay their expenses according to labor under which the applicant made a proposal to opposite party no. 2. to do the above work speedily and also assured that the applicant has more big tasks and his client talked him to complete the said work quickly and in lieu of this, the applicant requested opposite party no.2 for arranging machine, labor, capital and other expenses and also assured him to give work order of his company. Accepting the proposal, the applicant, opposite party no.2 agreed to work with

him. Opposite party no.2 requested the applicant that because there are two marriages in his house, he would arrange the machine, money and everything but he would reach on the spot rarely. Being busy in the said marriages, opposite party no.2 could hardly reach the spot but he had arranged machine, money and everything whichever was required as per his assurance. In that way opposite party no.2 spent lot of money and labor on trusting the applicant and the opposite party no.2 also got a written contract from the applicant and he had worked under those contracts. In this way, opposite party no.2 started working with the applicant under contracts given by the applicant and gave his machine, labor and money. After being free from marriages, when he came to the site of applicant, he came to know that the applicant had taken money and labor from other people like him and those people were very angry and they were threatening the applicant to return their money. When opposite party no.2 asked the applicant as to why he has not given their money, he told opposite party no.2 that in case he is interested in working with him, he may do the same, otherwise get away with his money. When opposite party no.2 asked the applicant to refund the expenditure incurred in aforesaid works taken by him, he started bothering him by promising to refund the same by tomorrow or day-after tomorrow. In spite of that, the applicant continued to lure him by showing him income tax return worth of 5-7 crores and a turnover of 50-60 crores. Ultimately after enormous pressure exerted by opposite party no.2, the applicant told him to make a statement of account of money whichever has been spend by him and at the end of February 2014, he accounted for about Rs. 15 crores on the applicant, which he has also admitted in the presence of other sharers of his company and some others. To refund the same, out of total amount of Rs. 15 crores, for paying Rs. 50 lacs, the applicant has given some cheques to opposite party no.2 and he has also assured the opposite party no.2 to refund all the money on different dates in future. When Cheque no. 002107 dated 15th June, 2014 for a sum of Rs. 12,00,000/-, Cheque no. 002108 dated 15th June, 2014 for a sum of Rs. 12,00,000/- and Cheque no. 002109 dated 15th June, 2014 for a sum of Rs. 12,00,000/- (i.e. total Rs. 36,00,000/-), which were given by the applicant, has been presented on 3rd July, 2014 by opposite party no.2 for encashment in Allahabad Bank, Branch-Obera, where account of opposite party no. 2 bearing Account No. 5018365077 is maintained, on the same day the same has been returned as dishonoured with a return memo showing "insufficient balance".

5. The said complaint supported by an affidavit has been registered as Complaint Case No. 1546 of 2014 (Om Construction Vs. M/s. Komal Construction), under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "N.I. Act"), Police Station-Obra, District-Sonbhadra. After recording statement of the complainant under Section 200 Cr.P.C, the court below has passed an order dated 16th September, 2014 and when the applicant could not appear before the court below, the court below has passed an order dated 21st March, 2015 issuing non-bailable warrant against the applicant. It is against these two orders that the present application under Section 482 Cr.P.C. has been filed.

6. On the matter being taken up, a Coordinate Bench of this Court passed following order:

"Heard learned counsel for the applicant and leaned AGA.

Learned counsel for the applicant has submitted that the complaint as well as the affidavits filed in support of the complaint is completely silent about any notice or its service upon the applicant as required under Section 138 of Negotiable Instruments Act, 1881.

Submissions made by learned counsel for the applicants, prima facie, appear to have substance and a prima facie case for grant of interim relief is made out.

Issue notice to opposite party no. 2 returnable within four weeks. He may file counter affidavit within the same period after receipt of notice. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

List this case after expiry of aforesaid period. Till the next date of listing no coercive steps shall be taken against the applicant only in Complaint Case No. 1546 of 2014, under Section 138 of N. I. Act, P.S. Obra, District Sonbhadra."

7. Learned counsel for the applicant submits that before summoning the applicant, the court below has not recorded statements of witnesses of opposite party no.2 except him, which is per se illegal. The applicant is the Director/Partner of M/s. Komal Construction. The said company is engaged in construction work. It is no doubt true that the applicant and the complainant were carrying on business transaction but the applicant has already re-paid some amount to the complainant. It is further submitted that in the complaint, the complainant/opposite party no.2 has only given the details of the cheques and the date of its dishonour. In the complaint, it is nowhere alleged that any legal notice was given by the complainant/opposite party no.2 through his advocate to the applicant nor anything has been said about the receipt of the same to the applicant, which are necessary and essential ingredients as per Section 138 N.I. Act. It is further submitted by the learned counsel for the applicant that Section 138 N.I. Act very clearly provides that the offence would be made out, if the payee or the holder in due course of the cheque, makes a demand for the payment of the said amount of money by giving a legal notice in writing, to the drawer of the cheque within 15 days of the receipt of the information received by him by the Bank qua the return of the cheque as unpaid. In the complaint, opposite party no.2. has only mentioned the date on which he has received information from the Bank and it has nowhere been mentioned as how he made a demand for the payment of the said amount of money. In absence of necessary and essential ingredients of the alleged offence, the complaint itself becomes void and the proceedings initiated on such a complaint is not at all maintainable. As such the same are liable to be quashed by this Court. Learned counsel for the applicant further submits that even the statement of opposite party no.2 which has been given on an affidavit, does not depict the allegations of sending notice or making a demand from the applicant. The statement like the complaint is absolutely silent about the factum of sending legal notice and failure on the part of the applicant to repay the amount, which is necessary ingredient for constituting an offence under Section 138 N.I. Act. The court below only on the basis of such complaint and statement of the complainant has committed error in passing the summoning order against applicant, which is also illegal. It is further submitted that in the impugned order passed by the court below dated 16th September, 2014, it has been mentioned

that cheques were dishonoured on 3rd July, 2014 and the legal notice, which was sent on 14th July, 2014. However, the said legal notice depicts that the said notice is a registered legal notice sent by the opposite party no.-2 through his advocate, namely, Ravindra Nath Pandey on 14th July, 2014. Even otherwise, the purported notice is vague and does not clearly depict the exact amount, which the applicant had to pay to the complainant. Neither in the complaint nor in the statement of the complainant recorded under Section 200 Cr.P.C., it has been mentioned as to on what date, the said legal notice has been received by the applicant. It is next submitted that even assuming without admitting that any such notice has been sent on 14th July, 2014 by registered post then, it can be inferred that the same has been delivered as per the period mentioned under Section 27 of the General Clauses Act, which mentions a period of 30 days. It is thus, submitted that if 30 days are to be calculated from 14th July, 2014, then it can be said that the said notice was delivered on 13th August, 2014, which further gives 15 days time to the applicant to repay the amount. If this 15 days period is added to 13th August, 2014, then it would mean that the complaint could not have been filed before 28th August, 2014 but in the present case the opposite party no.2 has filed the complaint on 13th August, 2014, which makes the complaint premature because no complaint can be maintained against the drawer of a cheque before the expiry of 15 days from the date of receipt of the notice under Proviso (c) to Section 138 N.I. Act, because the drawer/accused cannot be said to have committed any offence until then nor there is any accrual of cause of action for filing complaint under Section 138 N.I. Act. Any complaint filed before the expiry of the said 15 days is non est. Hence no cognizance of an offence can be taken on the basis of such non est complaint. In support of his aforesaid submissions, learned counsel for the applicant has relied upon following judgments of the Apex Court:

i. **Jugesh Sehgal Vs. Shamsher Singh Gogi**, reported in (2009) 14 SCC 683;

ii. **Yogendra Pratap Singh Vs. Savitri Pandey & Another** reported in (2014) 14 SCC 812;

iii. **N. Harihara Krishnan Vs. J. Thomas** reported in (2018) 13 SCC 663.

8. Learned counsel for the applicants, therefore, submitted that the present criminal proceedings initiated against the applicant are an abuse of the process of the Court and law. On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicants that the proceedings of the above mentioned complaint case are liable to be quashed by this Court.

9. Per contra, Mr. Prashant Kumar, learned A.G.A. for the State and Mr. Anand Priya Singh, learned counsel for opposite party no.2 have opposed the submissions made by the learned counsel for the applicant by contending that there is no illegality or infirmity in the order of summoning of the applicant passed by the concerned Magistrate. Learned counsel for the State and the learned counsel for opposite party no.2, therefore, submits that the present application is liable to be dismissed.

10. I have considered the submissions made by the learned counsel for the applicants and have gone through the records of the present application.

11. Before expressing any opinion on the merits of the case set up by both the parties, it would be worthwhile to reproduce Sections 138, 139 & 142 of the Negotiable Instrument Act, which are quoted herein-below:

138. Dishonour of cheque for insufficiency, etc., of funds in the account. *-- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless--*

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

139. Presumption in favour of holder*.--It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.*

*"**142 Cognizance of offences.** -- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)--*

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) ***such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138: [Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]***

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

12. From the above, it is manifestly clear that a dishonour would constitute an offence only if the cheque is returned by the bank "unpaid' either because the amount of money standing to the credit of the drawer's account is insufficient to honour the cheque or that the amount exceeds the amount arranged to be paid from that account by an agreement with that bank. Now, for an offence under Section 138 NI Act, it is essential that the cheque must have been issued in discharge of legal debt

or liability by accused on an account maintained by him with a bank and on presentation of such cheque for encashment within its period of validity, the cheque must have been returned unpaid. The payee of the cheque must have issued legal notice of demand within 30 days from the receipt of the information by him from the bank regarding such dishonor and where the drawer of the cheque fails to make the payment within 15 days of the receipt of the aforesaid legal demand notice, cause of action under Section 138 NI Act arises.

13. From the Chapter XVII comprising Sections 138 to 142 of the Negotiable Instruments Act, which was introduced in statute by Act 66 of 1988, it is also apparently clear that the object underlying the provision contained in the said Chapter was aimed at inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business and day to day transactions by making dishonour of such instruments an offence. A negotiable instrument whether the same is in the form of a promissory note or a cheque is by its very nature a solemn document that carries with it not only a representation to the holder in due course of any such instrument but also a promise that the same shall be honoured for payment. To that end Section 139 of the Act raises a statutory presumption that the cheque is issued in discharge of a lawfully recoverable debt or other liability. This presumption is no doubt rebuttable at trial but there is no gain saying that the same favours the complainant and shifts the burden to the drawer of the instrument (in case the same is dishonoured) to prove that the instrument was without any lawful consideration. It is also noteworthy that Section 138 while making dishonour of a cheque an offence punishable with imprisonment and fine also provides for safeguards to protect drawers of such instruments where dishonour may take place for reasons other than those arising out of dishonest intentions. It envisages service of a notice upon the drawer of the instrument calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period.

14. Under Section 138 of the Act, where a cheque issued by the drawer in the discharge of any debt or any other liability is returned by the bank unpaid, because the amount standing to the credit of that account is insufficient to honour the cheque, the said person is deemed to have committed an offence. This is subject to proviso to Section 138 which provides that the cheque should have been presented to the bank within the period of six months from the date of which it is drawn or within the period of its validity, whichever is earlier. The payee must also make a demand for the payment of the said amount by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding the return of the cheque unpaid. If despite this demand, the drawer fails to make the payment within fifteen days of the receipt of the notice, a cause of action arises for prosecuting him for the offence punishable under Section 138 of the Act. Section 142 provides that the court shall take cognizance of an offence punishable under Section 138 of the Act upon receipt of a complaint in writing made by the payee or, as the case may be, the holder in due course of the cheque. Such complaint must be made within one month of the date on which the cause of action arises under

clause (c) of the proviso to Section 138. However, discretion is given to the court to take cognizance of the complaint even after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making the complaint within such period.

15. persons who purported to discharge their liability by issuing cheques without really intending to do so, which was demonstrated by the fact that there was no sufficient balance in the account to discharge the liability. Apart from civil liability, a criminal liability was imposed on such unscrupulous drawers of cheques. The prosecution, however, was made subject to certain conditions. With a view to avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer to make amendments, the proviso to Section 138 provides that after dis- honour of the cheque, the payee or the holder of the cheque in due course must give a written notice to the drawer to make good the payment. The drawer is given 15 days time from date of receipt of notice to make the payment, and only if he fails to make the payment he may be prosecuted. The object which the proviso seeks to achieve is quite obvious. It may be that on account of mistake of the bank, a cheque may be returned despite the fact that there is sufficient balance in the account from which the amount is to be paid. In such a case if the drawer of the cheque is prosecuted without notice, it would result in great in-justice and hardship to an honest drawer. One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amendments and pays the amount within the prescribed period. It is for this reason that clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfill their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons.

16. If a notice is issued and served upon the drawer of the cheque, no controversy arises. Similarly if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. This leaves us with the third situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere etc. If in each such case the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. There is good authority to support the

proposition that once the complainant, the payee of the cheque, issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non availability can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the legal notice which may be returned with an endorsement that the addressee is not available on the given address.

17. Section 142 of the NI Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the NI Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. Now, since the answer to question (i) is in the negative, this Court observes that the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of the answer to question (i). As this Court has already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the Court of sufficient cause.

18. In **Jugesh Sehgal (Supra)**, which has been relied upon by the learned counsel for the applicant, the Apex Court in paragraph-21 has observed as follows:

"21. Bearing in mind the above legal position, we are of the opinion that it was a fit case where the High Court, in exercise of its (2008) 3 SCC 574 jurisdiction under Section 482 of the Code, should have quashed the complaint under Section 138 of the Act."

19. In **Yogendra Pratap Singh (Supra)**, which has also been relied upon by the learned counsel for the applicant, in paragraph nos. 36 to 41, the Apex Court has observed as follows:

"36. A complaint filed before expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to disclose the cause of action in terms of clause (c) of the proviso to Section 138 and upon such complaint

which does not disclose the cause of action the Court is not competent to take cognizance. A conjoint reading of Section 138, which defines as to when and under what circumstances an offence can be said to have been committed, with Section 142(b) of the NI Act, that reiterates the position of the point of time when the cause of action has arisen, leaves no manner of doubt that no offence can be said to have been committed unless and until the period of 15 days, as prescribed under clause (c) of the proviso to Section 138, has, in fact, elapsed. Therefore, a Court is barred in law from taking cognizance of such complaint. It is not open to the Court to take cognizance of such a complaint merely because on the date of consideration or taking cognizance thereof a period of 15 days from the date on which the notice has been served on the drawer/accused has elapsed. We have no doubt that all the five essential features of Section 138 of the NI Act, as noted in the judgment of this Court in Kusum Ingots & Alloys Ltd.19 and which we have approved, must be satisfied for a complaint to be filed under Section 138. If the period prescribed in clause (c) of the proviso to Section 138 has not expired, there is no commission of an offence nor accrual of cause of action for filing of complaint under Section 138 of the NI Act.

37. We, therefore, do not approve the view taken by this Court in Narsingh Das Tapadia1 and so also the judgments of various High Courts following Narsingh Das Tapadia1 that if the complaint under Section 138 is filed before expiry of 15 days from the date on which notice has been served on the drawer/accused the same is premature and if on the date of taking cognizance a period of 15 days from the date of service of notice on the drawer/accused has expired, such complaint was legally maintainable and, hence, the same is overruled.

38. Rather, the view taken by this Court in Sarav Investment & Financial Consultancy2 wherein this Court held that service of notice in terms of Section 138 proviso (b) of the NI Act was a part of the cause of action for lodging the complaint and communication to the accused about the fact of dishonouring of the cheque and calling upon to pay the amount within 15 days was imperative in character, commends itself to us. As noticed by us earlier, no complaint can be maintained against the drawer of the cheque before the expiry of 15 days from the date of receipt of notice because the drawer/accused cannot be said to have committed any offence until then. We approve the decision of this Court in Sarav Investment & Financial Consultancy and also the judgments of the High Courts which have taken the view following this judgment that the complaint under Section 138 of the NI Act filed before the expiry of 15 days of service of notice could not be treated as a complaint in the eye of law and criminal proceedings initiated on such complaint are liable to be quashed.

39. Our answer to question (i) is, therefore, in the negative.

40. The other question is that if the answer to question (i) is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142(b) for the filing of such a complaint has expired.

41. Section 142 of the NI Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the NI Act can be

filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. Now, since our answer to question (i) is in the negative, we observe that the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to question (i). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the Court of sufficient cause. Question (ii) is answered accordingly."

20. In **N. Harihara Krishnan (Supra)**, which has also been relied upon by the learned counsel for the applicant, the Apex Court in paragraph nos. 26 and 27 has observed as follows:

"26. The scheme of the prosecution in punishing under Section 138 of THE ACT is different from the scheme of the CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are: (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that inspite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden

would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.

27. By the nature of the offence under Section 138 of the Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of THE ACT before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide " cause of action for prosecution". Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a Court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, the Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the Cr.P.C. should give way to the procedure prescribed under Section 142. Hence the opening of non-obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint."

21. In **D. Vinod Shivappa Versus Nanda Belliappa** reported in (2006) 6 SCC 456, specially in paragraph nos. 15 to 19, the Apex Court has observed as follows:

"15. We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the addressee was not available at the time when postman went for delivery of the letter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the Court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be pre- mature at the

stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure.

17. In (1999) 7 SCC 510 : K. Bhaskaran vs. Sankaran Vaidhyan Balan and another, the drawee had presented a cheque issued by the drawer but the same was dishonoured. A notice was sent by registered post but the same was returned with the endorsement that the addressee was found absent on 3rd , 4th and 5th February, 1993 and intimation was served on addressee's house on 6th February, 2003. Thereafter the postal article remained unclaimed till 15th February, 1993 and it was returned to the sender with a further endorsement "unclaimed". The complaint filed by the drawee was dismissed on the ground of territorial jurisdiction as also on the ground that since the notice had not been received by the drawer, there was no cause of action for filing the complaint. On appeal, the High Court reversed the order of acquittal. The appellant approached this Court by special leave. This Court held in favour of the respondent on the question of territorial jurisdiction. On the question of notice this Court considered the scheme of Section 138 of the Act by particular reference to clauses (b) and (c) of the proviso thereof. In view of the legislative scheme it was held, the failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice. It was clear that the "giving of notice" in the context was not the same as the receipt of notice. "Giving" was the process of which the "receipt" was the accomplishment. This Court then observed :

"If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that Court should not adopt in interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure."

18. This Court noticed the position well settled in law that the notice refused to be accepted by the drawer can be presumed to have been served on him. In that case the notice was returned as "unclaimed" and not as refused. The Court posed the question "Will there be any significant difference between the two so far as the presumption of service is concerned?" Their Lordships referred to Section 27 of the General Clauses Act and observed that the principle incorporated therein could profitably be imported in a case where the sender had despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee, unless he proves that it was not really served and that he was not responsible for such non-service. This Court dismissed the appeal preferred by the drawer holding that where the notice is returned by the addressee as unclaimed such date of return to the sender would be the commencing date in reckoning the period of 15 days contemplated in clause (c) to the proviso of Section 138 of the Act. This would be without prejudice to the right of the drawer of the cheque to show that he

had no knowledge that the notice was brought to his address. Since the appellant did not attempt to discharge the burden to rebut the aforesaid presumption, the appeal was dismissed by this Court. The aforesaid decision is significant for two reasons. Firstly it was held that the principle incorporated in Section 27 of the General Clauses Act would apply in a case where the sender despatched the notice by post with the correct address written on it, but that would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address.

19.....…

"Section 27 of the General Clauses Act deals with the presumption of service of a letter sent by post. The despatcher of a notice has, therefore, a right to insist upon and claim the benefit of such a presumption. But as the presumption is rebuttable one, he has two options before him. One is to concede to the stand of the sendee that as a matter of fact he did not receive the notice, and the other is to contest the sendee's stand and take the risk for proving that he in fact received the notice. It is open to the despatcher to adopt either of the options. If he opts the former, he can afford to take appropriate steps for the effective service of notice upon the addressee."

22. From the records, it is not disputed that neither in the complaint nor in the statement of the complainant recorded under Section 200 Cr.P.C., is it mentioned as to on which dates, he has demanded for refund of his money from the applicant, on which date he had presented the alleged cheques in the bank for encashment. The complainant has also not disclosed the date on which he had sent the legal notice to the applicant through his advocate and the date of service of notice. The complainant has also disclosed the date i.e. 3rd July, 2014 on which the dishonoured cheques along with return memo showing "insufficient balance" amount in the account of the applicant, has been received.

23. From the aforesaid, it is not clear that one of main ingredient i.e. date of service of notice from which the date the cause of action arises i.e. date of bank return memo as per the provisions of Section 138 N.I. Act is completely missing in the present case. As per Section 138 read with Section 142 N.I. Act and the above discussions and law laid down by the Apex Court, the period of complaint being filed from the date of service of notice i.e. within one month is also not complied in the present case.

24. In the impugned summoning order also the concerned Magistrate has only recorded the date on which the alleged cheques were dishonoured i.e. 3rd July, 2014 and the date of legal notice i.e. 14th July, 2014, which was sent to the applicant but he has not recorded the date on which the legal notice has been served from which the date the cause of action would arise.

25. In view of the provisions of Sections 138 read with Section 142 N.I. Act as well as the law laid down by the Apex Court on this subject, the main ingredients are not complied with by the complainant while filing such immature complaint, which is liable to be quashed.

26. Accordingly, the entire proceedings of the Complaint Case No. 1546 of 2014 (Om Construction Vs. M/s. Komal Construction), under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "N.I. Act"),

Police Station-Obra, District-Sonbhadra, are quashed. However, it shall be open for the complainant/opposite party no.2 to file a fresh complaint against the applicant in accordance with law.

27. The present application is, accordingly, **allowed**. There shall be no order as to costs.

(2020)03-05ILR A1688
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2020

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Application U/S 482 Cr.P.C. No. 13219 of 2018

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

Counsel for the Applicants:
Sri Nipun Singh, Sri Abhishek Singh

Counsel for the Opposite Parties:
A.G.A., Sri Rajeev Kumar, Sri Rajnikant Pandey

Criminal Law-Criminal Procedure Code (2 of 1974) - Section 468(2)(b) - Cognizance of offence - Bar to taking cognizance after lapse of the period of limitation - Offence u/S. 323 IPC punishable with imprisonment for a term not exceeding one year - Limitation period applicable for taking cognizance is one year in view of 468(2)(b) - Protest petition which was treated as complaint filed after expiry of about 10 years from the date of submission of final report - no explanation furnished by complainant for delay-summoning order quashed (Para 15 16)

Application allowed (E-5)

List of cases cited :

St. of Haryana Vs. Bhajan Lal, AIR 1992 SC 604

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Nipun Singh, learned counsel for the applicants , learned AGA for the State and Sri Rajeev Kumar, learned counsel for the opposite party no.2.

2. Present application under Section 482 Cr.P.C. has been filed for quashing the summoning order dated 20.2.2018 and bailable warrant dated 21.3.2018 issued by the Civil Judge (Senior Division)/Fast Track Court, Gautam Budh Nagar as well as the entire proceedings of Complaint Case No. 2946 of 2017 (Rajendra Kumar Vs. Charanjeet Singh and others), under Section 323 of IPC, P.S. Sector-58, Noida, District Gautam Budh Nagar.

3. Brief facts for consideration of present application are that applicant-1 is a Managing Director of a Company incorporated under the Companies Act, 1956 formerly known as GSC Tafan Glass Pvt. Ltd. now known as GSC Glass Ltd., having its head office at 5 and 7, Udyog Vihar, Greater Noida, District Gautam Budh Nagar, while the applicant-2 and 3 are the ex-manager and ex-supervisor respectively of the said company and have retired long ago. The informant-opposite party no.2 was working as a helper in cutting department of the company.

4. In respect of an incident, which is alleged to have occurred on 17.6.2001 at 8.30 AM, an application under Section 156 (3) Cr.P.C. was filed on 23.6.2001for lodging/registering the first information report under Section 323, 326 and 506 IPC and first information report was lodged against the applicants on 17.7.2001 at case crime no. 179 of 2001, under Sections 323,

326 and 506 IPC, P.S. Sector-58, Noida, District Gautam Budh Nagar.

5. After registration of the first information report, police of the concerned police station investigated the matter in terms of Chapter XII of Cr.P.C. and submitted a final report dated 10.10.2001. Against this final report, the opposite party no.2-informant filed a protest petition dated 11.4.2011 i.e. after about 10 years. Upon filing of the aforesaid protest petition, the Court below passed an order dated 23.9.2011 directing the Station House Officer of the police station Sector 58, Noida to conduct further investigation in the matter and conclude the same at the earliest. After the passing of the aforesaid order dated 23.9.2011, the opposite party no.2 filed criminal misc. writ petition no. 20290 of 2014 (Rajendra Singh Vs. State of U.P. and others), which was disposed of by this Court vide order dated 7.11.2014. The order dated 7.11.2014 is reproduced herein below:

"Heard learned counsel for the petitioner and learned A.G.A.

This petition has been filed by the petitioner with a prayer that suitable direction may be issued to the authority concerned for ensuring fair investigation of case crime no. 179 of 2001, u/s 323, 326, 506 IPC P.S. Sector 58 Noida District Gautam Budh Nagar.

From the perusal of the record it reveals that the petitioner is the first informant of the above mentioned case. In case the petitioner is having any grievance with regard to the investigation of the abovementioned case, the same may be raised before the SSP, Gautam Budh Nagar who shall look into the matter so that fair and expeditious further investigation of the abovementioned case may be ensured.

With the above direction this petition is finally disposed of."

6. After the order passed by this Court in Criminal Misc. Writ Petition No. 20290 of 2014, the matter was investigated by the Investigating Officer under the direct supervision of Senior Superintendent of Police, Gautam Budh Nagar and again a final report dated 19.9.2014 was submitted by the Investigating Officer. Aggrieved by the said final report, the opposite party no.2 filed a protest petition on 6.7.2015. The Chief Judicial Magistrate, Gautam Budh Nagar vide its order dated 28.7.2015 did not accept the final report and treated the protest petition filed by opposite party no. 2 as a complaint case and fixed 7.9.2015 for recording of the statement of opposite party no.2 under Section 200 Cr.P.C.

7. Subsequently, statement of opposite party no.2, the informant/complainant was recorded on 29.1.2016. The statements of earlier witnesses of the informant namely, Salek and Ranveer alias Rani and new witnesses namely, Leele, Munish Chand and Dr. S.P. Jain (Retired) were recorded. Copy of these statements recorded under Section 202 Cr.P.C. have been appended collectively as annexure-14 to the affidavit while the statement under section 200,Cr.P.C. is annexure-13.

8. From bare perusal of the statement of Dr. S.P. Jain (Retired) , E.N.T. Surgeon, it is clear that the alleged injury of the informant could be possible while cleaning the ear and the said injury would have no impact on his hearing capacity and would heal at its own.

9. Ultimately, the Civil Judge (Senior Division)/Fast Track Court, Gautam Budh

Nagar has summoned the applicants vide order dated 20.2.2018 for the offence under Section 323 IPC.

10. The order dated 20.02.2018 summoning the applicants as well as the order dated 21.3.2018 issuing the bailable warrant against them and the entire proceedings of Complaint Case No. 2946 of 2017 are impugned in the present application.

11. Contention of learned counsel for the applicants is that present criminal proceedings are wholly malicious and amounts to abuse of the process of law, in as much as, no explanation has been furnished by the complainant with regard to the delay of about 10 years in filing the protest petition from the date of submission of final report i.e. 10.10.2001. It is further contended by learned counsel for the applicants that the court below while passing the impugned summoning order dated 20.2.2018 has not considered this aspect of the matter. He next submitted that the period for taking cognizance as prescribed under section 468,Cr.P.C. for an offence under Section 323 IPC has expired long back.

12. On the other hand, learned AGA as well as learned counsel for the opposite party no. 2 supported the impugned summoning order and submitted that applicants have rightly been summoned and after considering the statements made by the informant-opposite party no. 2 under Section 200 Cr.P.C as well as his witnesses under Section 202 Cr.P.C, the summoning order has rightly been passed and prima facie, a case for an offence under Section 323 is made out.

13. I have considered the rival submission so raised by learned counsel for the parties and perused the record.

14. The complainant in support of his case produced one witness amongst the factory workers namely, Leele Singh, who happens to be the real brother of opposite party no.2 and even his statement was recorded after a lapse of more than 15 years from the date of incident. In his statement, Leele Singh stated that he saw the opposite party no.2 when he was injured, but his blatant lie is proved beyond doubt as when his real brother (complainant) was allegedly injured, he even did not accompany him to the hospital and went to the factory to attend his routine duty. There is no explanation for the delay of about 10 years in filing the protest petition after the final report was submitted on 10.10.2001.

15. Section 468 Cr.P.C. creates a bar for taking cognizance after the lapse of period of limitation. The provisions of Section 468 Cr.P.C. read as under:

"468. Bar to taking cognizance after lapse of the period of limitation.

(1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub- section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only

[Provisions of this Chapter shall not apply to certain economic offences, see the Economic Offences (Inapplicability of Limitation) Act, 1974 (12 of 1974), s. 2 end Sch.]

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for term exceeding one year but not exceeding three years."

16. From a bare reading of the aforesaid Section, it is manifestly clear that there is a legislative bar in taking cognizance of offences of the category specified in subsection (2) after the expiry of the period of limitation. The offence under section 323 IPC being punishable with imprisonment for a term not exceeding one year, it is covered by section 468 (2) (b),Cr.P.C., for which the period of limitation prescribed is one year. Thus, in this case the period of limitation for taking cognizance was one year. The protest petition which was subsequently treated as a complaint was filed after expiry of about 10 years, even otherwise from bare perusal of entire facts and circumstances, it is apparent that the entire prosecution against the applicants is malicious and amounts to abuse of the process of law.

17. The Apex Court in **State of Haryana vs. Bhajan Lal, AIR 1992 SC 604**, after considering the previous decisions of the Apex Court and the provisions of the Code, culled out categories of cases, wherein at a threshold stage, criminal prosecution could be quashed either in exercise of powers under Article 226 of the Constitution or under Section 482 Cr.P.C, as the case may be, with a view to either prevent abuse the process of the Court or otherwise to secure the ends of justice, making it clear that it may not be possible to compartmentalize each and every such contingencies, but nevertheless following categories were mentioned:

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

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

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

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

redress for the grievance of the aggrieved party.

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

18. On the basis of allegation made in the first information report as well as from the summoning order, this Court is of the view that present prosecution is malicious and amounts to abuse of process of law and is also barred by limitation as prescribed under Section 468 (2)(b) and the case is squarely covered by the illustration (7) made in the case of ***Bhajan Lal*** (supra).

19. In view of what has been stated above. the summoning order dated 20.2.2018 and bailable warrant dated 21.3.2018 passed by the Civil Judge (Senior Division)/Fast Track Court, Gautam Budh Nagar as well as the entire proceedings of Complaint Case No. 2946 of 2017 (Rajendra Kumar Vs. Charanjeet Singh and others), under Section 323 of IPC are unsustainable in the eyes of law and are accordingly quashed.

20. In the result, the application stands allowed.

(2020)03-05ILR A1692
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.01.2020

BEFORE

THE HON'BLE DINESH PATHAK, J.

Application U/S 482 Cr.P.C. No. 13819 of 2019

Sanjeev Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjeev Gupta (In Person)

Counsel for the Respondents:
A.G.A., Sri Nitin Gupta

A. Criminal law- Code of Criminal Procedure, 1973 – Section 340 - offence effecting the administration of justice - Scope - legislative intent that offence committed should be of such nature which directly effects the administration of justice, viz., offence is committed after document is produced or given in evidence in court - provisions u/s 340 of CrPC come into play while offence has been commissioned subsequent to the document produced in court (Para 19, 22)

B. Criminal Law-Code of Criminal Procedure, 1973 - Section 340 - offence effecting the administration of justice - Expression - '*any Court is of opinion that it is expedient in the interests of justice*' – Meaning of - Held - denotes that Court, in case, is of the opinion that enquiry should be conducted in the interest of justice then he will conduct a preliminary enquiry and record a finding to that effect and make in writing complaint to the Magistrate Ist Class having competent jurisdiction (Para 20)

Application filed u/s 340 Cr.P.C before trial alleging PW-2, PW-3, PW-4 falsely deposed before the trial court - Applicant pointed out that there was contradiction in the statements made by them - Trial court rejected application - Appellate Court observed that correctness of statements of witness on oath are subject matter of judicial examination and the accused has no right to allege it to be false - *Held* - Fact, as deposed by respondents no. 2 to 4, as to whether the applicant had been taken by respondents no. 2 to 4 or not to the police station, is not going to effect the administration of justice and conviction of the applicant is not

reasonably probable or likely on this basis alone (Para 27)

Application dismissed (E-5)

List of cases cited :

1.Iqbal Singh Marwah & anr. Vs Meenakshi Marwah & anr. 2005 (4) SCC 370

2.Ashok Kumar Aggarwal Vs U.O.I. & ors., 2013 (15) SCC 539

3.Amarsang Nathaji As Himself Vs Hardik Harshadbhai Patel & ors., 2017 (1) SCC 113

(Delivered by Hon'ble Dinesh Pathak, J.)

01. Heard Shri Sanjeev Gupta, applicant in person and Shri Nitin Gupta, learned counsel for respondents no. 2 to 4 and Shri Amit Sinha, learned A.G.A. appearing for the State.

02. By means of the present application filed under Section 482 Cr.P.C., the applicant has challenged the order dated 18.03.2019 passed by the 12th Additional District & Sessions Judge, Ghaziabad in Criminal Appeal No. 114 of 2018 confirming the order dated 30.07.2018 passed by the Chief Judicial Magistrate VIIIth, Ghaziabad, rejecting the application dated 30.07.2018 filed under Section 340 Cr.P.C.

03. The factual matrix of the case is that the second marriage of the applicant was solemnized with Ritu on 01.07.2012 according to rituals of Arya Samaj but unfortunately the marriage did not prove successful due to several reasons. Ultimately, Ritu (wife of the applicant) lodged an F.I.R. dated 09.08.2013 (Ex. Ka-3) registered as Case Crime No. 331 of 2013 under Sections 498-A, 323, 377, 504 of I.P.C. and Section 3/4 Dowry Prohibition Act, P.S. Link Road, Ghaziabad.

04. Charge-sheet (Ex. Ka-6) was submitted against the applicant which led to registration of a Criminal Case No. 75 of 2016. Applicant was held guilty under Sections 498-A, 323 & 377 I.P.C. and Section 4 of the D.P. Act but was exonerated under Section 504 I.P.C. vide order dated 12.09.2018 passed by the Additional Chief Judicial Magistrate, Court No. 08, Ghaziabad.

05. Against the aforesaid order dated 12.09.2018, present applicant preferred an appeal, registered as Criminal Appeal No. 129 of 2018 and the same was partly allowed vide order dated 30.05.2019 passed by the Sessions Judge, Ghaziabad, exempting him under Section 4 of the Dowry Prohibition Act however, confirming the conviction under Sections 498-A, 323 and 377 I.P.C., and reducing the sentence of five years, as awarded under Section 377 I.P.C. by the trial court, to four years with rigorous imprisonment.

06. Meanwhile, the Applicant moved pendente lite application dated 30.07.2018 under Section 340 Cr.P.C. before the trial court after the evidence of parties was closed and the case was listed for final hearing, beseeching criminal action against PW-2 Shri Ashok Sabharwal (respondent no. 2 father of the victim), PW-3 Smt. Shashi Sabharwal (respondent no. 3 mother of the victim) and PW-4 Smt. Neha Sabharwal (respondent no. 4 Bhabhi of the victim), on the ground of perjury.

07. Aforesaid application was rejected on the same day vide order dated 30.07.2018 passed by A.C.J.M, Court No.8, Ghaziabad observing that the accused-

applicant has deliberately filed this application, at the stage of argument, just to delay the court proceedings, therefore, no sufficient ground is made out.

08. Aforesaid order dated 30.07.2019 was affirmed in Criminal Appeal No.114 of 2018 vide order dated 18.03.2019 by the Additional Session Judge, Court No.12, Ghaziabad, on the ground that the accused has already been held guilty by the trial court, therefore, there is no question of false statements being made by the witnesses. It has also been observed that correctness of statements of witness on oath are subject matter of judicial examination and the accused has no right to allege it to be false. Being aggrieved and dissatisfy with the appellate order dated 18.03.2019, the present application under Section 482 Cr.P.C. is preferred with the prayer for quashing the orders, passed by the courts below.

09. Perusal of the order-sheet dated 27.11.2019 reveals that the applicant has refused to file rejoinder affidavit to the counter affidavit filed by the respondents.

10. I have carefully examined the submissions made by the learned counsel for the parties and perused the record.

11. From the submission of the parties, moot issue before me is whether PW-2, PW-3 and PW-4 have falsely deposed before the trial court thereby committing perjury and action for the same is liable to be initiated under Section 340 read with 195(1)(b) of the Cr.P.C.

12. In application dated 30.07.2019 filed under Section 340 of Cr.P.C. allegations leveled against Smt. Neha Sabharwal (respondent no. 4) are that on 30.10.2015 she had deposed that on 09.08.2013 when Ritu was alone, present applicant Sanjeev Gupta manhandled and abused her and, therefore, on her shouting Smt. Neha Sabharwal (Bhabhi of Ritu) along with her mother-in-law and father-in-law with the help of passers-by caught hold the applicant-Sanjeev Gupta and took him to the police station. On the other hand her mother-in-law and father-in-law have denied on oath taking Sanjeev Gupta to the police station. Smt. Neha Sabharwal, in her statement recorded on 14.10.2013 under Section 161 Cr.P.C., had corroborated the version of her father-in-law and mother-in-law. As such, according to the applicant-Sanjeev Gupta, he is aggrieved due to the deposition made by respondents no. 2 to 4 qua taking him to the police station and has tried to point out that there is a contradiction at two stages of statement made by them.

13. Counsel for the respondents has contended that application filed by the applicant under Section 340 of Cr.P.C. was based on the statement given by opposite party nos. 2 to 4 during trial proceeding of criminal case pending against the applicant, therefore, the said application is not maintainable in the eyes of law. It is also contended that correctness of evidence, given during the trial, is to be examined by the trial court and provisions enumerated under Section 195 Cr.P.C. cannot be relied upon. He also emphasized that trial was concluded by the judgment dated 12.09.2018 which is partly affirmed/modified in Criminal Appeal vide judgment dated 30.05.2019 and as such no ground is made out to entertain the contempt proceedings under Section 340 of Cr.P.C.

14. Since the issue is related to the maintainability of application under Section 340 of Cr.P.C., it would be necessary to examine the provisions as

embodied under Section 340 read with Section 195 of Cr.P.C. and in particular the provision which is relevant for our purposes i.e. Section 195(b)(i)(ii), read as under:-

"195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence- (1) No Court shall take cognizance---

(a)(i) .....…

(ii) .....…

(iii) .....…

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub- clause (i) or sub- clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate."

15. The provision to initiate proceeding for contempt of lawful authority of public servants etc., Section 195 of Cr.P.C., is envisaged under Section 340 Cr.P.C. which reads as under :-

"340. Procedure in cases mentioned in Section 195 - (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub- section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195

(3) A complaint made under this section shall be signed,-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section,"Court" has the same meaning as in section 195."

16. Section 195 creates a bar to private prosecution. Normally, Section 190 of Cr.P.C. invokes jurisdiction to Magistrate for taking cognizance of any offence under conditions i.e. (a) on receiving a complaint with respect to constitution of offence, (b) upon a police report with respect to incident and (c) upon information received from any person other than police officer or upon his own knowledge. Provisions as embodied under Section 195 of Cr.P.C. provides exception to this general provision and creates embargo upon power of the Court to take cognizance on certain type of offences enumerated therein. Section 195 of Cr.P.C. clearly denotes that it deals with three distinct category of offence which have been described in Clause (a), (b)(i) and (b)(ii), which relates to the contempt of lawful authority of public servant, offence against public justice and offences relating to document given in evidence.

17. In the present matter in hand, the applicant has made allegations with respect to the correctness of contents of affidavit which was filed as an statement on oath during the court proceeding and tried to make out an offence of perjury which is said to have been committed by respondents no. 2 to 4.

18. Commission of offence, while any document was submitted as an evidence during court proceeding, can be examined within the ambit of Section 195 (1) (b) (ii) of Cr.P.C. Before discussing the scope of Clause b (ii), I feel it apposite to discuss the scope of Clause b (i) of Section 195 of Cr.P.C. Clause (b) (i) refers to offence of Chapter XI of I.P.C. which is captioned as *"Of false evidence and offence against public justice."* The offences mentioned in this clause relates to giving or fabricating false evidence or making a false declaration in any judicial proceeding or before a court of justice or before a public servant who is bound or authorized by law to receive such declaration, and also to some other offences which have a direct co-relation with the proceeding in a court of justice. Likewise provision as embodied under Clause (b) (ii) also relates to the offence which directly co-relate with the proceeding in a court of justice. The expression i.e. "when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court" should normally means that commission of such offence after a document is actually been produced or given in the court. Meaning thereby offence should have been committed at subsequent stage while the document is produced and given in evidence in a proceeding in any court.

19. Section 340 of Cr.P.C. falls under chapter XXVI of Cr.P.C. which is captioned as "provisions as to offence effecting the administration of justice". There is a clear cut legislative intent that offence committed should be of such nature which directly effects the administration of justice, viz., offence is committed after document is produced or given in evidence in court and enable the court to make a complaint in respect of such offence if that court is of the view that it is expedient in the interest of justice that an enquiry should be made into an offence. Clause (b) of Section 195 (1) Cr.P.C. authorizes such court to examine *prima facie* as it think necessary and then make a complaint thereof in writing after having recording a finding to that effect as contemplated under Section 340 (1) of Cr.P.C.

20. Bare perusal of Section 340 Cr.P.C. clearly shows that it is a subjective

satisfaction of the court concerned as to whether any enquiry should be made or not into any offence referred to in clause (b) of sub section 1 of Section 195 of Cr.P.C. which appears to have been committed in or in relation to a proceeding in that court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that case. Before initiating the proceeding court is also under obligation to conduct a preliminary enquiry. The phrase employed in Section 340 with respect to the cognizance to be taken by the court is ***"Any Court is of opinion that it is expedient in the interest of justice"***. The term as mentioned in Section 340 clearly denotes that Court, in case, is of the opinion that enquiry should be conducted in the interest of justice then he will conduct a preliminary enquiry and record a finding to that effect and make in writing complaint to the Magistrate Ist Class having competent jurisdiction.

21. Scope of Section 340 has already been dealt with in detail by the Constitution Bench of the Hon'ble Supreme Court in the case of **Iqbal Singh Marwah & Another vs. Meenakshi Marwah & Another** reported in **2005 (4) SCC, 370**. Relevant paragraph nos. 18, 25 & 26 of the aforesaid judgment is quoted herein below :-

"18. In view of the language used in Section 340 Cr.P.C. the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the Section is conditioned by the words "Court is of opinion that it is expedient in the interest of justice." This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(i)(b). This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (b)(ii), as canvassed by learned counsel for the appellants, would render the victim of such forgery or forged document remedyless. Any interpretation which leads to a situation where a victim of a crime is rendered remedyless, has to be discarded.

25. In view of the discussion made above, we are of the opinion that Sachida Nand Singh has been correctly decided and the view taken therein is the correct view. Section 195(1)(b)(ii) Cr.P.C. would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any Court i.e. during the time when the document was in custodia legis.

26. In the present case, the will has been produced in the Court subsequently. It is nobody's case that any offence as enumerated in Section 195(b)(ii) was committed in respect to the said will after it had been produced or

filed in the Court of District Judge. Therefore, the bar created by Section 195(1)(b)(ii) Cr.P.C. would not come into play and there is no embargo on the power of the Court to take cognizance of the offence on the basis of the complaint filed by the respondents. The view taken by the learned Additional Sessions Judge and the High Court is perfectly correct and calls for no interference.

22. In the case of Iqbal Singh Marwaha (supra) Hon'ble Supreme Court laid at rest the controversy with regard to the scope and applicability of the bar contained under Section 195 of Cr.P.C., it is clear that where the forgery is said to have been committed outside the court and before the document is produced in court then the bar under Section 195 of Cr.P.C. would not operate and Magistrate can take cognizance of a complaint filed by an aggrieved party and would not be necessary to adopt the procedure laid down under Section 340 of Cr.P.C. Meaning thereby, on the reverse, provisions under Section 340 of Cr.P.C. come into play while offence has been commissioned subsequent to the document produced in court and after conducting preliminary enquiry, court can make complaint for such offence to take penal action.

23. In support of his contention, learned counsel for the respondents has cited the decision of the Hon'ble Supreme Court in the case of **Ashok Kumar Aggarwal vs. Union of India & Others** reported in **2013 (15) SCC, 539**. In the aforesaid case offence of perjury has been leveled against Investigating Officer who has said to have been filed a false affidavit with respect to completion of enquiry but subsequently it has been found that some further enquiry was conducted with respect to the incident in question. Hon'ble Supreme Court has discussed the scope of Section 340 read with Section 195 of Cr.P.C. and came to the conclusion that there was no attempt at the part of the Investigating Officer to mislead the court.

24. Relevant paragraph nos. 7 & 8 are quoted herein below :-

"7. In this context, reference may be made of Section 340 under Chapter XXVI of the Cr.P.C., under the heading of "Provisions as to Offences Affecting the Administration of Justice". This Chapter deals with offences committed in or in relation to a proceeding in the court, or in respect of a document produced or given in evidence in a proceeding in the court and enables the court to make a complaint in respect of such offences if that court is of the view that it is expedient in the interest of justice that an inquiry should be made into an offence. Clause (b) of Section 195 (1) Cr.P.C. authorises such court to examine prima facie as it thinks necessary and then make a complaint thereof in writing after having recorded a finding to that effect as contemplated under Section 340 (1) Cr.P.C. In such a case, the question remains as to whether a prima facie case is made out which, if unrebutted, may have a reasonable likelihood to establish the specified offences and whether it is also expedient in the interest of justice to take any action. Thus, before lodging a complaint, the condition precedent for the court to be satisfied are that material so produced before the court makes out a prima facie case for a complaint and that it is expedient in the interest of justice to have prosecution under Section 193 IPC. (Vide: Karunakaran v. T.V. Eachara Warrier & Anr., AIR 1979 SC 290; and

K.T.M.S. Mohd. & Anr. v. Union of India, AIR 1992 SC 1831). "

"8. In the case of Chajoo Ram v. Radhey Shyam & Anr., AIR 1971 SC 1367, this Court held: "7. The prosecution for perjury should be sanctioned by courts only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be prima facie case of deliberate falsehood on a matter of substance and the court should be satisfied that there is reasonable foundation for the charge." (Emphasis added)"

25. Counsel for the respondents has also placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **Amarsang Nathaji As Himself vs. Hardik Harshadbhai Patel And Others** reported in **2017 (1) SCC, 113** wherein case of Iqbal Singh Marwaha (supra) was referred.

26. In view of the discussion made herein above, it is lucid that alleged crime of perjury as stated by the applicant in his application dated 30.07.2019 filed under Section 340 of Cr.P.C. is not going to, in any manner, effect the administration of justice which warrants any interference of the Court for moving complaint qua offence, which is said to have been committed while document was in *custodia legis.*

27. Mere fact, as deposed by respondents no. 2 to 4, as to whether the applicant had been taken by respondents no. 2 to 4 or not to the police station, is not going to effect the administration of justice and conviction of the applicant is not reasonably probable or likely on this basis alone.

28. Learned trial court has not found the present case fit, in the interest of justice, to enquire into with respect to offence of perjury said to have been committed by respondents no. 2 to 4 and rightly rejected the application on the ground that application was deliberately filed by the applicant, at the final stage of hearing, to prolong the litigation. There was no occasion to invoke the jurisdiction of the court concerned to initiate proceeding of contempt against the contesting respondents no. 2 to 4 for alleged offence of perjury. No offence made out while document was in *custodia legis*. As per allegation made by the applicant that contesting respondents no. 2 to 4 have filed false statement before the court, meaning thereby, offence of perjury allegedly committed made by the contesting respondents no. 2 to 4 would be prior to submission of documents in judicial proceeding in court. Therefore, as per law laid down by the Hon'ble Supreme Court in the case of Iqbal Singh Marwaha (supra), no case is made out to invoke the jurisdiction of court concerned under Section 340 of Cr.P.C.

29. The applicant has further argued that the courts below have committed illegality in not relying upon the provisions

as embodied under Section 343 Cr.P.C. & 194 I.P.C. In my opinion, provisions as embodied under Section 343 Cr.P.C. is not applicable in the instant case inasmuch as it provides the procedure to be followed by the Magistrate before whom the complaint is made by the Court concerned after conducting preliminary enquiry under Section 340 Cr.P.C. Provisions as contained under Section 194 I.P.C. are also not attracted inasmuch as it relates to giving or fabricating false evidence with intent to procure conviction of capital offence whereas the present matter relates to offence under Sections 498-A, 323, 377, 504 of I.P.C. & ¾ Dowry Prohibition Act.

30. The applicant has also submitted that no reason has been assigned by the court below in rejecting the application dated 30.07.2019. In support of his contention, he has cited judgment dated 29.09.2008 passed by the Hon'ble Apex Court in Criminal Appeal No. 1549 of 2008; State of Himachal Pradesh vs. Manoj Kumar @ Chotu. Aforesaid cited case is arising out of criminal trial under Section 376, 511 & 506 of I.P.C. Learned trial court has acquitted accused giving him the benefit of doubt. Against the order of acquittal, appeal was filed along with an application for grant of leave in terms of Section 378 of Cr.P.C. Aforesaid application under Section 378 of Cr.P.C. was dismissed summarily merely stating 'Dismissed'.

31. Against the order of dismissal of above application, criminal appeal was preferred. In those circumstances the Hon'ble Apex Court had observed that reason has to be assigned for refusing grant of leave to file appeal against acquittal and accordingly allowed the appeal and remanded the matter to the High Court for disposal of appeal on merits. Aforesaid cited judgment is clearly distinguishable from the facts of the present case inasmuch as the order in question has to be examined under the scope of Section 340 of Cr.P.C., apart from that the courts below has discussed the case of the applicant and found no ground of interference. Even otherwise, as discussed above, no offence has been committed during the time when the documents was in *custodia legis*.

32. It is admitted to the parties that the applicant has preferred Criminal Revision No. 2618 of 2019 (Sanjeev Gupta vs. State of U.P. & Others) assailing the order dated 30.05.2019 passed by the Sessions Judge, Ghaziabad in Criminal Appeal No. 129 of 2018. The aforesaid revision is still pending and by this Court vide order dated 09.07.2019, the applicant has been enlarged on bail. Therefore, the matter is still sub judice before this Court and the correctness of orders passed by the courts below in original proceeding are still to be examined. Both the courts below have passed conviction order against the applicant relying upon the statements made by witnesses, therefore, at this juncture statement made by respondents no. 2 to 4 cannot be held to be false or be held guilty of committing perjury.

33. The present application moved by the applicant lacks merit and deserves to be dismissed. No sufficient ground is shown to invoke the inherent power of this Court under Section 482 of Cr.P.C. Application dated 30.07.2018 under Section 340 Cr.P.C. filed by the applicant has rightly been rejected by the courts below.

34. The present application filed under Section 482 Cr.P.C. is **dismissed**. Parties shall bear their own cost.

(2020)03-05ILR A1701
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2020

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 Cr.P.C. No. 18951 of 2015

Abid & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri A.P. Tewari, R.S. Tripathi

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

Criminal law-Criminal Procedure Code (2 of 1974) - Section 482 - Quashing of charge sheet & entire proceeding - FIR lodged u/Ss.363,366,354,506,342,120-B of IPC - Accusation that accused enticed away victim & sum of Rs.5,00,000/ and also took away gold & silver ornament - in medical examination victim was found to be 18 yrs old - Victim in her statement u/s 164 CrPC stated she left her house out of her own sweet & she was never enticed by anyone-*Held* – Victim a major grown up girl - had gone willingly with accused - no force was applied to outrage her modesty nor she was kidnapped and that she married accused out of her own sweet will and is living as husband and wife with him - No offence made out - Court quashed entire proceeding. (Para 21)

Application Allowed (E-5)

List of cases cited :

1. St. of Har. Vs Bhajan Lal 1992 Supp(1) SCC 335

2. Madhavrao Jiwajirao Scindia Vs Sambhajirao Chandrojirao Angre (1988) 1 SCC 692

3. Rupan Deol Bajaj Vs Kanwar Pal Singh Gill (1995) 6 SCC 194

4.C.B.I. Vs Duncans Agro Industries Ltd., (1996) 5 SCC 591

5. St. of Bihar Vs Rajendra Agrawalla (1996) 8 SCC 164

6. Rajesh Bajaj Vs St. NCT of Delhi (1999) 3 SCC 259

7.Medchl Chemicals & Pharma (P) Ltd Vs Biological E. Ltd (2000) 3 SCC 269

8. Hridaya Ranjan Prasad Verma Vs St. of Bihar (2000) 4 SCC 168

9. M. Krishnan Vs Vijay Singh (2001) 8 SCC 645

10. Zandu Pharmaceutical Works Ltd. Vs Mohd. Sharaful Haque (2005) 1 SCC 122

11. Rishipal Singh Vs St. of U.P. and Anr., AIR 2014 SC 2567

12. Om Prakash & ors. Vs St. of Jharkhand 2012 (12) SCC 72

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

1. List revised.

2. Counsel for the opposite party no. 2 is not present.

3. Heard learned counsel for the applicants and learned A.G.A. for the State.

4. This application has been filed with a prayer to quash the impugned charge sheet dated 15.02.2014 in Case Crime No. 2287 of 2013, under Sections 363, 366, 354, 506, 342, 120-B I.P.C. as well as entire proceeding of S.T. No. 1200 of 2014 "State Vs. Abid and another" under Sections 363, 366 I.P.C., Police Station- Indrapuram, District Ghaziabad.

5. Brief facts of the case are that opposite party no. 2 lodged an F.I.R. on 18.12.2013 against five accused persons alleging therein that his fourteen year old daughter Kumari Laxmi @ Kavita studying in Class VIII was enticed away by the applicants with the help of his family members on 17.12.2013. It is further alleged that when he searched in his house, then, he found that sum of Rs.5,00,000/- and jewellery was also taken away by them. After investigation, charge sheet was submitted against the applicants.

6. It has been submitted by the learned counsel for the applicants that applicants approached this Court by means of Criminal Misc. Writ Petition No. 12735 of 2015 (Nizam and another Vs. State of U.P. and 2 others) and the boy Nizam, petitioner no. 1 whereas victim - Kumari Laxmi @ Kavita, petitioner no. 2 appeared in person before this Court and the Hon'ble Court vide order dated 25.05.2015, directed that in case the petitioners approach the S.S.P. concerned to provide them protection for the purposes of appearing before the court concerned to record the statement of the kidnapped girl under Section 164 Cr.P.C., and for medical examination, the same may be provided.

7. In pursuance of the order dated 25.05.2015, medical of the girl was conducted and she was found to be 18 year old. As per the statement under Section 164 Cr.P.C. of the victim, which was recorded on 09.06.2015, she has stated that she had left her house as she was annoyed with her parents, who were forcing her for marriage. Therefore, she left her house out of her own sweet will on 17.12.2013 and went to Gujarat to stay with her friend Ruksar. She has further stated that she had gone all alone. She knows Nizam since last two years and has performed Niqah with him on 13.12.2015 and they were staying as husband and wife. She was never enticed by anyone, wherever she went, it was out of her own sweet will.

8. Learned counsel for the applicants submits that no offence under the relevant Sections is made out against the applicants.

9. Learned counsel appearing for the State has argued that from the allegations leveled in the impugned F.I.R. and statement of the victim recorded under Section 164 Cr.P.C. as well as from the statement of other witnesses recorded by the police during the course of investigation and the material collected by it, the case against the applicants for commission of offence is punishable under Sections 363, 366, 354, 506, 342, 120B I.P.C. are made out. Hence, no interference is called for by this Court while exercising inherent powers under Section 482 Cr.P.C. and this Criminal Misc. Application is liable to be dismissed.

10. There is no doubt that the Court should be very careful while exercising the powers under section 482 Cr.P.C. particularly in the matters of quashing of charge sheet.

11. The Hon'ble Supreme Court in plethora of judgments has laid down the guidelines with regard to exercise of jurisdiction by the High Courts under section 482 Cr.P.C. In **State of Haryana v. Bhajan Lal** *1992 Supp(1) SCC 335*, the Hon'ble Supreme Court has listed the categories of cases when the power under section 482 Cr.P.C. can be exercised by the High Courts. The law laid down by the Hon'ble Supreme Court in State of Haryana v. Bhajan Lal (supra) has later on followed

in various decisions. To mention a few -- **Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre**, *(1988) 1 SCC 692*; **State of Haryana v. Bhajan Lal**,*1992 Supp (1) SCC 335*; **Rupan Deol Bajaj v. Kanwar Pal Singh Gill** *(1995) 6 SCC 194*; **Central Bureau of Investigation v. Duncans Agro Industries Ltd** *(1996) 5 SCC 591*; **State of Bihar v. Rajendra Agrawalla** *(1996) 8 SCC 164*, **Rajesh Bajaj v. State NCT of Delhi**, *(1999) 3 SCC 259*; **Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd** *(2000) 3 SCC 269* **Hridaya Ranjan Prasad Verma v. State of Bihar** *(2000) 4 SCC 168*, **M. Krishnan v. Vijay Singh** *(2001) 8 SCC 645* and **Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque** *(2005) 1 SCC 122*. The principles relevant are as under:

"(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."

12. Recently the Hon'ble Supreme Court in **Rishipal Singh vs. State of U.P. and Anr.**, *AIR 2014 SC 2567* has held as under:

13. This Court in plethora of judgments has laid down the guidelines with regard to exercise of jurisdiction by the Courts under Section 482, Cr.P.C. **In State of Haryana v. Bhajan Lal** *1992 Supp(1) SCC 335*, this Court has listed the categories of cases when the power under Section 482 Cr.P.C. can be exercised by the

Court. These principles or the guidelines were reiterated by this Court in **Central Bureau of Investigation v. Duncans Agro Industries Ltd.** *1996 (5) SCC 591*; **Rajesh Bajaj v. State NCT of Delhi** *1999 (3) SCC 259* and; **Zandu Pharmaceuticals Works Ltd. v. Mohd. Sharaful Haque & Anr** *(2005) 1 SCC 122*. This Court in Zandu Pharmaceuticals Ltd., observed that:

"The power under Section 482 of the Code should be used sparingly and with to prevent abuse of process of Court, but not to stifle legitimate prosecution. There can be no two opinions on this, but if it appears to the trained judicial mind that continuation of a prosecution would lead to abuse of process of Court, the power under Section 482 of the Code must be exercised and proceedings must be quashed".

14. Also see **Om Prakash and Ors. V. State of Jharkhand 2012 (12) SCC 72.**

What emerges from the above judgments is that when a prosecution at the initial stage is asked to be quashed, the tests to be applied by the Court is as to whether the uncontroverted allegations as made in the complaint prima facie establish the case. The Courts have to see whether the continuation of the complaint amounts to abuse of process of law and whether continuation of the criminal proceeding results in miscarriage of justice or when the Court comes to a conclusion that quashing these proceedings would otherwise serve the ends of justice, then the Court can exercise the power under Section 482, Cr.P.C. While exercising the power under the provision, the Courts have to only look at the uncontroverted allegation in the complaint whether prima facie discloses an offence or not, but it should not convert itself to that of a trial Court and dwell into the disputed questions of fact."

15. As per law laid down by the Hon'ble Supreme Court in the above referred cases, the High Court should be very careful while exercising power under section 482 Cr.P.C., however, at the same time, it should not allow a litigant to file vexatious complaints to otherwise settle his or her scores by setting the criminal law into motion, which is a pure abuse of process of law and it has to be interdicted at the threshold.

16. In view of the above legal position well settled by the Hon'ble Supreme Court, I would like to deal with the facts of the present case, which lead to file the impugned FIR against the applicants for the offences punishable under Sections 363, 366, 354, 506, 342, 120-B I.P.C.

17. Initially, an F.I.R. was lodged by Mahendra Singh Yadav, father of the victim, alleging therein that her minor daughter who was student of Class VIII was being teased by Nazim, while she used to go to school. Nazim stays in front of the house of the informant at Khoda. When the victim informed about the conduct of Nazim to the informant, he along with his relatives went to Nazim's house where he met his father, brother, sister and brother-in-law and when he told about the conduct of Nazim to the aforesaid persons, they started fighting with the informant and asked him not to come to his house again and be ready to face dire consequences. After the aforesaid incident, informant tried to convince Nazim not to tease his daughter. Five days prior to lodging of the F.I.R., victim told the informant that family members of Nazim along with him were standing near the building and starring at her. On 17.12.2013, at about 07:00 p.m., when the informant along with his wife and son, namely, Saurabh had gone to the

doctor for medicine, in his absence, Nazim came and took away his daughter Laxmi @ Kavita and informant's nine year old daughter Nandini was locked in the house by Nazim. When the informant reached the house, Nandini told him about the incident. The informant also found that Rs.5,00,000/-, 800g gold ornaments and 200g silver ornaments missing from his house. He has further alleged that he is fully sure that his daughter has been enticed away by Nazim with the help and assistance of his family members. For the aforesaid incident, F.I.R. was lodged under Sections 363, 366, 354, 506 I.P.C.

18. At this stage, it would be necessary to refer these aforesaid Sections 363, 366, 354, 506 I.P.C. :

363. Punishment for kidnapping.--Whoever kidnaps any person from 1[India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 1[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid].

354. Assault or criminal force to woman with intent to outrage her modesty.--Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

506. Punishment for criminal intimidation.--Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.--And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or 1[imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

19. Section 363 is the punishment for kidnapping from lawful guardianship and Section 366 deals with kidnapping, abducting and inducing women to compel her to marry. Whereas, Section 354 is assault or criminal force to women with intend to outrage her modesty and Section 504 deals with intentional insult with intend to provoke breach of peace. In the present case, after F.I.R. was lodged, Nazim along with victim approached this Hon'ble Court by means of filing a writ petition in which protection was given to Nazim as well as the victim and the Court had further directed the victim to get her

statement recorded under Section 164 Cr.P.C. and also get her medically examined. Therefore, on the basis of the aforesaid, it cannot be said that she was kidnapped or abducted from lawful guardianship.

20. The statement of the victim under Section 164 Cr.P.C. also goes to show that no criminal force was applied on the victim to outrage her modesty and she was not forced by Nazim to marry her. The victim has also not spoken anything serious against the family members of Nazim, therefore no offence under the relevant Sections is made out.

21. The Court must in each case consider the evidence before it and the surroundings circumstances before reaching a conclusion because each case has its own peculiar facts which may have a bearing. The undisputed facts of the case are that the victim was 18 year old as is clear from the medical certificate. She was a major grown up girl and had gone willingly with him that no force was applied to outrage her modesty nor she was kidnapped and that she has married Nazim out of her own sweet will and is living as husband and wife with him.

22. In the light of the aforesaid discussion and looking to the facts and circumstances, this Court is convinced that applicants are not guilty of the offence punishable under Sections 363, 366, 354, 506, 342, 120-B I.P.C., hence the continuance of the impugned F.I.R. against the applicants and other proceedings pursuant thereto will be nothing but in abuse of the process of the Court and the same are liable to be quashed.

23. Resultantly, the entire proceedings of Case Crime No. 2287 of 2013, under Sections 363, 366, 354, 506, 342, 120-B I.P.C. as well as entire proceeding of S.T. No. 1200 of 2014 "State Vs. Abid and another" under Sections 363, 366 I.P.C., Police Station- Indrapuram, District Ghaziabad, are an abuse process of law. The same are hereby quashed.

24. The present application is accordingly allowed. There shall be no order as to costs.

(2020)03-05ILR A1706
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2019

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482 Cr.P.C. No. 28450 of 2019

Smt. Radha Devi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Arun Kumar Singh

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

A. Evidence Law- Evidence Act (1 of 1872) - Sections.40, 41, 42, 43 - Acquittal of co-accused - judgment of acquittal of co-accused in a criminal trial is not admissible under sections 40 to 43 of the Evidence Act to bar the subsequent trial of the absconding co-accused - judgment of acquittal will be admissible only to show as to who were the parties in the proceedings or factum of acquittal
(Para 10)

B. Criminal Law- Criminal Procedure Code (2 of 1974) - Section 482 - Quashing of

criminal proceeding - Acquittal of co-accused - no ground to quash the proceedings against other accused

Securing of acquittal by co-accused in a trial emanating from same case crime - is no ground to quash the proceedings - as against those accused who has not faced the trial - at the pre-trial stage by High Court exercising power u/s 482 CrPC - In a trial of co-accused, the prosecution is not called upon nor it is expected to adduce evidence against absconding co-accused or such co accused who did not face trial (Para 6, 12)

Application dismissed (E-5)

List of cases cited :

1. Rajan Rai Vs St. of Bihar (2006) 1 SCC 191

2. Yanab Sheikh @ Gagu Vs St. of w.B. (2013) 6 SCC 428

3. Dalbir Singh Vs St. of Haryana (2008) 11 SCC425

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

1. Heard sri Arun Kumar Singh learned counsel for the applicants and Sri Virendra Kumar Maurya and Jagdamba Prasad Singh learned Additional Government Advocates for the State/opposite party no.1 and perused the record with the assistance of learned counsel for the parties.

2. This application under section 482 Cr.P.C. has been filed by the applicants with a prayer to quash impugned Charge-sheet dated 01.04.2015 arising out of in Case Crime No.284 of 2014 and the proceeding of Session Trial No.375 of 2018 in Case No.2209 of 2016 (State vs. Radha Devi and others), under sections 323, 506, 315 & 498A I.P.C. read with section 3/4 Dowry Prohibition Act, Police Station Bilhaur, District Kanpur Nagar, pending in the court of Fast Track Court, Court No.II, Kanpur Dehat.

3. A splendid question involved in this case is that "as to whether on the acquittal of co- accused, the charge sheet and criminal proceeding pursuant thereto against the remaining co-accused are liable to be quashed under section 482 Cr.P.C."?

4. It is submitted by the learned counsel for the applicant that the applicant no.1 Smt. Radha Devi is sister-in-law (Nanad), applicant no.2, Smt. Meenu is Senior Co-sister (Jethani) and applicant No.3 Smt. Pan Kumar is mother-in-law (Saas) of opposite party no.2, namely, Smt Asha Devi, who lodged FIR on 15.06.2014, registered as Case Crime No.284 of 2014 against the applicants, namely Smt. Radha Devi, Smt. Meenu and Smt. Pan Kumar and two other co-accused, namely, Laxman (husband) and Ram Naresh brother-in-law (Jeith). The investigating officer after investigation has submitted two charge-sheets in this case. Charge-sheet dated 29.10.2014 was submitted against the co-accused, Laxman (husband) and Ram Naresh (Jeith) and charge-sheet dated 01.04.2015 was submitted against the applicant Radha Devi, Meenu and Smt. Pan Kumar, who are on bail. It is next submitted that co-accused Laxman and Ram Naresh have been acquitted by judgment and order dated 11.06.2018 by Additional District & Session Judge/Fast Track Court No.3 in Session Trial No.53 of 2015, therefore, the applicants are not entitled to face trial and proceedings against them are liable to be quashed at the pre-trial stage by this Court in exercise of power under section 482 Cr.P.C.

5. Per contra, Sri Virendra Kumar Maurya and Jagdamba Prasad Singh,

learned Additional Government Advocates refuting the aforesaid submissions of the learned counsel for the applicants, vehemently opposed the aforesaid prayer of the applicants by contending that in this case charge sheet had been filed on 01.04.2015 against the applicants, but they have filed the present application under Section 482 Cr.P.C. in July, 2019 challenging the charge sheet dated 01.04.2015 after four years without any proper explanation of delay in filing the present application. The proceeding of the trial against the applicants cannot be said to be abuse of the process of Court, and cannot be quashed merely on the ground that two other co-accused of this case have been acquitted. The present application is liable to be dismissed on merit as well as on the ground of latches.

6. After having heard the argument of learned counsel of the parties, this Court is of the view that every case turns on its own facts and evidence as may be adduced and acquittal of co- accused in a trial emanating from same case crime does not necessarily entail acquittal of the other co-accused, who are yet to be put on trial. In a trial of co-accused, the prosecution is not called upon nor it is expected to adduce evidence against absconding co-accused or such co accused who did not face trial.

7. Before delving into this issue, it would also be useful to set out sections 40, 41, 42 and 43 of The Indian Evidence Act, 1872, which are under the heading "Judgments of Courts of justice when relevant", which reads as under :-

Section 40 :- Previous judgments relevant to bar a second suit or trial.--The existence of any judgment, order or decree which by law prevents any Courts from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

Section 41 :- Relevancy of certain judgments in probate, etc., jurisdiction.--A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order or decree is conclusive proof--

that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, 3[order or decree] declares it to have accrued to that person; 3[order or decree] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, 3[order or decree] declared that it had ceased or should cease; 3[order or decree] declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, 3[order or decree] declares that it had been or should be his property.

(3) Ins. by Act 18 of 1872, sec. 3.

Section 42 :- Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.--Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Section 43 :- Judgments, etc., other than those mentioned in sections 40 to 42, when relevant.--Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act.

8. The Apex Court in the matter of **Rajan Rai Vs. State of Bihar (2006) 1 SCC 191** has also considered the provisions of Section 40,41,42 and 43 of the Indian Evidence Act and held that judgment of acquittal of co-accused rendered in earlier trial arising out of same transaction was wholly irrelevant in the case of the accused, who was tried separately. The relevant paragraph nos. 8 and 10 of the said judgment are reproduced herein-below:-

"8. Coming to the first submission very strenuously canvassed by Shri Mishra, it would be necessary to refer to the provisions of Sections 40 to 44 of the Indian Evidence Act, 1872 [in short `the Evidence Act'] which are under the heading `Judgments of Courts of justice when relevant', and in the aforesaid Sections the circumstances under which previous judgments are relevant in civil and criminal cases have been enumerated. Section 40 states the circumstances in which a previous judgment may be relevant to bar a second suit or trial and has no application to the present case for the obvious reasons that no judgment order or decree is said to be in existence in this case which could in law be said to prevent the Sessions Court from holding the trial. Section 41 deals with the relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdiction and is equally inapplicable. Section 42 refers to the relevancy and effect of judgments, orders or decrees other than those mentioned in Section 41 in so far as they relate to matters of a public nature, and is again inapplicable to the present case. Then comes Section 43 which clearly lays down that judgments, order or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of the Evidence Act. As it has not been shown that the judgment of acquittal rendered by the High Court in appeals arising out of earlier sessions trial could be said to be relevant under the other provisions of the Evidence Act, it was clearly "irrelevant" and could not have been taken into consideration by the High Court while passing the impugned judgment. The remaining Section 44 deals with fraud or collusion in obtaining a judgment, or incompetency of a court which delivered it, and can possibly have no application in the present case. It would thus appear that the High Court was quite justified in ignoring the judgment of acquittal rendered by it which was clearly irrelevant.

10. A three Judges' Bench of this Court had occasion to consider the same very question in the case of Karan Singh vs. The State of Madhya Pradesh, AIR 1965 SC 1037, in which there were in all 8

accused persons out of whom accused Ram Hans absconded, as such trial of seven accused persons, including accused Karan Singh, who was appellant before this Court, proceeded and the trial court although acquitted other six accused persons, convicted the seventh accused, i.e., Karan Singh under Section 302 read with Section 149 IPC. Against his conviction, Karan Singh preferred an appeal before the High Court. During the pendency of his appeal, accused Ram Hans was apprehended and put on trial and upon its conclusion, the trial court recorded order of his acquittal, which attained finality, no appeal having been preferred against the same. Thereafter, when the appeal of accused Karan Singh was taken up for hearing, it was submitted that in view of the judgment of acquittal rendered in the trial of accused Ram Hans, the conviction of accused Karan Singh under Section 302 read with Section 149 IPC could not be sustained, more so when other six accused persons, who were tried with Karan Singh, were acquitted by the trial court and the judgment of acquittal attained finality. Repelling the contention, the High Court after considering the evidence adduced came to the conclusion that murder was committed by Ram Hans in furtherance of the common intention of both himself and accused Karan Singh and, accordingly, altered the conviction of Karan Singh from Section 302/149 to one under Section 302/34 IPC. Against the said judgment, when an appeal by special leave was preferred before this Court, it was contended that in view of the verdict of acquittal of accused Ram Hans, it was not permissible in law for the High Court to uphold conviction of accused Karan Singh. This Court, repelling the contention, held that decision in each case had to turn on the evidence led in it. Case of accused Ram Hans depended upon evidence led there while the case of accused Karan Singh, who had appealed before this Court, had to be decided only on the basis of evidence led during the course of his trial and the evidence led in the case of Ram Hans and the decision there arrived at would be wholly irrelevant in considering merits of the case of Karan Singh, who was appellant before this Court. This Court observed at page 1038 thus:-

" As the High Court pointed out, that observation has no application to the present case as here the acquittal of Ramhans was not in any proceeding to which the appellant was a party. Clearly, the decision in each case has to turn on the evidence led in it; Ramhans's case depended on the evidence led there while the appellant's case had to be decided only on the evidence led in it. The evidence led in Ramhans's case and the decision there arrived at on that evidence would be wholly irrelevant in considering the merits of the appellant's case."

In that case, after laying down the law, the Court further considered as to whether the High Court was justified in converting the conviction of accused Karan Singh from Section 302/149 to one under Section 302 read with section 34 IPC after recording a finding that the murder was committed by Ram Hans in furtherance of common intention of both himself and accused Karan Singh. This Court was of the view that in spite of the fact that accused Ram Hans was acquitted by the trial court and his acquittal attained finality, it was open to the High Court, as an appellate court, while considering appeal of accused Karan Singh, to consider evidence recorded in the trial of Karan Singh only for a limited purpose to find out as to whether Karan Singh could have shared common intention with accused

Ram Hans to commit murder of the deceased, though the same could not have otherwise affected the acquittal of Ram Hans. In view of the foregoing discussion, we are clearly of the view that the judgment of acquittal rendered in the trial of other four accused persons is wholly irrelevant in the appeal arising out of trial of appellant Rajan Rai as the said judgment was not admissible under the provisions of Sections 40 to 44 of the Evidence Act. Every case has to be decided on the evidence adduced therein. Case of the four acquitted accused persons was decided on the basis of evidence led there while case of the present appellant has to be decided only on the basis of evidence adduced during the course of his trial."

9. The Apex Court in another matter of **Yanob Sheikh @ Gagu Vs. State of West Bengal (2013) 6 SCC 428** has also considered the issue that what would be effect of judgment of acquittal of one accused on the other co-accused. The relevant paragraph nos. 24, 25 and 26 of the said judgment are reproduced herein-below:-

"24. In the present case, we are concerned with the merit or otherwise of the above reasoning leading to the acquittal of the accused Najrul. We are primarily concerned with the effect of this acquittal upon the case of the Appellant-accused. The Trial Court in its judgment clearly stated that there was direct and circumstantial evidence against the accused implicating him with the commission of the crime. Finding the Appellant guilty of the offence, the Trial Court punished him accordingly. Where the prosecution is able to establish the guilt of the accused by cogent, reliable and trustworthy evidence, mere acquittal of one accused would not automatically lead to acquittal of another accused. It is only where the entire case of the prosecution suffers from infirmities, discrepancies and where the prosecution is not able to establish its case, the acquittal of the co-accused would be of some relevancy for deciding the case of the other."

"25. In the case of ***Dalbir Singh v. State of Haryana (2008) 11 SCC 425,*** *this Court held as under:*

13. Coming to the applicability of the principle of falsus in uno, falsus in omnibus, even if major portion of evidence is found to be deficient, residue is sufficient to prove guilt of an accused, notwithstanding acquittal of large number of other co-accused persons, his conviction can be maintained. However, where large number of other persons are accused, the court has to carefully screen the evidence:

51. ... It is the duty of court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno, falsus in omnibus has no application in India and the witnesses cannot be branded as liars. The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) has not received general acceptance in different jurisdiction in India, nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be

called 'a mandatory rule of evidence'.(See Nisar Ali v. State of U.P.) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See Gurcharan Singh v. State of Punjab.) The doctrine is a dangerous one, specially in India, for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of M.P. and Ugar Ahir v. State of Bihar.) An attempt has to be made to in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is discard the evidence in toto. (See Zwinglee Ariel v. State of M.P. and Balaka Singh v. State of Punjab.) As observed by this Court in State of Rajasthan v. Kalki normal discrepancies in evidence are those which are due to normal errors of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and these are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so."

"26. The cumulative effect of the above discussion is that the acquittal of a co-accused perse is not sufficient to result in acquittal of the other accused. The Court has to screen the entire evidence and does not extend the threat of falsity to universal acquittal. The Court must examine the entire prosecution evidence in its correct perspective before it can conclude the effect of acquittal of one accused on the other in the facts and circumstances of a given case."

10. In view of above discussion, it is clear that the judgment of acquittal of co-accused in a criminal trial is not admissible under sections 40 to 43 of the Evidence Act to bar the subsequent trial of the absconding co-accused and cannot hence be deduced as a relevant document while considering the prayer to quash the proceedings against remaining co-accused under section 482 Cr.P.C. The judgment of acquittal will be admissible only to show as

to who were the parties in the proceedings or factum of acquittal. As such securing of acquittal by co-accused cannot be considered as relevant circumstances and ground for exercising power under section 482 Cr.P.C., to quash the proceedings as against those accused who has not faced the trial. The judgment not inter parties cannot justify the invocation of the doctrine of issue stopple under the Law.

11. It is also well settled that power of quashing the criminal proceedings at the pre-trial stage should be exercised very sparingly and with circumspection and that too in the exceptional and rare case. The extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice. As such the inherent powers of the High Court cannot normally be invoked, unless such materials are of an unimpeachable nature, which can be translated into legal evidence in the course of trial.

12. As a fallout and consequences of aforesaid discussion, I have no hesitation in holding that even on the acquittal of co-accused, the charge sheet and criminal proceeding pursuant thereto against the remaining co-accused cannot be quashed under section 482 Cr.P.C.

13. The application sans merit and is, accordingly, **dismissed**.

(2020)03-05ILR A1713
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.01.2020

BEFORE
THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 33012 of 2019

Vikas Kumar ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Manvendra Narain Pathak

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

Criminal Law- Criminal Procedure Code (2 of 1974)- Sections. 451, 457 - Excise Act Sections 60, 63, 72 - Release of confiscated Vehicle - mere pendency of confiscation proceedings before the District Magistrate u/s 72 of the U.P. Excise Act shall not operate as a bar against the release of the seized vehicle which is required for trial under Section 60 of the U.P. Excise Act

(Para 17,18, 19)

Applicant registered owner of seized vehicle - vehicle detained by police alleging it was transporting liquor - release application rejected by Judicial Magistrate only on the ground that the investigation was going on & the confiscation proceedings U/s 72 of UP Excise Act were pending before the District Magistrate - neither the State or any other person claimed their ownership over the vehicle - *Held* - no useful purpose will be served in keeping the vehicle stationed at the police station in the open yard for a long period allowing it to be damaged with the passage of time. (Para 22)

Appeal allowed (E-5)

List of case cited :

1. Sunderbhai Ambalal Desai & C.M. Mudaliar Vs. St. of Gujrat AIR 2003 SC 638

2. Nand Vs St. of UP 1996 Law Suit (All) 423

3. Jai Prakash Vs. St. of U.P. 1992 AWC 1744

4. Kamaljeet Singh Vs St. of U.P. 1986 U.P. Cri. Ruling 50 (Alld)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This application u/s 482 Cr.P.C. has been filed by the applicant invoking the inherent jurisdiction of this Court with the prayer for quashing the order dated 10.06.2019 passed by Incharge Judicial Magistrate, Court No.11 Deoria in Misc. Case No.171 of 2019 (State Vs. Satya Prakash Mall), arising out of Case Crime No.318 of 2018, under Sections 419, 420, 467, 468, 471, 272 I.P.C. and under Sections 60, 63, 72 of Excise Act, Police Station Rudhrapur, District Deoria.

2. Further prayer has also been made to quash the order dated 18.07.2019 passed by Additional District and Sessions Judge, Court No.7, Deoria in Criminal Revision No.93 of 2019 (Vikas Kumar Vs. State of U.P.) filed against the aforesaid order of learned Incharge Judicial Magistrate, Deoria, rejecting the release application which has been confirmed by the learned revisional court.

3. Counter and rejoinder affidavits have been exchanged between the parties.

4. Heard learned counsel for the applicant, learned A.G.A. for the opposite parties and perused the record.

5. Learned counsel for the applicant has submitted that the applicant is the registered owner of vehicle/Mahindra Scorpio bearing Chasis No. MA1TA2TDKJ2J39166 and Engine No.TDJ4J79127, in this regard sale certificate and trade certificate were issued by the agency. Thereafter, the applicant has applied for registration of the said vehicle before the Regional Transport Officer, Siwan and when the vehicle of the applicant was driven by driver, while going to Deoria for treatment of his relative, then police of Police Station Rudhrapur, District Deoria caught the vehicle and detained at Police Station Deoria without any reason. When the applicant came to know about this incident he went to police station to ensure about the incident but the vehicle of the applicant was not there and it was detained by the police to some other place keeping the vehicle in their custody.

6. Learned counsel for the applicant further argued that the applicant has been falsely implicated in the case to extract illegal gratification from him and after the denial the police, thereafter, lodged an F.I.R. under Sections 419, 420, 467, 468, 471, 272 I.P.C. and under Sections 60, 63, 72 of Excise Act, Police Station Rudhrapur, District Deoria and vehicle was ceased by the police. Learned counsel for the applicant further argued that the applicant was released on bail on 28.01.2019 in respect of the above incident.

7. Learned counsel for the applicant submits that the applicant has moved release application before the learned Magistrate stating therein that he is an agriculturist and was using his vehicle for personal use and when the vehicle was ceased by the police, driver of the applicant was going to Deoria for treatment of his relative and the vehicle was wrongly detained by the police. Learned counsel for the applicant further submits that it was wrongly stated by the police that applicant was transporting the liqueur in the said vehicle.

8. Learned counsel for the applicant further submits that the release application of the applicant was rejected by the learned Magistrate on 10.06.2019 only on the ground that the investigation was going on and the confiscation proceedings under Section 72 of U.P. Excise Act were

pending before the District Magistrate, Deoria, therefore, the vehicle cannot be released. Against the order of learned Magistrate, the applicant has filed criminal revision before the Additional District and Sessions Judge, Deoria bearing Case No.93 of 2019 (Vikas Vs. State of U.P.) and the learned revisional court rejected the criminal revision vide order dated 18.07.2019 on the same ground, observing that the confiscation proceedings are pending before the District Magistrate, Deoria, therefore, the vehicle in question cannot be released.

9. Learned counsel for the applicant has submitted that the vehicle is standing in open yard in the police station since long and with the passage of time ultimately it will become junk and after sometime it is not useful for any purpose. Reliance has been placed on the law laid down by the **Hon'ble Apex Court** in the case of ***Sunderbhai Ambalal Desai and C.M. Mudaliar Vs. State of Gujrat, AIR 2003 SC 638.***

10. Learned counsel for the applicant has further drawn the attention of the Court regarding the provisions of Sections 451 and 457 of Cr.P.C., which is quoted as under:-

"451. Order for custody and disposal of property pending trial in certain cases. When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.- For the purposes of this section," property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

457. Procedure by police upon seizure of property.

(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

11. Learned counsel for the applicant has further submitted that the applicant is ready to comply with all the conditions, which the lower court will impose while releasing the vehicle. Undisputedly, applicant is the rightful owner of the

vehicle, therefore, the vehicle be released in his favour and the impugned orders be quashed.

12. Learned A.G.A. has opposed the application and detailed counter affidavit has been filed. In the counter affidavit it has been stated that the proceedings under Section 72 of the U.P. Excise Act are pending before the District Magistrate, Deoria who is the competent authority to decide this issue whether the vehicle be released or not and the applicant may appear before the District Magistrate and apprise him regarding his grievances. Learned A.G.A. further submits that the vehicle is involved in criminal case under Sections 419, 420, 467, 468, 471, 272 I.P.C. and under Sections 60, 63, 72 of Excise Act and therefore, the vehicle cannot be released in favour of the applicant.

13. In the rejoinder affidavit filed by the applicant, it has been stated by the learned counsel for the applicant that applicant is an innocent person and has been falsely implicated in the case and the vehicle has nothing do with the alleged offence. It was further submitted that no evidence was collected by the investigating officer under Section 17 of the Excise Act and the police personnel cannot lodge a complaint under Excise Act, therefore, the entire proceedings is against the process of law and is liable to be quashed.

14. Learned counsel for the applicant has contented that mere pendency of confiscation proceedings before the District Magistrate under Section 72 of the U.P. Excise Act shall not operate as a bar against the release of vehicle seized under Section 60 of the U.P. Excise Act.

15. After having heard the learned counsel for the parties, I have carefully gone through the relevant legal provisions and the judgments rendered by the Hon'ble Apex Court in the case of ***Sunderbhai Ambalal Desai*** (supra) and the judgment passed by this court in various cases under the U.P. Excise Act.

16. The Hon'ble Apex Court in the case of ***Sunderbhai Ambalal Desai, AIR 2003 SC 638*** (supra) in para 17 and 21 has been pleased held as under:-

"17. In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of application for return of such vehicles.

21. However these powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under Section 451 Cr.P.C. Are properly and promptly exercised and articles are not kept for a long time at the police station, in any case, for not more than fifteen days to one month. This Object can also be achieved if there is proper supervision by the Registry of the concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly."

17. In ***Nand Vs. State of U.P., 1996 Law Suit (All) 423*** this Court has observed that pendency of the confiscation proceedings under Section 72 of the U. P. Excise Act is not a bar for release of the vehicle which is required for the trial under Section 60 of the U. P. Excise Act. It has been clearly observed by this Court in para 7 that:-

" I think it is not proper to allow the truck to be damaged by remaining stationed at police station. Admittedly, the ownership of the truck is not disputed. The State of Uttar Pradesh does not claim its ownership. Therefore, I think it will be proper and in the larger interest of public as well as the revisionist that the revisionist gives a Bank guarantee of Rs. 2 lakhs before the C.J.M., Kanpur Dehat and files a bond that he shall be producing the truck as and when needed by the criminal courts or the District Magistrate, Kanpur Dehat, and he shall not make any changes nor any variation in the truck."

18. This Court further has held in the case of ***Jai Prakash Vs. State of U.P., 1992 AWC 1744*** that mere pendency of confiscation proceedings before the Collector is no bar to release the vehicle.

19. In ***Kamaljeet Singh Vs. State of U.P., 1986 U.P. Cri. Ruling 50 (Alld)***, the same view was taken by this court that pendency of confiscation proceedings shall not operate as bar against the release of vehicle seized u/s 60 of Excise Act.

20. In the opinion of this Court, it is not disputed that the power under Section 451 of Cr.P.C. is not properly and widely used by the court below while passing the orders. The power conferred under Section 451 of Cr.P.C. be exercised by the court below with judicious mind and without any unnecessarily delay. So that the litigant may not suffer, merely keeping the article in the custody of the police in the open yard will not fulfill any purpose and ultimately it result the damage of the said property. The owner of the property be allowed to enjoy the fruits of the said property for the remaining period for which the property is being made.

21. Further in the opinion of this Court, the procedure as contemplated under Section 457 of Cr.P.C. be also followed promptly, so that the concerned Magistrate may take prompt decision for disposal of such properties and be released in favour of the entitled person of the said property, keeping the said property in the custody will not solve any purpose and that gives a mental and financial torture to the owner of the said property which is also against the law and against the principles of natural justice.

22. As per the legal propositions mentioned above and keeping in view this fact that undisputedly the applicant is the registered owner of the seized vehicle and the ownership of the vehicle is not indispute neither the State or any other person has claimed their ownership over the vehicle, therefore, no useful purpose will be served in keeping the vehicle stationed at the police station in the open yard for a long period allowing it to be damaged with the passage of time.

23. In view of the above facts and circumstances of the case, the impugned orders are not sustainable in the eyes of law and require interference by this court.

24. Accordingly, the application u/s 482 Cr.P.C. is **allowed** and the impugned order dated 10.06.2019 & order dated 18.07.2019 are set aside and the case is remitted back to the concerned Magistrate to decide the release application of the applicant afresh within a period of two months from the date of certified copy of this order is filed before the court below

in the light of the aforesaid observations and the law as discussed above.

(2020)03-05ILR A1718
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.

Application U/S 482 No. 37200 of 2010

Uma Shankar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Bharat Bhushan Paul, Sri S.P. Sharma

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

Criminal Law-Negotiable Instruments Act (26 of 1881)-Section.142 - Negotiable Instruments (Amendment and Miscellaneous Provision) Act, (55) 2002 - amendment of Section 142 w.e.f. - 6.2.2003-Dishonour of cheque - Complaint - Limitation - cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making the complaint within such period - no need for filing an application separately under Section 5 of the Limitation Act

Complainant fell seriously ill & was bed ridden so she could not file complaint within time - Complainant filed medical certificate along with complaint - Complaint filed onon 1.5.2006 i.e.after amendment of S.142 came into force - Hence complaint not barred by limitation.
(Para 18 19)

Application dismissed (E-5)

Cases relied on:

Subodh S. Salaskar Vs. Jayprakash M. Shah U.P. Criminal Rulings 2008 (3) 614

(Delivered by Hon'ble Naheed Ara Moonis, J.)

1. Heard learned counsel for the applicants, the learned AGA for the State and perused the record.

2. The instant application has been filed invoking the inherent powers of this court under Section 482 Cr.P.C. to quash the proceeding of complaint Case No. 1288 of 2010 whereby the applicant has been summoned to face trial under Section 138 of Negotiable Instrument Act, police station M.M. Gate, district Agra and the order dated 18.10.2010 passed by the Additional Chief Judicial Magistrate-II, Agra in the aforesaid case.

3. The submission of the learned counsel for the applicant is that the applicant is maliciously being prosecuted pursuant to the complaint lodged by the opposite party no.2 under Section 138 of Negotiable Instrument Act on 1.5.2006. It is alleged in the complaint that the opposite party no.2 had sold her two plots to the wife of the applicant for consideration of Rs. 5 lacs, the payment whereof was given by two cheques. One cheque was honour by the bank while another cheque no. 546759 dated 25.6.2005 was dishonoured by the bank with the memorandum dated 21.12.2005 mentioning "not arranged for". It was mentioned in the complaint that the opposite party no.2 had sent a registered notice on 4.1.2006 but the same was never received by the applicant and has been alleged that despite service of notice no reply was given by the applicant nor made any payment. On the basis of the aforesaid complaint dated 1.5.2006 the statements of

the complainant and witnesses were recorded and the court below proceeded to summon the applicant to face trial by order dated 24.5.2006 under Section 138 of Negotiable Instrument Act. The court below has further observed that no prima facie offence is made out under Section 420 I.P.C.

4. Aggrieved by the summoning order dated 24.5.2006 the applicant challenged the proceeding before this court by filing Criminal Misc. Application No. 642 of 2008, which was disposed of with the direction to the applicant to surrender before the court below and apply for bail and file objection. In pursuance of the order of this court the applicant had surrendered before the court below and was released on bail. The applicant has filed objection denying the contents of the complaint and submitted that in the registered sale deed only one cheque of Rs. 2,50,000/- was mentioned, which was honoured on 28.6.2005 by the bank in favour of the opposite party no.2 and Rs. 2,50,000/- was given to the opposite party no.2 in cash. The second cheque in dispute was given as guarantee of which stop payment was done by the applicant on 12.7.2005 as one cheque, which was issued in favour of the opposite party no.2 was also cleared in respect of the sale consideration. In the objection the applicant has also denied that no notice whatsoever was received by the applicant. Specific plea was raised in respect of filing the complaint as barred by limitation as the complainant has filed the complaint after four months on 1.5.2006 whereas it ought to have been filed on 19.2.2006 after expiry of 15 days notice. This objection has been rejected by the court below wholly on erroneous ground by holding that such objection cannot be decided at this stage, which will be considered at the time of hearing of the case.

5. The said order was passed on 16.10.2008, as such the same was again challenged before this court by filing 482 Petition No. 3009 of 2009. The petition was allowed and another Bench of this court quashed the order dated 16.10.2008 directing the court below to consider the question of maintainability of complaint first then proceed with the trial "if need arises for the same".

6. In pursuance of the direction of this court the learned Magistrate after considering the arguments qua the objection raised by the applicant with regard to maintainability of the complaint rejected the objection on 18.10.2010, hence this petition has been filed. The learned Magistrate has committed manifest error in accepting that the complaint has been filed by the opposite party no.2 was maintainable and filed well within time for which no separate application is required for condoning the delay and maintained the order summoning the applicant to face trial under Section 138 of Negotiable Instrument Act. When the complaint itself barred by time of which no plausible explanation was given by moving a separate application to condone the delay in filing the appeal the hence prosecution of the applicant suffers from manifest error of law.

7. The learned counsel for the applicant has relied upon the decision of the Apex Court in U.P. Criminal Rulings 2008 Volume 3 Page 614 Subodh S. Salaskar Vs. Jayprakash M. Shah and another and submitted that it has been specifically held that in the matter of dishonour of cheque unless condition precedent for taking cognizance are not

satisfied cognizance of offence cannot be taken. Reliance has been paced in paras 23 and 24 of the aforesaid case, which is delineated herein as under;

" 23. The complaint petition admittedly was filed on 20.04.2001. The notice having been sent on 17.01.2001, if the presumption of service of notice within a reasonable time is raised, it should be deemed to have been served at best within a period of thirty days from the date of issuance thereof, i.e., 16.02.2001. The accused was required to make payment in terms of the said notice within fifteen days thereafter, i.e., on or about 2.03.2001. The complaint petition, therefore, should have been filed by 2.04.2001."

"24. Ex facie, it was barred by limitation. No application for condonation of delay was filed. No application for condonation of delay was otherwise maintainable. The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay. It is, therefore, a substantive provision and not a procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the Limitation Act, 1963 or Section 473 of the Code of Criminal Procedure, 1976. The provisions of the said Acts are not applicable. In any event, no such application for condonation of delay was filed. If the proviso appended to Clause (b) of Section 142 of the Act contained a substantive provision and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well-settled, in absence of an express provision, cannot be given a retrospective effect or retroactive operation."

8. Considering the dictum of the Apex Court the court directed not to take coercive action against the applicant while issuing notice to the opposite party no.1 on 23.11.2010. Thereafter the aforesaid order was confirmed by order dated 16.9.2011 staying further proceeding of the case. Despite service of notice no counter affidavit has been filed on behalf of the opposite party no. 2. However, the court below has now proceeded against the applicant in view of the order of the Hon'ble Apex Court in the case of Asian Resurfacing of Road Agency Pvt. Ltd. and others Vs. Central Bureau of Investigation, AIR 2018 SC 2039 that the proceedings shall not be stayed after expiry of six months and hence the court below by order dated 30.3.2019 has issued non bailable warrant against the applicant.

9. It is further submitted by the learned counsel for the applicant that issuance of non bailable warrant against the applicant is liable to be quashed and also the further proceeding of the case as the complaint itself is not maintainable, which was filed beyond the period of limitation of which no separate application was moved for condoning the delay in filing the complaint, which is the requirement of the law.

10. The learned A.G.A. has refuted the submission of the learned counsel for the applicant and contended that the order passed by the court below way back on

24.5.2006 summoning the applicant to face trial does not suffer from any error much less any error of law and the case, which has been cited by the learned counsel for the applicant on the basis of which the proceeding has been stayed would not apply in the present facts and circumstances of the case. The disputed question of fact with respect to execution of the sale deed in consideration of Rs. 5 lacs is not disputed at all by the applicant. The opposite party no.2 was handed over two cheques by the applicant. Each of Rs. 2,50,000/-. The applicant had got the sale deed executed in the name of his wife Smt. Prabha Sharma of which reference has been given in the sale deed. As one cheque issued by the applicant was encashed, the other cheque of Rs. 2,50,000/- was returned due to insufficiency of fund in the account of the applicant on 21.12.2005 and hence a legal notice was given by the opposite party no.2 on 4.1.2006 of which neither any reply was given nor payment of the cheque amount was paid and hence the complaint was filed on 1.5.2006 by the opposite party no.2. The opposite party no.2 in paragraph 6 of the complaint has specifically given reason for not filing the complaint earlier as she was seriously ill and her treatment was going on in Ganga Nursing Home, Rambagh, Agra and was advised by the Doctor for complete bed rest from 1.2.2006 to 27.4.2006 and in this regard the Doctor has issued a certificate, which was appended along with the complaint. As the applicant has committed fraud with the opposite party no. 2 who got the sale deed executed surreptitiously in the name of his wife and the cheque was given when there was no amount of Rs. 2,50,000/- in his account on account of which the cheque was dishonoured and hence the complaint was filed on 1.5.2006 by the opposite party no. 2. After taking into account the oral and documentary evidence the learned court below proceeded to pass the order summoning the applicant to face trial. So far as the filing of the complaint not within time is concerned the objection of the applicant is absolutely baseless which is only in order to linger on the proceeding as twice the court below has rejected the same after considering the provisions of law regarding maintainability, as such the applicant has ample opportunity to raise the objection with respect to the disputed question of fact at the appropriate stage before the trial court. Hence the present 482 petition is liable to be dismissed.

11. This court has given anxious consideration to the arguments advanced by the learned counsel for the applicant and the learned A.G.A. for the State.

12. So far as the question raised by the learned counsel for the applicant that the complaint is barred by limitation for which no separate application has been filed to condone the delay in filing the complaint, it is necessary to deal the provisions of Sections 138 and 142 of the Act.

*"138 - Dishonour of cheque for insufficiency, etc., of funds in the account *** *** *** Provided that nothing contained in this section shall apply unless--*

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the

said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

Section 142 of the Act also puts a limitation in the power of the court to take cognizance of the offences, which reads as under:

"142 . Cognizance of offences Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)--

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause-of-action arises under clause (c) of the proviso to section 138 :

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

13. The language used in Section 138 of the Act is based upon five components, namely, (i) drawing the cheque, (ii) presentation of cheque to the bank, (iii) returning of the cheque unpaid by the drawer,(iv) giving notice in writing to the drawer of the cheque demanding payment of the amount and (v) failure of the drawer to make payment within 15 days of receipt of the notice.

14. In the present case the disputed cheque no. 546749 dated 25.6.2005 of Rs. 2,50,000/- of State Bank of India, Sadar Bazar, Agra handed over to the complainant by the applicant, which bears his signature and on giving assurance by the applicant when the cheque was deposited by the opposite party no.2 in her account after five months in Punjab National Bank, Agra, the same was returned with the endorsement of "insufficient fund" in the account of the applicant on 21.12.2005, hence a legal notice was given with respect to the dishonour of the cheque by the complainant through registered post on 4.1.2006, which was received by the applicant but even after expiry of 15 days when the required amount was not paid by the applicant the complaint was filed on 1.5.2006 specifically bringing to the notice that as she fell ill she could not file the complaint within the time and in this regard she has filed medical certificate of the Doctor along with the complaint even during this period also the applicant had not paid the due amount to the opposite party no. 2.

15. The contention of the counsel for the applicant is that the requirement of Section 142 has not been complied with yet the cognizance has been taken by the court below suffers from manifest error in view of the decision of the Apex Court in

Subodh S. Salaskar Vs. Jayprakash M. Shah would not apply in the present circumstance of the case. The case of Subodh S. Salaskar Vs. Jayprakash M. Shah (supra) was in relation to the complaint, which was filed under Section 138 of the Act on 20.4.2001. In that case the notice was issued on 16.2.2001 then the complaint petition should have been filed by 2.4.2001, which was filed on 20.4.2001. Thus it is evident that the complaint in the said case was filed prior to the amendment of Section 142 of the Act.

16. The amendment in Clause (b) of Section 142 of the Act has been added by the Negotiable Instruments (Amendment and Miscellaneous Provision) Act, (55) 2002 with effect from 6.2.2003, which delineates here as under;

"Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making the complaint within such period."

17. Thus this amended provision was not applicable when the complaint was filed in Subodh S. Salaskar Vs. Jayprakash M. Shah's case for which a separate application for condoning the delay was required to be filed as per the provisions of t he Limitation Act. The Apex Court has held that the proviso to Clause (b) of Section 142 of the Act was inserted in 2002 could not have been retrospective effect, which is a substantive provision, hence the proceeding was quashed holding the complaint in the said case was not filed within time and held that the learned Magistrate had no jurisdiction to take cognizance under Section 138 of the Act.

18. By virtue of the amendment the proviso added in 2002 under Section 142 of the Act does not lay any requirement for filing an application separately under Section 5 of the Limitation Act. The present complaint was filed in 2006 after the amendment has came into force. Thus according to the proviso if the complainant has put forth the reason in the complaint itself for not filing the complaint within time and the learned Magistrate is satisfied that delay has been explained can take cognizance of the offence as such the said case is not applicable in the present facts and circumstances of the case. It is not incumbent upon the opposite party no.2 to file separate application for condoning the delay in filing the complaint in view of the proviso to Section 142 of the Act. The complainant had satisfied that she had sufficient cause for not making a complaint within the prescribed period as there is an explanation of the delay in filing the complaint the learned court below has committed no error in rejecting the objection of the applicant in the light of the amended proviso of Section 142 of the Act who however succeeded in getting the proceeding of the present case stalled for a long period. The other factual aspect of the case cannot be decided at the threshold, which is the subject matter of trial. Thus it cannot be said that the filing of complaint was barred by limitation, the learned Magistrate has rightly rejected the objection filed by the applicant by impugned order dated 18.10.2010 which does not call for any interference. The applicant has utterly failed to make out any case that the cognizance is bad in law, hence there is no justifiable reason to quash the proceeding pending against the applicant since 2010.

19. The application is absolutely misconceived and is accordingly dismissed. The interim order is hereby vacated. The

disputed questions of fact will be considered by the court below in accordance with law and it is expected that as the proceeding is pending since long the court below shall proceed with the case on its own merit expeditiously in accordance with law after giving opportunity of hearing to both the parties.

20. Since the non bailable warrant had already been issued against the applicant, he is directed to appear before the court concerned within three weeks and apply for bail, which shall be considered by the court below in accordance with law.

21. The office is directed to communicate this order to the court below through FAX forthwith for information and necessary compliance.

(2020)03-05ILR A1724
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.11.2019

BEFORE
THE HON'BLE AJIT SINGH, J.

Application U/S 482 No. 38681 of 2019

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

Counsel for the Applicants:
Sri Arvind Kumar, Sri Abhishek Narayan Pandey, Sri Rajiv Lochan Shukla

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

Criminal Law-Criminal Procedure Code, 1973 - Section 193 - Cognizance of offence - cognizance for the second time u/s 193 CrPC by the Session Court not permissible by law - cognizance of an offence can only be taken once - if once the cognizance of the offence has been taken by the Sessions Court after committal of the case to it & trial has commenced - then again the Sessions Court cannot go back & take further cognizance of the case again u/s 193 CrPC and summon other accused - if the trial court considers after evaluating the evidence which has come during trial then the trial court may proceed against the persons, who appears to be guilty with the aid of Section 319 Cr.P.C. (Para 16, 17, 18)

FIR against 13 named persons - ten persons were chargesheeted - cognizance taken by trial court on 31.08.2018 against all ten persons - prosecution moved application u/s 193 CrPC that police had not submitted any report against three accused-persons - it was prayed that those three accused be arrayed as an accused - trial court took further cognizance and summoned those three accused for trial on 18.09.2019 - *Held* - Trial court order illegal (Para 18)

Application allowed (E-5)

List of cases cited :

1. Dharm Pal & ors. Vs St. of Haryana & ors. 2014 3 SCC 306

2.Hardeep Singh Vs St. of Punjab & ors. 2014 3 SCC 92

3.Y. Saraba Reddy Vs Puthur Rami Reddy & anr. 2007 4 SCC 773

4.Minu Kumari Vs St. of Bihar (2006) 4 SCC 359

5. Balveer Singh Vs St. of Rajasthan (2016) 6 SCC 680

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

1. Heard Sri Rajiv Lochan Shukla, learned counsel for the applicants, Sri Ravi Prakash Pandey, learned AGA for the State and perused the material available on record.

2. The present application under Section 482 Cr.P.C. has been filed by the

applicants for quashing the impugned order dated 18.09.2019 passed by Additional Sessions Judge, Court No.10, Meerut in S.T. No.447 of 2018 and 912 of 2018 (State of U.P. vs. Ikram and Ors.), under Sections 147, 148, 149, 323, 342, 352, 307, 302 and 308 IPC, Police Station Parichitgarh, District Meerut.

3. The first information report of this incident was lodged by the complainant against 13 named accused-persons. It was alleged in the FIR that brother of the complainant was done to death by the accused-persons and later on 'Behnoi'-Kamrul of the complainant Muzassim was also done to death by the accused-persons and Kamrul and Muzassim had died on the spot and the complainant and his brother Sadrul, Fahim, Kadim, Javed and Salim had also received injuries. The matter was investigated and the police had submitted charge sheet on 29.03.2018 against eight persons and against five accused-persons, the investigation was in progress. Later on second charge sheet was submitted on 23.06.2018 against two persons, namely Iftedar and Jisaan. The cognizance of the offence on the basis of papers submitted by the police was taken by the Sessions Court on 31.08.2018 and later on charges were framed. After framing of charge, an application was moved from the prosecution side under Section 193 Cr.P.C. and in the application it was mentioned that the complainant filed FIR against 13 named persons and eight persons were chargesheeted, later on, two persons were also chargesheeted and cognizance was taken by the trial court against all ten persons and it was mentioned in that application the police had not submitted any report under Section 173(2) Cr.P.C. against three accused-persons, namely Farman, Hussain and Rameej and three years have passed and the police has not submitted any charge sheet against the accused-persons, namely Farman, Hussain and Rameej and it was prayed in that application that three accused, namely Farman, Hussain and Rameej be arrayed as an accused under Section 193 Cr.P.C. and this application was disposed of by the trial court vide impugned order dated 18.09.2019 and by the said impugned order, the application given by the prosecution under Section 193 Cr.P.C. was accepted and the accused Farman, Hussain and Rameej were summoned for trial under Sections 147, 148, 149, 323, 342, 352, 307, 302 and 308 IPC.

4. Aggrieved by this order, the present application under Section 482 Cr.P.C. has been filed by the accused-persons with a prayer for quashing the impugned order.

5. It has been submitted by the learned counsel appearing on behalf of the applicants that the impugned order passed by the trial court is against the law and when the Sessions court has taken cognizance under Section 193 Cr.P.C. earlier on 31.08.2018, then it was not within the scope of the trial court to again take cognizance of the present accused-applicants on the basis of police papers submitted by the police. It has been further submitted that when the trial was in progress, the evidence of PW-1 was recorded on 20.09.2018, then the application under Section 193 Cr.P.C. is not legally maintainable, as it was beyond the scope of the trial judge to summon the accused-applicants under Section 193 Cr.P.C. It is also submitted that when the trial has progressed, then the court can summon the accused-persons, who were not arrayed as accused in the charge sheet or against whom charge has not been

framed only under Section 319 Cr.P.C. after considering the evidence during trial.

6. Learned counsel for the applicants has relied on the judgment of Hon'ble Supreme Court in the case of **Dharm Pal & Ors. Vs. State of Haryana & Ors. reported in 2014 3 SCC 306, Hardeep Singh Vs. State of Punjab & Ors. reported in 2014 3 SCC 92** and in the case of **Y. Saraba Reddy Vs. Puthur Rami Reddy & Anr. reported in 2007 4 SCC 773.**

7. Sri Ravi Prakash Pandey, learned AGA has vehemently opposed the arguments advanced by learned counsel for the applicants and submitted that the impugned order passed by the learned trial judge under Section 193 Cr.P.C. is a perfect order and no interference is legally required in that impugned order as it was well within the scope of the learned trial judge to array some other persons as an accused in the trial.

8. This Court would like to refer to the provisions of Sections 190 and 193 Cr.P.C. of the Code, which has come into play in the instant case for the proper understanding thereof, as it shall provide categorical answer to the issue in hand and will help this Court in tracing the underlying legal principle laid down in the present case.

"Section 190. Cognizance of offences by Magistrates. (1) Subject to the provisions of this Chapter, any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered in this behalf under sub-section (2), may take cognizance of any offence ---

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the Second Class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

Section 193. Cognizance of offences by courts of Session.--- Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

9. Sections 190 and 193 of the Code are in Chapter XIV. This Chapter contains the title "Conditions requisite for initiation of proceedings". Section 190 deals with cognizance of offence by Magistrates. It empowers any Magistrate of the First Class, and any Magistrate of the Second Class which are specially empowered to take cognizance "of any offence" under three circumstances mentioned therein. These three circumstances include taking of cognizance upon a police report of such facts which may constitute an offence. It is trite law that even when police report is filed stating that no offence is made out, the Magistrate can ignore the conclusion arrived at by the investigating officer and is competent to apply its independent mind to the facts emerging from the investigation and take cognizance of the case if it thinks

that the facts emerging from the investigation do lead to prima facie view that commission of an offence is made out. In such a situation, the Magistrate is not bound to follow the procedure laid down in sections 200 and 202 of the Code for taking cognizance of the case under Section 190(1)(a) though it is open for him to act under Section 200 or Section 202 as well as held in the case of Minu Kumari Vs. State of Bihar, reported in (2006) 4 SCC, 359. Thus, when a complaint is received by the Magistrate under Section 190(1)(a) of the Code, the Magistrate is empowered to resort to procedure laid down in Section 200 or 202 of the Code and then take cognizance. If police report is filed he would take cognizance upon such a report, as provided under Section 190(1)(b) of the Code in the manner mentioned above as highlighted in the case of ***Minu Kumari (Supra).***

10. Likewise, Section 193 of the Code empowers the Court of Session to take cognizance of offences and states that the Court of Session shall not take cognizance of any offence as the court of original jurisdiction unless the case has been committed to it by the Magistrate under this Code. As per this section, the Court of Session can take cognizance only after the case has been committed to it by the Magistrate, However, once the case is committed to it by the Magistrate, the Court of Session is empowered to take cognizance acting ***"as a court of original jurisdiction".***

11. In view of the aforesaid provisions, the question that arises is as to whether the Magistrate can take cognizance of an offence which is triable by the Court of Session or he is to simply commit the case to the Court of Session, after completion of committal proceedings as it is the Court of Session which is competent to try such cases. On the one hand, Section 190 of the Code empowers the Magistrate to "***take cognizance of any offence"*** which gives an impression that such Magistrate can take cognizance even of an offence which is triable by the Court of Session. On the other hand, when the case if committed to the Court of Session by the Magistrate, Section 193 of the Code stipulates that the Court of Session shall take cognizance "as a court of original jurisdiction" which shows that the cognizance is taken by the Court of Session as a court of original jurisdiction and, thus, it is the first time the cognizance is taken and any order passed by the Magistrate while committing the case to the Court of Session did not amount to taking cognizance of the offence which is triable by the Court of Session.

12. A bare reading of Section 190 of the Code which uses the expression ***"any offence"*** amply shows that no restriction is imposed on the Magistrate that the Magistrate can take cognizance only for the offence triable by the Magistrate Court and not in respect of the offence triable by a Court of Session. Thus, he has the power to take cognizance of an offence which is triable by the Court of Session. If it is so, the question is as to what meaning is to be assigned to the words **"as a court of original jurisdiction"** occurring in Section 193 of the Code when the Court of Session takes cognizance of any offence. To put it otherwise, when the Magistrate has taken cognizance and thereafter only committed the case to the Court of Session, whether the Court of Session is not empowered to take cognizance of an offence again under Section 193 of the Code or it still has power to take cognizance acting as court of original jurisdiction. In order to find the

answer, it is necessary to have a look on the decision of the Apex Court in the case of **Dharam Pal Vs. State of Haryana, reported in (2014) 3 SCC., 306.**

13. In the case of **Dharam Pal Vs. State of Haryana (Supra)**, an F.I.R. was registered against one N and the appellants for the commission of offences under Sections 307 and 323 read with Section 34 I.P.C. The police after investigation submitted its report under Section 173(2) of the Code before the Magistrate sending only N for trial while including the names of the appellants in Column 2 of the report. On receipt of such police report, the Magistrate did not, straightaway, commit the case to the Sessions Court but, on an objection being raised by the complainant, issued summons to the appellants therein to face trial with the other accused N as the Magistrate was convinced that a prima facie case to go for trial had been made out against the appellants as well. Further, while doing so, the Magistrate did not hold any further inquiry, as contemplated under Sections 190, 200 or even 202 of the Code, but proceeded to issue summons on the basis of the police report only. In this background, the following questions arose for the consideration by the Constitution Bench. (SCC p.312, para 7).

"7.1 Does the Committing Magistrate have any other role to play after committing the case to the Court of Session on findings from the police report that the case was triable by the Court of Session ?

7.2 If the Magistrate disagrees with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in Column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh, to stand trial in connection with the case made out in the police report ?

7.3 Having decided to issue summons against the appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Session to stand trial or whether he was justified in issuing summons against them without following such procedure ?

7.4 Can the Sessions Judge issue summons under Section 193 Cr.P.C. as a court of original jurisdiction ?

7.5 Upon the case being committed to the Court of Session, could the Sessions Judge issue summons separately under Section 193 of the Code or would he have to wait till the stage under Section 319 of the Code was reached in order to take recourse thereto ?

7.6 Was Ranjit Singh Vs. State of Punjab, reported in the case of (1998) 7 SCC, 149, which set aside the decision in the case of Kishun Singh Vs. State of Bihar, reported in (1993) 2 SCC, 16, rightly decided or not ?'

14. Answering the reference, the Constitution Bench in the case of **Dharam Pal Vs. State of Haryana (Supra)**, held that :

"The Magistrate has ample powers to disagree with the final report that may be filed by the police authorities under section 173(2) of the Code and to proceed against the accused persons

dehors the police report. The Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) of the Code. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being prima facie satisfied that a case had been made out to proceed against the persons named in Column 2 of the report, he may proceed to try the said persons or if he is satisfied that a case had been made out which was triable by the Court of Session, he must commit the case to the Court of Session to proceed further in the matter. Further, if the Magistrate decides to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same is found to be triable by the Sessions Court.

The Sessions Judge is entitled to issue summon under Section 193 of the Code upon the case being committed to him by the Magistrate. Section 193 speaks of cognizance of offences by the Court of Session. The key words in the section are that (Dharam Pal Dharam Pal Vs. State of Haryana (Supra) (SCC p.319, para 38).

"38.....no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

The provision of section 193 entails that a case must, first of all committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising original jurisdiction. The submission that the cognizance indicated in Section 193 deals not with cognizance of an offence but of the commitment order passed by the Magistrate, was specifically rejected in view of the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said section.

Cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceeding to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of section 209 of the Code will, therefore, have to be understood as the Magistrate playing a passive role in committing the case to the Court of session on findings from the police report that the case was triable by the Court of Session. Nor can there by any question of part cognizance being taken by the Magistrate and part cognizance being taken by the Sessions Judge.

In the process of coming to the aforesaid conclusions, this Court in Dharam Pal Vs. State of Haryana (Supra)

accepted the view expressed in the of Kishun Singh Vs. State of Bihar, reported in (1993) 2 SCC, 16 (SCC p.320, para 40) the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. It specifically held that upon committal under Section 209 of the Code, the Sessions Judge may summon those persons shown in Column 2 of the police report to stand trial along with those already named therein.

Interestingly, at the same time, the Court in the case of Dharam Pal Vs. State of Haryana (Supra) also held that it would not be correct to hold that on receipt of a police report and seeing that the case is triable by a Court of Session, the Magistrate has no other function but to commit the case for trial to the Court of Session and the Sessions Judge has to wait till the stage under Section 319 of the Code is reached before proceeding against the persons against whom a prima facie case is made out from the material contained in the case papers sent by the Magistrate while committing the case to the Court of Session."

15. In this view of the matter Hon'ble Apex Court in the case of B**alveer Singh Vs. State of Rajasthan, reported in (2016) 6 SCC, 680**, held as under :

"In that view of the matter, we have no hesitation in agreeing with the views expressed n Kishun Singh Vs. State of Bihar (Supra) that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Sessions Judge may summon those persons shown in Column 2 of the police report to stand trial along with those already named therein."

16. It is well settled position of law that cognizance of an offence can only be taken once and if once the cognizance of the offence has been taken in the present case by the Sessions Court after committal of the case to the Sessions Court and the Sessions Court had charged the accused and the trial of the accused has commenced then again the Sessions Court will not be able to go back and to take further cognizance of the case again under Section 193 Cr.P.C.

17. In the present matter as the cognizance has already been taken by the learned Sessions Judge and charges were framed against the accused after considering the police papers annexed with the charge-sheet and the trial had started, it would not be proper for the trial court to take further cognizance of the case and to summon the three accused by the impugned order. The summoning of the three accused by the impugned order is not in consonance with the legal provisions of law. The cognizance taken by the trial sessions court under Section 193 Cr.P.C. for the second time is not perfectly valid and permissible by law. The impugned order is not legally proper and the impugned order transpires that the trial sessions court has abused the process of law. The impugned order is liable to be quashed.

18. The impugned order dated 18.09.2019 passed by Additional Sessions

Judge, Court No.10, Meerut in S.T. No.447 of 2018 and 912 of 2018 (State of U.P. Vs. Ikram and Ors.), under Sections 147, 148, 149, 323, 342, 352, 307, 302 and 308 IPC, Police Station Parichitgarh, District Meerut, is hereby **quashed** with the direction that since the trial has proceeded and is at an advanced stage as the prosecution has examined the prosecution witness of the trial and if the trial court considers after evaluating the evidence before it, which has come during trial then the trial court may proceed against the persons, who appears to be guilty of the commission of offence with the aid of Section 319 Cr.P.C.

(2020)03-05ILR A1731
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.02.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 40418 of 2012

K.P. Thakur & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Sri Sunil Tripathi, Sri S.K. Tripathi, Sri Amitabh Trivedi, Sri Devesh Tripathi

Counsel for the Respondents:
A.G.A., Sri Ashok Kumar

Criminal law-Applicants were Enquiry Officer and Presiding Officer respectively-Applicant was delinquent employee-false caomplaint under SC/St Act filed-ingredients of section 3(1) (X) not found-alleged place of incidence was chamber-not a public view-no mention that he was insulted being a member of Scheduled Caste-Application partly allowed-summoning for offence u/s 3(1) (X) quashed. (E-9)

Cases cited:

1. Gorige Pentaiah Vs. St. of A.P. & ors. (2008) 12 Supreme Court Cases 531

2. . of A.P. Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

3. Hamida Vs. Rashid, (2008) 1 SCC 474

4.Monica Kumar Vs. St. of U.P., (2008) 8 SCC 781

5.Popular Muthiah Vs. State, Represented by Inspector of Police, (2006) 7 SCC 296

6.Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

7. State of Bihar Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

8. Vaijnath Kondiba Khandke Vs. St. Of Mah. & anr. AIR 2018 SC 2659

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicants, by means of this application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with prayer to quash the entire proceeding of Complaint Case No. 1577 of 2012, under Sections 323, 504, 506 I.P.C. and Section 3(1)(X) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, pending in the Court of Judicial Magistrate, Duddhi, Sonebhadra.

2. Heard learned counsel for applicants, learned counsel for opposite party no. 2, learned A.G.A. for State and perused the record.

3. Learned counsel for applicants argued that a departmental inquiry was pending against Vinod Kumar Tanay,

wherein applicant no. 1 K.P. Thakur was Enquiry Officer and applicant no. 2 Binod Kumar was Presenting Officer. This enquiry was being hindered by Vinod Kumar Tanay by any means. He was summoned for recording of evidence in above inquiry, where he came with M.P. Tiwari, another co-worker. It was objected with a direction to M.P. Tiwari not to intervene in the proceeding of enquiry and he was asked to remain outside of the chamber of applicant no. 1, wherein enquiry was being conducted. He made obstruction. The complainant Vinod Kumar Tanay was of habit of creating hindrance in the smooth functioning by making false accusation at different stages because of being member of Scheduled Caste community. In that enquiry too he tried so, for which instant complaint was lodged by applicants to Department's superiors as well as local authorities. This complaint, with false accusation, was got lodged before court of Judicial Magistrate, Duddhi, Sonebhadra, wherein allegation was levelled with a view to make hindrance in above departmental enquiry, wherein he was examined under Section 200 Cr.P.C. and his two witnesses (co-workers), were examined under Section 202 Cr.P.C. and on the basis of same, learned Magistrate passed impugned summoning order for offences punishable under Sections 323, 504, 506 I.P.C. read with Section 3(1)(X) of SC/ST Act, whereas no assault or abuse in a public view was said to be made by applicants nor it was ever made. The statements, recorded under Section 200 Cr.P.C. as of complainant was with no mention that this occurrence of alleged assault and abuse was made with intention to abuse or insult on the basis of complainant being member of Scheduled Caste community by present applicants, who were not member of Scheduled Caste community. The place of occurrence has been said to be chamber of applicant no. 1 that too after bolting it from inside i.e. it was not an abuse in the public view. The essential ingredients of offence punishable under Section 3(1)(X) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred as the Act) are intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view. In **Gorige Pentaiah Versus State of Andhra Pradesh & Others; (2008) 12 Supreme Court Cases 531**, apex court has propounded at para 6 that a public view is the view, which is of public access. Once it is inside any house, it will not be a public view and in the case of lack of above basic ingredient, the offences of Section 3(1)(X) of the Act is not completed. The same has been propounded by apex court while interpreting public view in same case at para 28. In present case, the place of occurrence has been said to be chamber of applicant no. 1, which was said to be bolted from inside. Meaning thereby, that was not a public view at all. The enquiry concluded with dismissal of complainant as well as his witnesses. Applicants being officers of Northern Coalfields Limited being Controller and Head of Department of Mining, where complainant was an employee and they are to take work from him with administrative control and if such type of practice is being permitted then it will be highly impossible for administrative superiors in getting work from administrative inferiors in performance of official duties. The allegations levelled by complainant was false, baseless and under manipulation, for hindering senior officers and influencing enquiry being conducted against him. It was abuse of process of law.

Hence, this application with above prayer for setting aside impugned summoning order.

4. Learned counsel for opposite party no. 2 vehemently opposed above argument with this contention that there was huge corruption in the office of applicants, for which repeated complaint was being made by complainant, and no inquiry was got conducted, whereas documents regarding same were in the office of given section of the office concerned from where it may be taken and inquiry may be conducted, but no such inquiry was ever conducted and complainant was being victimized, wherefor above departmental enquiry was being constituted and proceeded, wherein complainant along with his colleague M.P. Tiwari, went for appearing in above enquiry. When this occurrence took place, door was bolted from inside and M.P. Tiwari was asked to remain outside from chamber, wherein he was assaulted and insulted by taking name of his caste and threat of dire consequences was extended, which was instantly complained to Department's officers as well as local authorities and police, but of no avail. Then a complaint was filed before Judicial Magistrate, where cognizance was taken and enquiry under Sections 200 and 202 Cr.P.C. was got conducted, thereafter, prima facie evidence was found and impugned summoning order was passed against applicants, against which this application under Section 482 Cr.P.C. has been filed and it is with ulterior motive to get complainant victimized. Hence, this court in exercise of inherent jurisdiction is not to dwell in factual aspect. There was a medical paper, where injuries were found. Hence, this application be dismissed.

5. Learned A.G.A. has vehemently argued that in first line of complaint at para 2, it has been specifically mentioned that complainant was member of Scheduled Caste community and he was insulted and abused by accused persons because of being a member of Scheduled Caste community and place of occurrence was an office, which can never be held to be residential premises of accused persons. It was a public place. It can never be said to be not in public view. Accordingly, this application be dismissed.

6. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474**, hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive*

in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

7. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**, Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not"*.

8. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above. But this provision under Section 482 Cr.P.C. is for ensuring end of justice by avoiding abuse of process of law and it is not a power creating section under Code of Criminal Procedure, rather it is an acknowledging power of High Court of Judicature for ensuring that no abuse of process of law by any criminal machinery is to be there and this Court is to see as to whether there is any abuse of process of law apparently on the face of record or in procedure.

9. In present case, the complaint is by an administrative inferior against administrative superior, admittedly, who is conducting a departmental enquiry against him and he had gone there to participate in above proceeding. The Enquiry Officer is to decide as to whether Assisting Officer is to be given to employee, who is delinquent employee in above inquiry or inquiry is to be conducted in camera in Chamber. Any Tom and Harry can never be permitted to come inside, wherein the enquiry is being conducted and to participate in above enquiry, rather if any Assisting Officer is to be taken by delinquent employee, he will have to move an application before Administrative Head or Enquiry Officer for appointing and permitting any Assisting Officer to that delinquent employee and, thereafter, that Assisting Officer may take part in above Administrative Enquiry. In present case, M.P. Tiwari in his statement, recorded under Section 202 Cr.P.C., has said that he went at the place of occurrence to say the justice. Neither he was appointed

as Assisting Officer nor he was permitted to take part in enquiry, but he went to that place for saying justice. He was so social worker and so a person of securing cause of justice that without following the procedure, he present himself for saying justice, though he was asked to remain out and he remained out side. The door was locked form inside. It was a Chamber of the Enquiry Officer, where Presenting Officer and Enquiry Officer were present and it can never be said to be a public view. Even if, any occurrence took place at that place, it may never be said to be a public view and it has been verified by apex court, mentioned as above. Hence, the very ingredient of offence punishable under Section 3(1)(X) of the Act was missing. The second aspect is that complainant in his statement recorded under Section 200 Cr.P.C. has not said that he was insulted because of being a member of Scheduled Caste community by a persons, who were not member of Scheduled Caste community. This ingredient too was missing in the statement of complainant, recorded under Section 200 of Cr.P.C. Other two witnesses, who were examined were co-workers of the same Department and they were admittedly not inside the room, when this occurrence took place and how this occurrence took place, what was precipitation time and what resulted in this occurrence, were not witnessed by those witnesses. Hence, for the same occurrence, these superiors have lodged complaint with local authorities as well as Department Heads and for the same, this complaint was filed there. What was the precipitating point, could not be determined by those witnesses. Moreso, apex court in **Vaijnath Kondiba Khandke vs State Of Maharashtra and Anr. AIR 2018 SC 2659**, has propounded that while dealing with a matter, in which complaint or accusation has been lodged by administrative junior or employee against his Head of Office or administrative superior regarding their exploitation or harassment, the Court must take in mind that if such type of occurrence are being actually visualized, then it will be highly impossible for administrative superiors to take work from administrative juniors. There must be administrative authority of administrative superiors, then and then only, they will be in position to take work from junior employees and mere bald allegation of harassment and such type of exploitation are to be strictly analyzed with all care and caution. Hence, in present case, admittedly, applicants were Enquiry Officer and Presenting Officer. They were conducting a regular departmental enquiry against complainant. Meaning thereby, charge was framed and the employee complainant was charged employee. Meaning thereby, prima facie, he was delinquent employee, for which charge was framed. Preliminary inquiry stage was passed. Thereafter, departmental enquiry was being conducted and when this enquiry was conducted this fuss was created. Who created this and what was the precipitating point was to be visualized and examined by Magistrate before summoning applicants, but casually impugned order of summoning for offence punishable under Section 3(1)(X) of the Act was passed. On above facts and circumstances, as apparently offence under Section 3(1)(X) of the Act was not made out, on the basis of evidence collected in inquiry by Magistrate concerned, hence this application merits to be allowed in part.

10. The application is partly **allowed**. The summoning for offence punishable

under Section 3(1)(X) of the Act is hereby quashed. For rest of the offences, the prayed relief is refused.

(2020)03-05ILR A1736
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.11.2019

BEFORE
THE HON'BLE AJIT SINGH, J.

Application U/S 482 No. 40911 of 2019

Ballia & Anr. ...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Sri Abhishek Srivastava, Sri Abhishek Mayank.

Counsel for the Opposite Party:
A.G.A., Sri Ronak Chaturvedi

Criminal law-U.P. Gangster and Anti Social Activities (Prevention) Act, 1986-section 12-Trial u/s 302 IPC pending and about to conclude-Applicant submit that trial under Gangster Act may first be concluded thereafter trial u/s302IPC-section 12 of the Act-case under Gangster Act should not be delayed-clash of dates with other case to be avoided- if dates are common then case under the Gangster Act will get precedence-other case cannot be placed in abeyance-Application dismissed.

Held, If the interpretation is given that till the conclusion of trial under the Gangsters Act all other cases have to be placed in abeyance, then a chaotic situation would arise and accused would manage a case pending under various other acts merely on the ground of pendency of case under Gangster Act.(Para 18) (E-9)

In the present case Session Trial against the accused persons is pending since 2005 and they are just trying to get delayed the trial with the help of Section 12 of the Gangsters Act.
(Para 19)

After considering all the submissions and the law laid down by this Court, this Court is of the opinion that the trial against the accused persons cannot be kept in abeyance till conclusion of the trial under the Gangsters Act. The only consideration for this Court is that there should not be any collusion of date so that cases under the Gangsters Act are not delayed**.** (Para 20)

Cases cited:

1. Mohd. Tariq & anr. Vs St. of U.P. Application U/s 482 No. 18978 of 2019

2. Rohit Singh Vs. St. of U.P. (2016) 95 ACC 350

3. Dharmendra Kirthal Vs St. of U.P. [(2013) 8 SCC 368

4. Mobin Iftikhar Zaidi Vs. St. of U.P. (Application U/s 482 No. 27361 of 2011)

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

1. Sri Ronak Chaturvedi, learned counsel has filed counter affidavit filed on behalf of the informant, which is taken on record.

2. Heard Sri Abhishek Srivastava, learned counsel for the applicants, Sri Ronak Chaturvedi, learned counsel for the informant, learned A.G.A. for the State and perused the record.

3. The applicants, through the present application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with a prayer to quash the proceedings of S.T. No. 661 of 2005 (State vs. Balliya, under Section 302 I.P.C., P.S. Khair, district-Aligarh, pending in the Court of Addl. District Judge-IV, Aligarh till the disposal of G.S.T. No. 630 of 2010, under Section 2/3 U.P. Gangster and Anti Social Activities (Prevention) Act, 1986,

pending in the Court of Addl. District Judge, court no. 6, Aligarh in view of the Section 12 of U.P. Gangster and Anti Social Activities (Prevention) Act, 1986.

4. Learned counsel for the applicants submitted that the applicants are facing trial in Sessions Trial no. is 661 of 2005, under Section 302 I.P.C. and in view of the aforesaid Sessions Trial, the applicants were also arrayed as accused in S.S.T. No. 630 of 2010, under Section 2/3 U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, which is pending in the Court of IV Addl. District Judge, Aligarh and the proceedings of Gangsters Act are still continuing and proceedings in the Session Trial no. 661 of 2005, under Section 302 I.P.C. are about to conclude.

5. Learned counsel for the applicants has relied on Section 12 U.P Gangster and Anti Social Activities (Prevention) Act, 1986 and submitted that trial under the Gangster act may first be concluded and thereafter trial under Section 302 I.P.C. should proceed.

6. Learned counsel for the applicants while advancing his argument has placed reliance on the order of this Court in **Mohd. Tariq and another vs. State of U.P**. passed in application U/s 482 No. 18978 of 2019 and has submitted that in view of the decision in the above mentioned case the trial of the Gangster Act pending in the court of IVth Addl. District Judge, Aligarh be given precedence and proceedings of S.T. No. 661 of 2005, pending in the Court of VIth Addl. District Judge be kept in abeyance till the decision of S.T. No. 630 of 2010 under Gangster Act.

7. On the other hand, learned A.G.A. as well as learned counsel for the informant have submitted that matter has been very well dealt with by another Bench of this Court in **Rohit Singh vs. State of U.P**. **(2016) 95 ACC 350** and has submitted that validity of this section has been upheld by Hon'ble Apex Court in the case of **Dharmendra Kirthal v. State of U.P**. [(2013) 8 SCC 368. Hon'ble Apex Court observed as follows :

"32. The present provision is to be tested on the touchstone of the aforesaid constitutional principle. The provision clearly mandates that the trial under this Act of any offence by the Special Court shall have precedence and shall be concluded in preference to the trial in such other courts to achieve the said purpose. The legislature thought it appropriate to provide that the trial of such other case shall remain in abeyance. It is apt to note here that "any other case" against the accused in "any other court" does not include the Special Court. The emphasis is on speedy trial and not denial of it. The legislature has incorporated such a provision so that an accused does not face trial in two cases simultaneously and a case before the Special Court does not linger owing to clash of dates in trial. It is also worthy to note that the Special Court has been conferred jurisdiction under sub-section (1) of Section 8 of the Act to try any other offences with which the accused may, under any other law for the time being in force, have been charged and proceeded at the same trial."

8. Hon'ble Apex Court has also held in **Shashi Gupta vs. State of U.P.,** in that case, Hon'ble Apex Court has stated as under :-

"We have seen the provisions of Sections 7 & 8 of the Gangsters Act. In our opinion, these provisions do not mean that if a case is already started under the

provisions of the Indian Penal Code and has proceeded to some extent, then if a case under the Gangsters Act has been initiated on the same facts, then it must be transferred to the Special Court under the Gangsters Act. If this submissions is accepted then a large number of cases will be thus delayed and frustrated".

9. This issue was also dealt with by this Court in **Mobin Iftikhar Zaidi v. State of U.P.** (Application U/s 482 No. 27361 of 2011), in which it has been observed that, "***The legislative intention was not that the proceedings of other offences must be kept in abeyance till conclusion of trial under the Gangsters Act."***

10. Relevant part of the judgment is being reproduced below :-

"A perusal of the aforesaid provision reveals the legislative intent behind the said provision and its object was that the trial under the Gangsters Act should be given preference and the same should not get unduly delayed because of pendency of other cases in other courts. The legislative intention was not that the proceedings of other offences must be kept in abeyance till conclusion of trial under the Gangsters Act. Its intent was that the dates fixed in the other trials and in the case under the Gangsters Act should not clash together, in order to ensure that the trial under the Gangsters Act does not get unduly delayed or hampered with and reaches to its logical conclusion at the earliest. It can not be the intention of the legislature that if a person is required in other cases in crimes of such henious nature such as murder, dacoity, loot and rape etc, the trial of those offences should not proceed further till conclusion of trial under Gangsters Act. In view of the above, it is clear that the legislative intent is that the trial under the Gangsters Act need be given preference to other trial."

11. Learned counsel for the applicants contended that all the provision of Sections 7, 8 and 12 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act have to be read together then Court should form an opinion.

12. Sections 7, 8 and 12 of U.P. Gangsters and Anti-Social Activities (Prevention) Act is being reproduced below:-

"7. Jurisdiction of Special Courts- (1) Notwithstanding anything contained in the Code, were a Special Court has been constituted for any local area, every offence punishable under any provision of this Act or any rule made thereunder shall be triable only by the Special Court within whose local jurisdiction it was committed whether before or after the constitution of such special Court.

(2) All cases triable by a Special Court, which immediately before the constitution of such Special Court were pending before any Court, shall on creation of such Special Court having jurisdiction over such cases, stand transferred to it.

(3) Where it appears to any court in the course of any inquiry or trial in respect of any offence that the case is one which should be 'red by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court and thereupon such case shall be tried and disposed of by the Special Court in accordance with the provisions of this Act:

Provided that it shall be lawful for the Special Court to act on the evidence, if any, recorded by the Court in the case in the presence of the accused before the transfer of the case under this section:

Provided further that if the Special Court is of opinion that further examination of any of the witnesses whose evidence is already recorded in the case is necessary in the interest of justice, it may re-summon any such witness and after such further examination, cross-examination and re-examination, it any, as it may permit, the witness shall be discharged.

(4) The State Government may, if satisfied that it is necessary or expedient in the public interest so to do, transfer any case pending before a Special Court to another Special Court.

8. Power of Special courts with respect to other offences.- (1) When trying any offence punishable under this Act a Special Court may also try any other offence with which the accused may, under any other law for the time being in force, be charged at the same trial.

(2) If in the course of any trial under this Act of any offence, it is found that the accused has committed any other offence under this Act or any rule thereunder or under any other law, the Special Court may convict such person of such other offence and pass any sentence authorized by this Act or such rule or, as the case may be, such other law, for the punishment thereof."

12. From the above discussion, it emerges that intention of legislature behind enacting Section 12 is that case under the Gangsters Act should not be delayed. Other cases can go on but clash of dates has to be avoided and for this purpose 'kept in abeyance' would mean that if dates are common then case under the Gangsters Act will get precedence.

13. Learned A.G.A. as well as learned counsel for the informant have also submitted that Session Trial under Section 302 I.P.C. is pending since 2005 and sole purpose of the applicants is to get delayed the judgement of the Session Trial and this application has been filed only to get delayed the trial.

14. After perusal of the provisions of Gangsters Act, it emerges that the intention of the legislative behind enacting Section 12 is that case under the Gangsters Act should not be delayed. Other cases can go on but clash of dates has to be avoided and for this purpose 'kept in abeyance' would mean that if dates are common then case under the Gangsters Act will get precedence.

15. If cases under the IPC or other Acts have been the basis for slapping Gangsters Act, then all the cases can be tried by Special court. It will save valuable time of court apart from ridding prosecution of its burden of producing same evidence repeatedly in different courts.

16. Moreover, Section 7 enables Special court to utilize the evidence recorded during trial.

17. This Court is in respectful agreement with the view taken by Hon. Rajesh Dayal Khare, J. and with the view of Hon. Sudhir Kumar Saxena, J.

18. If the interpretation is given that till the conclusion of trial under the Gangsters Act all other cases have to be

placed in abeyance, then a chaotic situation would arise and accused would manage a case pending under various other acts merely on the ground of pendency of case under Gangster Act.

19. In the present case Session Trial against the accused persons is pending since 2005 and they are just trying to get delayed the trial with the help of Section 12 of the Gangsters Act.

20. After considering all the submissions and the law laid down by this Court, this Court is of the opinion that the trial against the accused persons cannot be kept in abeyance till conclusion of the trial under the Gangsters Act. The only consideration for this Court is that there should not be any collusion of date so that cases under the Gangsters Act are not delayed.

21. In the case on hand, the report was lodged in the year 2005. The trial is pending since 2005 and the trial is about to conclude. The sole purpose of filing of this application is to get the trial delayed, which this Court will not permit.

22. The prayer claimed by the applicants is devoid of merits and is liable to be rejected and hence, it is accordingly **dismissed.**

(2020)03-05ILR A1740
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.11.2019

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 42444 of 2019

Gulam Rabbani @ Sonu ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ronak Chaturvedi

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

Criminal law-Cognizance order-Once the Magistrate takes cognizance-either without discussing reasons-it shall be presumed-he is satisfied on the basis of materialavailable before himdetail discussion not required- Application disposed. (E-9)

Cases cited:

1. Shakuntala Devi Vs. St. of U.P. & ors., Application u/s 482 Cr.P.C. No.11232 of 2018 decided on 25.07.2018

2. Sunil Bharti Mittal Vs. C.B.I. reported in (2015) 4 SCC 609

3. Fakhruddin Ahmad Vs. St. of Uttaranchal reported in (2008) 17 SCC 157

4. Kanti Bhadra Shah & anr. Vs. St. of W.B. (2000) 1 SCC 722

5. Bhushan Kumar & anr. Vs. St. (NCT of Delhi) & anr., (2012) 5 SCC 424

6. U.P. Pollution Control Board Vs. Mohan Meakins Ltd. & ors. (2000) 3 SCC 745

7. Amrawati & anr. Vs. St. of U.P. 2004 (57) ALR 290

8. Lal Kamlendra Pratap Singh Vs. St. of U.P. 2009 (3) ADJ 322 (SC)

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

1. The present 482 Cr.P.C. application has been filed to quash the charge sheet

dated 26.03.2019 as well as cognizance and summoning order dated 12.04.2019 passed by learned Special Chief Judicial Magistrate, Allahabad in Criminal Case No.619 of 2019 (State Vs. Zulfekar Ali and others), under Sections 147, 148, 308, 452, 323, 504, 325 I.P.C., Police Station Mauaima, District Prayagraj, arising out of Case Crime No.272 of 2018, pending in the Court of Special Chief Judicial Magistrate, Allahabad.

2. Heard Sri Ronak Chaturvedi, learned counsel for the applicant, Sri Amit Singh Chauhan, learned A.G.A. and perused the record.

3. It has been contended by learned counsel for the applicant that the order dated 12.04.2019 contained in Annexure 2 to the application by which cognizance of the offence in the instant matter has been taken suffers from judicial non application of mind. It has further been submitted that the cognizance and summoning order have been passed in a mechanical manner, order being without reasons is bad in the eyes of laws as it reflects non application of mind. It has also been argued on behalf of the applicant that the perusal of record of investigation goes to show that the entire allegations made by opposite party no.2 are false and incorrect and the applicant has falsely been implicated in order to exert pressure upon him, hence entire proceeding is also liable to be quashed. Learned counsel for the applicant has argued that the impugned order dated 12.04.2019 whereby the court below has taken cognizance and has issued summons to the applicant, also reflects non application of mind as it is a single line order, not mentioning the offences or the name of the accused.

4. In support of his contention, learned counsel for the applicant has relied upon **Application u/s 482 Cr.P.C. No.11232 of 2018 (Shakuntala Devi Vs. State of U.P. & others), decided on 25.07.2018, Sunil Bharti Mittal Vs. Central Bureau of Investigation reported in (2015) 4 SCC 609; Fakhruddin Ahmad Vs. State of Uttaranchal reported in (2008) 17 SCC 157.**

5. On the other hand, learned A.G.A. has vehemently rebutted the contentions of the applicant's side by submitting that the order taking cognizance and issuing summons against accused is not required to have reasons, much more so when such order is passed upon a charge sheet filed by the Investigating Officer under Section 173 (2) of the Code of Criminal Procedure which itself contains the entire material collected by Investigating Officer, and hence, the impugned order is not amenable to challenge only on this score. According to learned A.G.A. the merit of the order is to be tested on the basis of the contents and allegations of FIR and material available on case diary or on the basis of any other requirement of law necessary to be fulfilled in order to pass order of cognizance and issuing summons against accused.

6. Learned A.G.A. has relied upon several judgments in support of his contention.

7. The Apex Court in the case of **Kanti Bhadra Shah and another Vs. State of West Bengal (2000) 1 SCC 722** in para nos.11 and 12 has observed as under :-

"11. Even in cases instituted otherwise than on police report the Magistrate is required to write an order showing the reasons only if he is to discharge the accused. This is clear from Section 245. As per the first sub-section of Section 245, if a magistrate, after taking all

the evidence considers that no case against the accused has been made out which if unrebutted would warrant his conviction, he shall discharge the accused. As per sub-section (2) the Magistrate is empowered to discharge the accused at any previous stage of the case if he considers the charge to be groundless. Under both sub-sections he is obliged to record his reasons for doing so. In this context it is pertinent to point out that even in a trial before a court of session, the judge is required to record reasons only if he decides to discharge the accused. (vide Section 227 of the Code). But if he is to frame the charge he may do so without recording his reasons for showing why he framed the charge.

12. If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial Courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial. It is a salutary guideline that when orders rejecting or granting bail are passed, the Court should avoid expressing one way or other on contentious issues, except in cases such as those falling within Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985."

8. The Apex Court in the case of **Bhushan Kumar and another Vs. State (NCT of Delhi) and another, (2012) 5 SCC 424** has referred the case of Kanti Bhadra Shah's case as well as **U.P. Pollution Control Board Vs. Mohan Meakins Ltd. & others (2000) 3 SCC 745 a**nd observed in paragraph nos.12, 13, 14, 19 and 20, which is as follows :-

(12) A "summons" is a process issued by a Court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in Court. A person who is summoned is legally bound to appear before the Court on the given date and time. Willful disobedience is liable to be punished under Section 174 IPC. It is a ground for contempt of court.

(13) S ection 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit

narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

(14) Time and again it has been stated by this Court that the summoning order under Section 204 of the Code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith.

(15) .....

(16) .....

(17) .....

(18) .....

(19) This being the settled legal position, the order passed by the Magistrate could not be faulted with only on the ground that the summoning order was not a reasoned order.

(20) It is inherent in Section 251 of the Code that when an accused appears before the trial Court pursuant to summons issued under Section 204 of the Code in a summons trial case, it is the bounden duty of the trial Court to carefully go through the allegations made in the charge sheet or complaint and consider the evidence to come to a conclusion whether or not, commission of any offence is disclosed and if the answer is in the affirmative, the Magistrate shall explain the substance of the accusation to the accused and ask him whether he pleads guilty otherwise, he is bound to discharge the accused as per Section 239 of the Code."

9. The case of **Fakhruddin (supra)** upon which the learned counsel for the applicant has placed reliance is of no help to him as the Apex Court in the case of **Fakhruddin (supra)** was examining the validity of the order passed by Uttaranchal High Court by which it had declined to quash the charge sheet on the ground that it had no power to look into the documents and papers which were filed along with charge sheet for the purpose of considering the prayer for quashing of prosecution, and the Apex Court, while disagreeing with the reasons spelt out by the High Court for refusing to quash the charge sheet set aside the order of the Uttaranchal High Court and remitted the matter back to the High Court for deciding the prayer for quashing of prosecution afresh in accordance with law.

10. The other case, i.e. **Shakuntala Devi (supra)** which has been relied upon by learned counsel for the applicant is not applicable in the present case as in that case earlier a detailed order was filed containing reasons not to accept the charge sheet as filed. Certain specific observations were made in that order to take notice of contradictions in the statements recorded under Section 161 Cr.P.C. Then, prima facie, it was observed that the investigation had not been properly conducted. A hope was also expressed that if a proper investigation were conducted, it may be possible to collect essential evidence. Consequently, further investigation was directed, after which cognizance order was passed.

11. In view of the discussions made hereinabove, I think that there is no legal requirement that the trial court should write the order showing reasons for taking cognizance or for framing of charge after going through the several decisions of

Hon'ble the Apex Court as well as this Court on subject in issue, I am of the view that once the Magistrate takes cognizance of an offence either without discussing what are the reasons behind it, it shall be presumed that on the basis of material available before him he is satisfied that there is sufficient material for taking cognizance and if he is satisfied with those materials for taking cognizance, the detail discussion of those materials by the learned Magistrate is not required. Further once he issues process, even without writing word "cognizance is taken", it is presumed that he has taken cognizance, the writing of word "cognizance is taken" is not necessary. The reason is that by issuance of process he proceeds with the case and the accused who has been summoned for trial have sufficient opportunity to defend himself at the appropriate stage provided in code. In response of issuance of process/summons it is not open for the accused to challenge the summoning order on the ground that no cognizance has been taken or no satisfaction has been shown or there is no detail discussion of the material available rather he has to follow the next step of the process.

12. The prayer for quashing the order dated 12.04.2019 is refused as I do not see any abuse of the court's process either.

13. It is argued that the co-accused Shahjad Ali @ Babloo and others have been granted relief of bail by a co-ordinate Bench of this Court vide order dated 01.11.2019 passed in Application u/s 482 No.39127 of 2019. The same is reproduced hereinunder :-

"Heard learned counsel for the applicants and learned A.G.A. for the State.

The present 482 Cr.P.C. application has been filed to quash the charge sheet dated 26.3.2019 as well as the cognizance order dated 18.4.2019 and the entire proceedings of Criminal Case No. 619 of 2019, arising out of Case Crime No. 0272 of 2018, under Sections-147, 148, 308, 452, 323, 325, 504 I.P.C., Police Station- Mau Aima , District- Prayagraj, pending in the court of Special Chief Judicial Magistrate, Allahabad.

The contention of learned counsel for the applicants is that no offence against the applicants is disclosed and the present prosecution has been instituted with a malafide intention for the purpose of causing harassment. He pointed out certain documents and statements in support of his contention. At this stage, the argument raised by learned counsel for the applicants involves factual disputes and appraisal of evidence.

From the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants at this stage. All the submissions made at the bar, relate to the disputed questions of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283.

The prayer for quashing the entire proceeding of the aforesaid case is refused.

However, in view of the entirety of facts and circumstances of the case, it is directed that in case the applicants appear and surrender before the court below within 60 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290 as well as judgement passed by Hon'ble Apex Court reported in 2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.

With the aforesaid directions, this application is finally disposed of.

Till then no coercive action shall be taken against the applicants.

However, in case, the applicants do not appears before the court below within the aforesaid period, coercive action shall be taken against them.

It is made clear that the applicants will not be granted any further time by this Court for surrendering before the court below as directed above."

14. However, it is observed that if the bail has not been obtained as yet, the accused may appear before the court below and apply for bail within two months from today. The court below shall make an endeavour to decide the bail application on the same day, if possible, keeping in view the observations made by the Court in the Full Bench decision of **Amrawati and another Vs. State of U.P. 2004 (57) ALR 290** and also in view of the decision given by the Hon'ble Supreme Court in the case of **Lal Kamlendra Pratap Singh Vs. State of U.P. 2009 (3) ADJ 322 (SC).**

15. In the aforesaid period or till the date of appearance of the accused in the court below, whichever is earlier, no coercive measures shall be taken or given effect to.

16. With the aforesaid observations, this application is finally disposed off.

(2020)03-05ILR A1745
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.02.2020

BEFORE
THE HON'BLE RAJUL BHARGAVA, J.

Application U/S 482 No. 43298 of 2019

Raghunath ...Applicant
Versus
State of U.P.& Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vinay Kumar, Sri Sanjeev Kumar Sharma

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

Criminal law-Code of Criminal Procedure - Section 311-Application to recall of PW-2 for cross-examination rejected-for three years prosecution did not adduced any evidence-after three years statement recorded and on same day opportunity to cross examination closed due to non pressence of lawyer-impugned order quashed-Application allowed. (E-9)

Held, Considering the above, I am of the view that if the defence is not given proper opportunity to cross-examine PW-2-prosecutrix, who is the victim of the case, it will cause a serious prejudice to defence case as her

testimony would go unrebutted. It is a fundamental right of an accused to have fair trial as envisaged under Article 21 of the Constitution and if the impugned order is not quashed then the main object of affording fair trial to accused in the spirit of life and liberty shall be greatly jeopardized. The powers to recall a witness under Section 311 Cr.P.C. is a very wide and could be exercised for the just decision of a case. The Section 311 Cr.P.C. empowers the Courts to recall material witness at any stage of enquiry or trial, if his/her evidence appears to it to be essential to the arrival at the just decision of a case. (Para 12) (E-9)

Cases Cited:

1. Rafiq & ors. Vs. Munshilal and others AIR 1981 SC 1400

2. The Secretary, Department of Horticulture, Chandigarh & ors. Vs. Raghu Raj AIR 2009 SC 514

(Delivered by Hon'ble Rajul Bhargava, J.)

1. Heard Sri Vinay Kumar Advocate, Sri S.K. Sharma Advocate, learned counsels for the applicant, learned A.G.A. for the State and perused the materials and documents on record.

2. The present application under Section 482 Cr.P.C has been filed with a prayer to quash the order dated 04.10.2019 passed by the learned Special Judge (POCSO)/Additional Session Judge, Kanpur Nagar, in Session trial No. 9 of 2013, arising out of Case Crime No. 466 of 2013, under Sections 376, 504, 506, 406 I.P.C., P.S. Kalyanpur, District- Kanpur Nagar, whereby the application under Section 311 Cr.P.C filed by the applicant to recall PW-2, prosecutrix for cross-examination has been dismissed.

3. The applicant is an accused under Sections 376, 504, 506 and 406 I.P.C, presently facing trial. The statement under Section 164 Cr.P.C of PW-2, prosecutrix was recorded on 02.11.2015 and thereafter on account of non-presence of the prosecutrix and mostly at the instance of prosecution; the case got continuously adjourned from 19.12.2015 to 06.10.2018. Thereafter on 03.11.2018 the prosecution proved the statement of the prosecutrix, however, since the counsel of the applicant was not present for cross-examination neither any adjournment application was filed by the defence counsel, as such the concerned court below closed the opportunity of defence to cross-examine the PW-2, prosecutrix vide same order dated 03.11.2018. Subsequently, on 20.12.2018 an application under Section 311 Cr.P.C. was filed, for recall of PW-2 for cross-examination, which has been rejected under the impugned order dated 04.10.2019.

4. It has been argued by learned counsel for the applicant that the applicant and other accused are facing a grave charge of commission of rape and the court below denied the opportunity of cross-examination of the star witness, thus, the testimony of the prosecutrix would remain unrebutted creating grave injustice and prejudice to the applicant. It is further argued that in fact the applicant has been attending the court regularly barring few occasions as is evident from the order-sheet, however, the record would demonstrate that the prosecution itself was proceeding in a lackadaisical manner and on the date when impugned order was passed there was some negligence and remissness on the part of his lawyer for which the applicant cannot be made

to suffer and therefore the closure of an opportunity to cross-examine by the trial court that the defence counsel willingly did not appear to cross-examine PW-2, prosecutrix is unfounded. The opportunity to recall PW-2 was moved on 20.11.2018 itself but the same reamin pending and was decided by the impugned order dated 4.10.2019.

5. After carefully perusing the order-sheet on record, I find that the examination-in-chief of the prosecutrix, PW-2 was recorded on 2.11.2015, however, as the statement recorded under Section 164 Cr.P.C. was not on record and the same could not be proved the prosecution sought adjournment and on the request of the prosecution the case was adjourned. Order-sheet also reflects that for about three years the prosecution did not adduce any evidence and produced the prosecutrix on 3.11.2018. It appears that her statement recorded under Section 164 Cr.P.C. was proved by the prosecution and on the very same day as the counsel for the applicant did not appear for cross-examination the court closed the opportunity to cross-examine the prosecutrix. Learned counsel has further argued that till date the evidence of prosecution is going on and therefore the applicant may be provided at least an opportunity to cross-examine PW-2, prosecutrix for the just decision of the case and set-aside the impugned order.

6. In my considered opinion, not affording an opportunity, particularly in view of the fact that the lawyer of the applicant was not available to cross-examine the prosecutrix before the concerned Court below on the date fixed, is not justified.

7. In the case of ***Rafiq and others vs. Munshilal and others AIR 1981 SC 1400,*** the Hon'ble Supreme Court dealt with a matter where negligence on part of a counsel had caused adverse consequences to the litigant. The Hon'ble Supreme Court in para 3 of the Judgement, held as under: -

"3.The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this

appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law."

8. Likewise, in the case of ***The Secretary, Department of Horticulture, Chandigarh and Ors. Vs. Raghu Raj AIR 2009 SC 514,*** the Hon'ble Apex Court considered the responsibility of a counsel and consequences of non-appearance of a counsel or any default on part of a counsel on a litigant. Such default of counsel cannot visit the party with any penal consequences. The Hon'ble Apex Court in para 27 and 28 of the Judgement, held as under: -

"27. Now, it cannot be gainsaid that an advocate has no right to remain absent from the Court when the case of his client comes up for hearing. He is duty bound to attend the case in Court or to make an alternative arrangement. Non-appearance in Court without `sufficient cause' cannot be excused. Such absence is not only unfair to the client of the advocate but also unfair and discourteous to the Court and can never be countenanced.

28. At the same time, however, when a party engages an advocate who is expected to appear at the time of hearing but fails to so appear, normally, a party should not suffer on account of default or non-appearance of the advocate. "

9. It is further pertinent to note here that in view of the fact that the applicant is being tried for a heinous offence under Section 376 I.P.C., as such the cross-examination of PW-2, who is the victim, is absolutely essential to arrive at just decision of the case and the impugned order rejecting the applicant's application under Section 311 Cr.P.C.

10. Considering the above, I am of the view that if the defence is not given proper opportunity to cross-examine PW-2-prosecutrix, who is the victim of the case, it will cause a serious prejudice to defence case as her testimony would go unrebutted. It is a fundamental right of an accused to have fair trial as envisaged under Article 21 of the Constitution and if the impugned order is not quashed then the main object of affording fair trial to accused in the spirit of life and liberty shall be greatly jeopardized. The powers to recall a witness under Section 311 Cr.P.C. is a very wide and could be exercised for the just decision of a case. The Section 311 Cr.P.C. empowers the Courts to recall material witness at any stage of enquiry or trial, if his/her evidence appears to it to be essential to the arrival at the just decision of a case.

11. Considering the facts and circumstances of the case, I am of the view that the ends of justice would be served, if

an opportunity is granted to the applicant to cross-examine PW-2-prosecutrix. In view of it, the learned Judge is directed to recall PW-2, prosecutrix by fixing a date within three weeks and ensure her presence through concerned police station. It is made clear that on appearance of PW-2, prosecutrix, the defence shall positively cross-examine her and no further opportunity shall be given, unless the trial court under some exigency deems it fit to adjourn the case for her cross-examination.

12. In view of aforesaid, the impugned order dated 04.10.2019 cannot be sustained and is hereby quashed and the application is accordingly **allowed.**

13. However, considering the long pendency of trial, the trial Court is hereby directed to expedite the aforesaid trial and conclude the same in accordance with law, considering the provisions of Section 309 Cr.P.C, without granting unnecessary adjournments to either of the parties as expeditiously as possible preferably within a period of four months from the date of production of a certified copy of this Order, if there is no legal impediment.

14. Office is directed to communicate the order to the court concerned forthwith.

(2020)03-05ILR A1749
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 45858 of 2019

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

Counsel for the Applicant:
Sri Sunil Dubey

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

Criminal law-Code of Criminal Procedure-section 311-Application u/s 311 Cr.P.C. rejected-prayed for questioning PW-1 over photographs which could not be filed on record by previous counsel for unknown reason-photographs depicted that PW-1 was present-photographs never placed on record till date of the Application-no question arises for any cross-examination over it-Application dismissed. (E-9)

Cases cited:

1. St. of A.P. v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida v. Rashid, (2008) 1 SCC 474

3. Monica Kumar v. St. of U.P., (2008) 8 SCC 781

4. Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296,

5. Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973 (Hereinafter in short referred as 'Cr.P.C.'), has been filed by Anand Prakash Singh, applicant, with a prayer for setting aside impugned, dated 15.2.2019, passed by the Additional Chief Judicial Magistrate, Court no.7, Varanasi, in Case No.1571 of 2013, State vs. Anand Prakash Singh, of Police Station-Adampura, District Varanasi, pending in the court of Additional Chief

Judicial Magistrate, court no.7, Varanasi, whereby, Application, filed under Section 311 of Cr.P.C., by the applicant, with a prayer for re-examining PW-1, has been rejected.

2. Learned counsel for applicant argued that an application, under Section 311 of Cr.P.C., was moved before the Trial court, with a prayer for giving an opportunity to learned counsel for defence for questioning PW-1 over photographs, which could not be filed on record by the erstwhile counsel, under his wrong advise, and after engagement of present counsel, it was thought that above witness be cross-examined over those photographs. Witness, Varsha Singh, is there in those photographs and this Application was rejected by Trial court, which was an abuse of process of law. Hence, this Application, with above prayer, invoking inherent jurisdiction of this Court, under Section 482 of Cr.P.C.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. From very perusal of the Application, moved, under Section 311 of Cr.P.C., before Trial court, it is apparent that on the date, i.e., 5.2.2018, some photographs were said to have been filed through list before the court, concerned, and prosecution witness no.1 could not be cross-examined over those photographs because of non-filing of the same before Trial court by the erstwhile counsel owning to his unknown reasons, whereas, those photographs were of this depiction that witness, PW-1, was present therein and it will belie entire case of prosecution. Hence, in the interest of justice, witness be summoned.

5. It was objected by other side with this contention that those photographs were result of tricky photography and it was neither with any certificate, certifying same to be original one nor any negative of the same nor were placed on record prior to above date of filing of the application, rather, those tricky photographs were got fabricated, only with a view to linger the proceeding.

6. Learned Trial court, after hearing learned counsel for both sides, rejected the application, while passing impugned order.

7. Admittedly, it was never said that those photographs could not be placed on record, even after, best exercise, made by the applicant, i.e., those documents were not filed till above date of Application, hence, no question arises for any cross-examination over those photographs and once it were opposed to be a tricky photographs and manufactured by the applicant, with a view to lingering proceeding, then, very genesis and admissibility of above photographs were challenged and unless those photographs were admitted on record, after satisfying ingredients by proving by applicant, by evidence of the person, who prepared those photographs and these ingredients were not part of record, and as such they are not admitted and no question of taking those photographs on record arises.

8. Moreso, Section 311 of Code of Criminal Procedure, 1973, provides, as under:

"311. Power to summon material witness, or examine person present.-Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-

examine any such person if his evidence appears to it to be essential to the just decision of the case."

9. Thus, end of justice is a sine qua non for entertaining an application, under Section 311 of Cr.P.C. This Section is an enabling Section, empowering the court for summoning and re-examining a witness, who had already been examined or to be examined or to be summoned for examination, in the course of ends of justice, for reaching just judicial making by the court and in present case, learned Magistrate, by a detailed order, had written those ingredients and concluded that there was no ground for re-examining of PW-1, with regard to above photographs.

10. This Court, in exercise of inherent jurisdiction, conferred upon it by Section 482 of Cr.P.C, is not to embark upon factual matrix because it may prejudice fair trial. On the ground of law, too, the impugned order is well intact and has been passed in accordance with provisions of law and precedents on the subject and as such does not call for any interference by this Court, in exercise of inherent jurisdiction.

11. Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844**, has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent judgment, in the case of **Hamida v. Rashid, (2008) 1 SCC 474**, Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296**, has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

12. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494**, has propounded *"To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for*

interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**, Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not"*.

13. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

14. In view of what has been discussed, hereinabove, this Application, being devoid of merits, merits dismissal and it stands dismissed as such.

(2020)03-05ILR A1752
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 47282 of 2019

Ranjit ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Pramod Kumar Saxena

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

Criminal Law-Complainant alleges that Applicant owes some money-for repayment Applicant gave a chequeto Complainant-cheque was returned by bank for insufficient balance-no evidence was led by Applicant nor its prima facie that any fraud exist -bank has also not made any remarkon the return memo-no illegality in the orders passed by Court below-Application dismissed. (E-9)

Cases Cited:

1. Raj Kumar Khurana Vs. State of (NCT of Delhi) & anr. reported in (2009) 6 SCC 72 (distinguished)

2. S.P. Chengalvaraya Naidu (dead) by L.Rs. Appellants Vs. Jagannath (dead) by L.Rs. & ors.r Respondents, reported in AIR 1994 SC 853;

3. Kali Ram Vs. St. of H.P., reported in (1973) 2 SCC 808

4. Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Pyarelal

5. M.S. Narayana Menon Alias Mani Vs. St. of Kerala & anr., reported in (2006) 6 SCC 39

6. Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, reported in (2008) 4 SCC 54

7. Kumar Exports Vs. Sharma Carpets, reported in (2009) 2 SCC 513

8. Rangappa Vs. Sri Mohan, reported in (2010) 11 SCC 441

9. Basalingappa Vs. Mudibasappa reported in (2019) 5 SCC 418

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

1. Heard Sri Pramod Kumar Saxena, learned counsel for the applicant and Mr. Amit Singh Chauhan and Mr. Prashant Kumar, learned A.G.As. for the State.

2. Learned counsel for the applicant and the learned A.G.A. agree that the present application may be disposed of at this stage without calling for further affidavits in view of the order proposed to be passed today.

3. By means of this 482 Cr.P.C. application, the applicant has questioned summoning order dated 7th May, 2019 passed by the Chief Judicial Magistrate, Jalaun in Complaint Case No.1277 of 2019 (Sm. Kamla Devi Vs. Ranjit), under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "N.I. Act"), Police Station-Kotwali Orai, District-Jalaun, whereby the applicant has been summoned. The applicant also seeks for quashing of the order dated 24th October, 2019 passed by the Sessions Judge, Jalaun in Criminal Revision No. 66 of 2019, whereby the revision filed by the applicant against the summoning order dated 7th May, 2019, has been dismissed.

4. The facts, as borne out from the records of the present application, are as follows:

The complainant/opposite party no.2 and applicant are relatives, as the applicant is son-in-law of brother of the complainant/opposite party no.2. In month of April, 2016, being the relative of the complainant, the applicant had taken a loan of Rs. 1,90,000/- from the complainant for purchasing of tractor and installation of tube-well on his field, on the assurance that he would repay the same within a year. After expiry of the aforesaid period, when the complainant requested the applicant to return the aforesaid money, he deferred the same. When the complainant exerted pressure upon the applicant to repay the same, he had given a cheque no. 806369 of Vijaya Bank for a sum of Rs. 1,90,000/- to the complainant on 15th January, 2019. On the same day, the complainant has presented the same before the Central Bank of India, where her saving bank account is maintained, for encashment, but the same has been returned to the complainant on 19th January, along with return memo that there was no sufficient balance in the account of the applicant. Thereafter since the applicant was the relative, opposite party no.2/complainant did not want to take any legal action against him, hence she made all efforts to reconcile the matter but all went in vain. Thereafter the complainant/opposite party no.2 sent a legal notice to the applicant through her advocate on 6th February, 2019 within 15 days of the receipt of return memo, which has been served upon him on 9th February, 2019. The applicant instead of repaying the loan amount of complainant, has sent a reply to the legal notice sent by opposite party no.2 on 5th March, 2019. Hence, the present complaint has been filed by the complainant/opposite party no.2. After registration of the said complaint case, impugned summoning order has been passed against the applicant.

5. Learned counsel for the applicant submits that the applicant is self-employed and driving E-Rikshaw for his livelihood in New Delhi and its surrounding area for the last five years. Opposite party no.2/complainant is sister of father-in-law of the brother of the applicant, namely, Dharmendra. The allegations made in the complaint case that the applicant has taken loan of Rs. 1,90,000/- from the complainant for purchasing tractor and installation of tube-well on his field, is absolutely false and fictitious as in the year 2016, the applicant was living in New Delhi, where he was driving E-Rickshaw for his livelihood. It is further submitted that the applicant had never given any cheque of Rs. 1,90,000/- to the complainant/opposite party no.2 for repayment of loan taken by him. He was unaware of any conspiracy which was being hatched by opposite party

no.2 or her sons. After receiving legal notice dated 6th February, 2019 sent by the Advocate of complainant about the loan taken, dishonour of cheque and demand of payment, he came to know that some conspiracy is going on against him and he tried to search his cheque book and found that the same was missing. On 28th February, 2019, the applicant informed the concerned Branch of the Bank about his missing cheques and stopping of payment from the said account. It is further submitted that being close relatives, sons of the complainant, namely, Sandeep, Jitendra and Kuldeep, came to Delhi and resided in the room of the applicant in November, 2018 and they stole the cheque book of the applicant and by making his forged signatures, they cooked up a false and frivolous story. It is further submitted that the applicant was not engaged in agriculture for which he had to take any loan. His father and two elder brothers are engaged in agriculture. When he came to know that Sandeep son of opposite party no.2 had stolen his cheque book and forged his signatures on one leaf and deposited in the account of opposite party no.2 at Orai as conspired, the applicant gave reply to the legal notice sent by opposite party no.2 through her Advocate on 5th March, 2019. It is further submitted that after getting reply of notice, opposite party no.2 instead of contacting the applicant and clarifying the matter, straightway filed the present complaint case against him on 19th March, 2019 without enclosing copy of the reply of applicant. The concerned Magistrate, without application of judicial mind, took congizance and summoned the applicant on 7th May, 2019. Since the applicant was residing in Delhi, he had no knowledge about the summoning order issued against him and could not appear before the court below, the bailable warrant has been issued against him. It is against the summoning order dated 7th May, 2019, applicant has preferred Criminal Revision No. 66 of 2019, which has also been dismissed by the District and Sessions Judge, Jalaun at Orai vide order dated 24th October, 2019. The revisional court has also committed error in confirming the summoning order. It is further submitted that on 20th September, 2019 the applicant has also tried to lodge a first information report against the complainant and her sons for theft, forgery and cheating and when the same has not been lodged, he moved a complaint before the Chief Judicial Magistrate, Jalaun which was registered as Complaint Case No. 5549 of 2019. It is further submitted that the complaint/opposite party no.2 concealed the facts mentioned in the reply given by the applicant to the legal notice dated 6th February, 2019, in which he had taken a plea that the cheque has been stolen and the signature appended on he said cheque was forged. Complainant has also not attached copy of the said reply along with the complaint. It is also submitted that in the complaint, the complainant/opposite party no.2 did not disclose that by what mode, before whom and at which place, the loan was given, as it is not given in the normal course of business. Such amount is legally not recoverable debt/loan as per Section 138 N.I. Act, hence no offence will be constituted if the cheque is dishonored on the ground of stolen and forged cheque. It is further submitted that the concerned Magistrate has acted in mechanical manner while passing the summoning order dated 7th May, 2019 and did not apply his judicial mind, as it was not a case of business transaction but it is case of hatched conspiracy between near relations. No details of loan, witnesses and cheque have been disclosed in the complaint which makes the whole case very flimsy and

doubtful. In support of his plea, the learned counsel for the applicant has commended this Court to the following decisions of the Apex Court:

1.**Raj Kumar Khurana Vs. State of (NCT of Delhi) & Another** reported in (2009) 6 SCC 72;

2. **S.P. Chengalvaraya Naidu (dead) by L.Rs. Appellants Vs. Jagannath (dead) by L.Rs. & other Respondents**, reported in AIR 1994 SC 853; and

6. Learned counsel for the applicants, therefore, submitted that the present criminal proceedings initiated against the applicants are not only malicious but also amount to an abuse of the process of the Court. On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicants that the proceedings of the above mentioned complaint case are liable to be quashed by this Court.

7. Per contra, Mr. Chauhan learned counsel for the State has opposed the submissions made by the learned counsel for the applicant by contending that there is no illegality or infirmity in the order of summoning of the applicant passed by the concerned Magistrate, as also in the order affirming the same passed by the revisional court. It is further submitted that the submissions made by the learned counsel for the applicant that stolen cheques cannot be a basis of constituting an offence of Section 138 of N.I. Act is liable to be rejected on the ground that it is not a case of fraud, conspiracy or stealing of cheques. As per the own case of the applicant, It is only after receiving legal notice sent by opposite party no.2 through her Advocate, he made an application before the Bank about missing of cheques and stopping of his account only on 28th February, 2019 and thereafter he went to concerned Police Station for lodging of the first information report, but the same has not been lodged and ultimately he filed a complaint thereafter. The said step has only been taken to build up his case of fraud, conspiracy and stealing of cheque. It is also submitted that the plea taken on behalf of the applicant that the signature appended on the cheque is not of the applicant, the same is forged and fabricated, which have been committed by opposite party no.2 and her sons, is also liable to be rejected on the ground that after presentation of the cheque in question before the Bank for encashment by opposite party no.2, the same has been dishonoured and returned on 19th January, 2019 with a endorsement that there is no sufficient balance in the account of the applicant and not with an endorsement that the signature is different. The concerned Magistrate on the basis of materials and evidence produced before him has rightly passed the order summoning the applicant. At the initial stage, the truth, veracity and effect of the evidence which the prosecutor adduced cannot be meticulously judged, nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the concerned Magistrate at that stage to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. At that stage, the concerned Magistrate is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial

stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the concerned Magistrate to say that there is no sufficient ground for proceeding against the accused. It is further submitted that the revisional court has also not committed any error in affirming the order of the concerned Magistrate summoning the applicant. It is further submitted that the case laws as cited by the learned counsel for the applicant are not applicable in the facts of the present case. On the cumulative strength of the aforesaid, learned A.G.A. for the State submits that the present application is liable to be dismissed.

8. I have considered the submissions made by the learned counsel for the applicants and have gone through the records of the present application.

9. Before expressing any opinion on the merits of the case set up by both the parties, it would be worthwhile to reproduce Sections 118, 138 and 139 of the Negotiable Instrument Act, which are quoted herein-below:

*"**118. Presumptions as to negotiable instruments.** --Until the contrary is proved, the following presumptions shall be made:--*

(a) of consideration --that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date --that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance --that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer --that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements --that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps --that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course --that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

***138. Dishonour of cheque for insufficiency, etc., of funds in the account.** -- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made*

with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

***139. Presumption in favour of holder.**--It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."*

10. From the above, it is manifestly clear that a dishonour would constitute an offence only if the cheque is returned by the bank "unpaid' either because the amount of money standing to the credit of the drawer's account is insufficient to honour the cheque or that the amount exceeds the amount arranged to be paid from that account by an agreement with that bank. Now, for an offence under Section 138 NI Act, it is essential that the cheque must have been issued in discharge of legal debt or liability by accused on an account maintained by him with a bank and on presentation of such cheque for encashment within its period of validity, the cheque must have been returned unpaid. The payee of the cheque must have issued legal notice of demand within 30 days from the receipt of the information by him from the bank regarding such dishonor and where the drawer of the cheque fails to make the payment within 15 days of the receipt of the aforesaid legal demand notice, cause of action under Section 138 NI Act arises.

11. From the Chapter XVII comprising Sections 138 to 142 of the Negotiable Instruments Act, which was introduced in statute by Act 66 of 1988, it is also apparently clear that the object underlying the provision contained in the said Chapter was aimed at inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business and day to day transactions by making dishonour of such instruments an offence. A negotiable instrument whether the same is in the form of a promissory note or a cheque is by its very nature a solemn document that carries with it not only a representation to the holder in due

course of any such instrument but also a promise that the same shall be honoured for payment. To that end Section 139 of the Act raises a statutory presumption that the cheque is issued in discharge of a lawfully recoverable debt or other liability. This presumption is no doubt rebuttable at trial but there is no gain saying that the same favours the complainant and shifts the burden to the drawer of the instrument (in case the same is dishonoured) to prove that the instrument was without any lawful consideration. It is also noteworthy that Section 138 while making dishonour of a cheque an offence punishable with imprisonment and fine also provides for safeguards to protect drawers of such instruments where dishonour may take place for reasons other than those arising out of dishonest intentions. It envisages service of a notice upon the drawer of the instrument calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period.

12. This Court having noticed the facts of the case and the evidence on the record needs to note the legal principles regarding nature of presumptions to be drawn under Section 139 of the Act and the manner in which it can be rebutted by an accused. Section 118 provides for presumptions as to negotiable instruments. The complainant being holder of cheque and the signature appended on the cheque having not been denied by the Bank, presumption shall be drawn that cheque was issued for the discharge of any debt or other liability. The presumption under Section 139 is a rebuttable presumption. Before this Court refers to various judgments of the Apex Court considering Sections 118 and 139, it is relevant to notice the general principles pertaining to burden of proof on an accused especially in a case where some statutory presumption regarding guilt of the accused has to be drawn.

13. A Three-Judge Bench of the Apex Court in the case of ***K*ali Ram Vs. State of Himachal Pradesh,** reported in (1973) 2 SCC 808 has laid down following:-

"23. .....One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

14. Further the Apex Court in **Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Pyarelal**, reported in (1999) 3 SCC 35 had considered Section 118(a) of the Act and held that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable and defendant can prove the non-existence of a consideration by raising a probable defence. In paragraph No.12 following has been laid down:-

"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist....."

15. In **M.S. Narayana Menon Alias Mani Vs. State of Kerala and Another,** reported in (2006) 6 SCC 39, the Apex Court had considered Sections 118(a), 138 and 139 of the Act, 1881 and held that that presumptions both under Sections 118(a) and 139 are rebuttable in nature. Explaining the expressions "may presume" and "shall presume" referring to an earlier judgment, following was held in paragraph No.28:-

"28. What would be the effect of the expressions "may presume", "shall presume" and "conclusive proof" has been considered by this Court in Union of India v. Pramod Gupta, (2005) 12 SCC 1, in the following terms: (SCC pp. 30-31, para 52) "It is true that the legislature used two different phraseologies "shall be presumed' and "may be presumed' in Section 42 of the Punjab Land Revenue Act and furthermore

*although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis-à-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume' would be conclusive. The meaning of the expressions "may presume' and "shall presume' have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expre*ssion "shall presume' cannot be held to be synonymous with "conclusive proof'."

16. In view of the above, it is clear that the expression "shall presume" cannot be held to be synonymous with conclusive proof. Referring to definition of words "proved" and "disproved" under Section 3 of the Evidence Act, following was laid down by the Apex Court in paragraph No.30 of the aforesaid judgment:

"30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

17. The Apex Court has already held that what is needed is to raise a probable defence, for which it is not necessary for the accused to disprove the existence of consideration by way of direct evidence and even the evidence adduced on behalf of the complainant can be relied upon. Dealing with standard of proof, following was observed in paragraph No.32:-

"32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies."

18. In **Krishna Janardhan Bhat Vs. Dattatraya G. Hegde,** reported in *(2008) 4 SCC 54,* the Apex Court has held that an accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. Following was laid down in Paragraph No.32:-

"32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different."

19. The Apex Court again reiterated that whereas prosecution must prove the

guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". In paragraph No.34, following was laid down:-

"34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies."

20. In **Kumar Exports Vs. Sharma Carpets**, reported in (2009) 2 SCC 513, the Apex Court again examined as to when complainant discharges the burden to prove that instrument was executed and when the burden shall be shifted. In paragraph Nos. 18 to 20, following has been laid down:-

"18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use *of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.*

20. .....The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon

consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist....."

21. A Three-Judge Bench of the Apex Court in **Rangappa Vs. Sri Mohan,** reported in *(2010) 11 SCC 441* had elaborately considered provisions of Sections 138 and 139. In the above case, trial court had acquitted the accused in a case relating to dishonour of cheque under Section 138. The High Court had reversed the judgment of the trial court convicting the accused. In the above case, the accused had admitted signatures on the cheque. This Court held that where the fact of signature on the cheque is acknowledged, a presumption has to be raised that the cheque pertained to a legally enforceable debt or liability, however, this presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. In Paragraph No.13, following has been laid down:-

"13. The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No. 0886322 dated 8-2-2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable."

22. After referring to various other judgments of this Court, the Apex Court in that case held that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability, which, of course, is in the nature of a rebuttable presumption. In paragraph No.26, following was laid down:-

"26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, (2008) 4 SCC 54 may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant."

23. Elaborating further, the Apex Court has held that Section 139 of the Act is an example of a reverse onus and the test of proportionality should guide the construction and interpretation of reverse onus clauses on the defendant-accused and the defendant- accused cannot be expected to discharge an unduly high standard of proof. In paragraph Nos. 27 and 28, following was laid down:-

"27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the

dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

24. In its latest judgment, the Apex Court in the case of **Basalingappa Vs. Mudibasappa** reported in (2019) 5 SCC 418, specifically in paragraph nos. -23 and 24 has noticed as follows:

"23. We may now notice judgment relied by the learned counsel for the complainant, i.e., judgment of this Court in Kishan Rao Vs. Shankargouda, (2018) 8 SCC 165. This Court in the above case has examined Section 139 of the Act. In the above case, the only defence which was taken by the accused was that cheque was stolen by the appellant. The said defence was rejected by the trial court. In paragraph Nos. 21 to 23, following was laid down:-

"21. In the present case, the trial court as well as the appellate court having found that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank, the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant, the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court.

22. Another judgment which needs to be looked into is Rangappa v. Sri Mohan (2010) 11 SCC 441. A three-Judge Bench of this Court had occasion to examine the presumption under Section 139 of the 1881 Act. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. Following was laid down in paras 26 and 27: (SCC pp. 453-54) "26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does

indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof."

23. ***No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High Court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the evidence of PW 1, himself has not been explained by the High Court.***

24. ***The above Kishan Rao case was a case where this Court did not find the defence raised by the accused probable. The only defence raised was that cheque was stolen having been rejected by the trial court and no contrary opinion having been expressed by the High Court, this Court reversed the judgment of the High Court restoring the conviction. The respondent cannot take any benefit of the said judgment, which was on its own facts."***

(Emphasis added)

25. This Court has also considered the judgments of the Apex Court in the cases of of **Raj Kumar Khurana** and **S.P. Chengalvaraya Naidu (dead) by L.Rs. (Supras)**, which have heavily been relied upon by the learned counsel for the applicant. The facts of that case is that the appellant of the said case had lost two blank cheques in his office along with some stamp papers and immediately thereafter he had informed the Bank about missing of the said cheques and also he made a complaint before the Police Station on 21st April, 2001 and when the said blank cheques were alleged filled up on 24th June, 2001 and presented before the Bank, the same were returned dishonoured with the remarks "Said cheque reported lost by the drawer". However, in the facts of the present case, as per the own statement of the applicant that

sons of opposite party no.2 went to the place of applicant at New Delhi and stole the cheques of the applicant in November, 2018 and after making forged signatures of the applicant, on 15th January, 2019 opposite party no.2 had presented the same before the Bank but same has been returned by the Bank to the complainant on 19th January, along with return memo that there was no sufficient balance in the account of the applicant. Thereafter the complainant/opposite party no.2 sent a legal notice to the applicant through her advocate on 6th February, 2019 within 15 days of the receipt of return memo, which has been served upon him on 9th February, 2019. Only on 28th February, 2019, the applicant had informed the Bank about his missing of cheques and stoppage of his bank account. Thereafter on 5th March, 2019, he had given reply to the legal notice dated 6th February, 2019 but has not filed any first information report or complaint under Section 156 Cr.P.C. till that date. It is on 20th September, 2019 (reference paragraph-21 of the affidavit accompanying the present application), applicant went to the Police Station for lodging of the first information report about theft, forgery and cheating alleged to have been committed by opposite party no.2 and her sons by using his stolen cheques. When his first information report has not been lodged, he made a complaint under Section 156 (3) Cr.P.C. (reference paragraph-22 of the affidavit accompanying the present application). However, perusal of the said complaint does not mention the date on which such complaint has made moved by the applicant. Therefore, in the opinion of the Court, the case relied upon by the learned counsel for the applicant in the case of Raj Kumar Khurana (Supra) is clearly distinguishable in the facts of the present case.

26. So far as the second judgment relied upon by the learned counsel for the applicant in the case of **S.P. Chengalvaraya Naidu (dead) by L.Rs. (supra)** is concerned, this Court has perused the said judgment in which the Apex Court has held that the courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. It can be said without hesitation that a person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A litigant who approached the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other wise then he would be guilty of playing fraud on the court. However, in the facts of the present case, neither both the courts below or this Court has prima facie found that the opposite party no.2 has committed any fraud by submitting or filing any forged document. No evidence was led by the applicant. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below as the applicant had not been successful in creating doubt in the mind of the Courts with regard to the existence of the debt or liability or missing or stealing of cheques. The Bank has also not made a remark on the return memo to the opposite party no.2 that there was no sufficient balance in the account of the applicant. Therefore, the case relied upon the by the learned counsel for the applicant in the case of **S.P. Chengalvaraya Naidu (dead) by L.Rs. (supra)** is also not applicable.

27. In view of the aforesaid, this Court finds substance in the contention raised by the learned A.G.A. for the State

that there is no illegality or infirmity in the orders passed by both the courts below. This Court also finds that the trial Court after examining the original copy of cheque, cheque return memo, bank receipt, notice, notice delivery statement and original registry receipt, has found substance in the submission of the complainant and has observed that prima facie case for the offence punishable under Section 138 N.I. Act is made out against the applicant and he has rightly passed the impugned order dated 7th May, 2019 summoning the applicant. This Court also finds that after hearing the learned counsel for the parties and examining the records available on record, the revisional court has rightly rejected the criminal revision filed by the applicant against the summoning order dated 7th May, 2019. While passing the impugned order, the revisional court has recorded a finding that the case of the applicant is that he has not taken any money from the complainant and he has not given any cheque to her as also the signature appended on the said cheque is forged, as the same was not of the applicant, may be examined at appropriate stage and before appropriate forum, as the correctness, genuineness or veracity of the same cannot be examined at this pre-trial stage. Hence, this Court does not find any illegality or perversity in the order passed by the Courts below.

28. Even otherwise, this Court also observes that the applicant has already availed his remedy of revision against the order passed by the trial Court. Since in the present case also, the applicant has tried to wreck up the issue of `legality' or `propriety' of the orders passed by the Courts, therefore, the present application is nothing but a second revision; in the garb of application filed under Section 482 Cr.P.C. However, a person cannot be permitted to do indirectly what he cannot do directly. A bare perusal of Section 482 Cr.P.C shows that the power under Section 482 Cr.P.C can be invoked for three purposes, namely, for giving effect to the orders passed under this Court, for preventing the abuse of the process of the Court and to meet the ends of justice. In the present case, the prayer of the applicant is not for giving any effect to any order passed by the Court. Therefore, the first eventuality prescribed under Section 482 Cr.P.C is not at all attracted. Still further, by any means, an order passed by a Court of competent jurisdiction and continuation thereof; cannot be branded as an abuse of the process of Court; unless it is alleged and shown to the High Court that the Courts below had acted for irrelevant reasons or for extraneous considerations. Needless to say that sufficiency of reasons is not to be gone into after the revisional Court. It is not even the allegation of the applicant in this case that orders are passed by Court below; for irrelevant or extraneous considerations. So far as the third ingredient of Section 482 Cr.P.C is concerned, this Court is not supposed to go into `legality' and `propriety' of the order passed by the trial Court. Section 397(3) of Cr.P.C prohibits second revision by a party. Under Section 397(1), the Revisional Court is authorized to see `legality' and `propriety' of the order passed by the Court. Since second revision by the same party is prohibited under Section 397(3), therefore, any argument on `legality' or `propriety' of an order passed by the Court below, ordinarily, is not to be appreciated in proceedings under Section 482 Cr.P.C, unless it is shown, at the macro level, that such an order has resulted from considerations which were totally alien to the process of the Court or have produced

incomprehensibly absurd result and, therefore, have resulted in defeating the ends of justice itself. What cannot be done directly, cannot be done indirectly as well. In the present case, except to argue for re-appreciation of the material before the trial Court, there is not even a submission or an allegation regarding any aberration in the process adopted by the Courts for passing the impugned orders. Therefore, power under Section 482 Cr.P.C cannot be exercised by this Court to re-appreciate the same material, which was available before the Courts below and which have been duly appreciated by the Courts below.

29. Apart from the above, this Court also observes that plea taken on behalf of the applicant that the present complaint is not maintainable on the ground that sons of opposite party no.2 has stolen his cheques and after committing forgery and playing fraud with the help of same, opposite party no. 2 had presented the same before the Bank, cannot be accepted at this stage of the proceedings, as under the order of the trial court he has only been summoned under the provisions of N.I. Act only. The said plea may be taken and examined during the course of trial not at the pre-trial stage. It may also be observed that if it is accepted that sons of opposite party no.2 had stolen his cheques in November, 2018 from his house as per his own statement and after making forged signatures of the applicant, on 15th January, 2019 opposite party no.2 had presented the same before the Bank but same has been returned by the Bank to the complainant on 19th January, along with return memo that there was no sufficient balance in the account of the applicant. Thereafter the complainant/opposite party no.2 sent a legal notice to the applicant through her advocate on 6th February, 2019 within 15 days of the receipt of return memo, which has been served upon him on 9th February, 2019. Only on 28th February, 2019, the applicant had informed the Bank about his missing of cheques and stoppage of his bank account. Thereafter on 5th March, 2019, he had given reply to the legal notice dated 6th February, 2019 but has not filed any first information report or complaint under Section 156 Cr.P.C. till that date. It is on 20th September, 2019 (reference paragraph-21 of the affidavit accompanying the present application), applicant went to the Police Station for lodging of the first information report about theft, forgery and cheating alleged to have been committed by opposite party no.2 and her sons by using his stolen cheques.

30. From the aforesaid it is apparent that from November, 2018 to 28th February, 2019 he has slept over his missing cheques and woke up only after service of legal notice dated 6th February, 2019 i.e. on 9th February, 2019 but after 19 days he moved an application before the Bank for stoppage of bank account. Except that, he has taken six months and twenty days to go to Police Station for lodging of the first information report. Therefore, this Court is of the opinion that the said plea has no leg to stand. The other plea taken on behalf of the applicant that the signature appended on the cheque is not of the applicant the same is forged, has also no leg to stand on the ground that the on presentation of the same, the Bank has returned the same along with return memo as "there was no sufficient balance in the account of applicant" and not as "mismatched signatures".

31. In the present case, much less to speak of any process alien to law being adopted by the Courts below, as stated

above, this Court does not find even any illegality or perversity in the orders passed by the Courts below.

32. This application is accordingly dismissed. There shall be no order as to costs.

(2020)03-05ILR A1768
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 47456 of 2019

Jata Shankar Trivedi & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Subash Chandra Tiwari

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

(A) Criminal law- Code of criminal procedure, 1973 - Sections 482 – Inherent jurisdiction - Indian Penal Code, 1860 - Sections-498A and 376D - exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits. (Para -7)

First information report - previous report of missing of son of Applicant no.1 was lodged - occurrence of rape was held to be a suspicious one - whereupon, Inspector was directed for making investigation - investigation resulted in submission of chargesheet - wherein, cognizance has been taken by the learned Magistrate - chargesheet has been filed on the basis of evidence, collected and statements recorded, under Section 161 of Cr.P.C.- statements, under Sections 164 of Cr.P.C., too. (Para - 4)

HELD:- This Court, in exercise of its inherent jurisdiction, conferred upon it by Section 482 of Code of Criminal Procedure, is not expected to embark upon factual matrix because it may prejudice fair trial - arguments as well as facts and circumstances, raised before this Court, can very well be raised before the Trial court, concerned, at the stage of proceeding, under Section 227 of Cr.P.C., and before the Magistrate, prior to making committal to the court of Sessions.(Para-4)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Lal Kamlendra Pratap Singh Vs. St. of U.P. , 2009 (3) ADJ 322 (SC)

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P., (2008) 8 SCC 781

4. Popular Muthiah Vs. State, Represented by Inspector of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. State of Bihar Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati & anr. Vs. St. of U.P. reported in 2004 (57) ALR 290

8. St. of A.P. Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973 (Hereinafter, in short, referred to as 'Cr.P.C.'), has been filed by the Applicants, Jata Shankar Trivedi and Divya Trivedi, with a prayer for setting aside impugned chargesheet, dated 6.12.2018 and

cognizance taking order, dated 2.2.2019, with entire proceeding, in Criminal Case No. 2138 of 2019, State vs. Jata Shankar Trivedi and othrs, arising out of Case Crime No.49 of 2018, under Sections-498A and 376D of Indian Penal Code, Police Station-Collectorganj, District-Kanpur Nagar, pending in the court of Additional Chief Metropolitant Magistrate, IX, Kanpur Nagar.

2. Learned counsel for applicants argued that Opposite party no. 2 fell in love with the son of Applicant no.1, resulting in love marriage with him. Both of them resided separately at Shuklaganj, Unnao. Applicants are having no concern with them. Subsequently, Opposite party no.2 fell in extramarital relationship with Rinkesh Shukla, who usurped entire belonging of son of Applicant No.1 and ultimately ousted him from his house at Shuklaganj, Unnao. Being father, Applicant no.1, and feeling pity upon his own son, permitted him to reside at his home. Then, threat was being extended by Rinkesh Shukla to applicants. Ultimately, this false case was got manipulated and fabricated against Applicant no.1 and other accused persons, with concocted story, whereas, a missing report of his own son was got reported, prior to this occurrence, by Applicant no.1 and this was mentioned in the first information report, lodged at Police Station, concerned, itself, that this concocted story of offence of rape seems to be suspicious because Applicant no.1 has moved an application, under Section 156 (3) of Cr.P.C., before the Magistrate, concerned, with regard to missing of his son, wherein, apprehension on Opposite party no.2 and Rinkesh Shukla was expressed upon which a first information report was lodged and as a result whereof this false implication of Applicant no.1 and other accused is there, wherein impugned chargesheet has been filed upon which cognizance has been taken by the court, concerned, whereas, no such occurrence ever occurred and applicants are being victimized by Opposite party no.2. This was a proceeding, under abuse of process of law. Hence, for avoiding abuse of process of law in ensuring ends of justice, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. From very perusal of the first information report, it is apparent that the previous report of missing of son of Applicant no.1 was lodged and this occurrence of rape was held to be a suspicious one, whereupon, Inspector, Police Station-Shuklaganj, District Kanpur Nagar, was directed for making investigation, under above facts and circumstances, but, it is there that investigation resulted in submission of chargesheet, wherein, cognizance has been taken by the learned Magistrate. The chargesheet has been filed on the basis of evidence, collected and statements recorded, under Section 161 of Cr.P.C. There are statements, under Sections 164 of Cr.P.C., too. Hence, this Court, in exercise of its inherent jurisdiction, conferred upon it by Section 482 of Code of Criminal Procedure, is not expected to embark upon factual matrix because it may prejudice fair trial. However, it cannot be said that there is nothing on record for making an indulgence in exercise of inherent jurisdiction. Hence, prayed relief, for quashing of chargesheet is not liable to be granted, hence, declined. However, the arguments as well as facts and

circumstances, raised before this Court, can very well be raised before the Trial court, concerned, at the stage of proceeding, under Section 227 of Cr.P.C., and before the Magistrate, prior to making committal to the court of Sessions, that too, by way of adopting proper procedure, in accordance with law and if applicants raise such a plea the courts, concerned, will consider and decide the same, in accordance with the provisions of law and precedents on the issue.

5. Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844**, *has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court".* In another subsequent judgment, in the case of **Hamida v. Rashid, (2008) 1 SCC 474,** Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice".* In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded *"Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself."* While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296**, has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

6. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494**, has propounded "To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

7. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

8. In view of what has been discussed above, this Application, under Section 482

of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

9. Applicants prayed for a protection from being victimized in above case.

10. In view of the prayer made by the applicants, they are being afforded an opportunity to appear and surrender before the court below within 30 days from today and apply for bail. Their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

11. For a period of 30 days from today, no coercive action shall be taken against the applicants.

12. In case, if the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)03-05ILR A1771
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.01.2019

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482 Cr.P.C. No. 47672 of 2018

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

Counsel for the Applicants:
Sri Ravindra Sonker

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

(A) Criminal law-Code of criminal procedure, 1973 - Sections 482 – Inherent jurisdiction - Indian Penal Code, 1860 - Sections 323, 504, 506, 452 I.P.C. - application under Section 156(3) Cr.P.C. - Statement of the complainant under Section 200 Cr.P.C. - Statement of witnesses under 202 Cr.P.C. - disputed questions of fact and the defence of the accused cannot be taken into consideration at the pre-trial stage - present case - no cognizable offence is made out against the applicants - impugned order does not suffer from any illegality - no abuse of the process of law. (Para- 12,16,17)

Application under Section 156(3) - before the Judicial Magistrate - dispute relating to money transaction between the complainant and the applicant - On making objection - the accused persons assaulted him and his wife due to which they have received injuries - summoned the applicants under Sections 452, 323, 504, 506 I.P.C. to face trial – witnesses - examined under Section 202 – Magistrate has recorded the statement of the complainant under Section 200 Cr.P.C. – learned magistrate summoned accused under section 204 Cr.P.C.(Para – 3)

HELD:- At the stage of summoning under Section 204 Cr.P.C., learned Magistrate is neither required to go into the merits and de-merits of the case nor to examine the genuineness of the allegations or otherwise - learned Magistrate is required to see, whether on taking the entire contents of the complaint on their face value as it is the prima-facie offence is made out against the accused or not. (Para-10)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List Of Cases Cited:-

1. Mahboob & Ors. vs. State of U.P. Through Secy. Home Department Civil Secretariat & Anr., 2016 Law Suit (Allahabad) 3768

2. Eicher Tractors Ltd. Vs. Harihar Singh, 2008 Law Suit (S.C.) 1643,

3. R.P. Kapur Vs. St. of Punjab, AIR 1960 SC 866,

4. St. of Bihar & anr. Vs. P.P. Sharma I.A.S. and another, 1992 SCC (Cri.) 192
5. Zandu Pharmaceutical Works Ltd. & ors. Vs.. Mohd. Shararful Haque & anr., 2005 SCC (Cri.) 283

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

1. Heard Sri Ravindra Sonker, learned counsel for the applicants and learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been preferred by the applicants with a prayer to quash the impugned summoning order dated 27.09.2018, passed by Judicial Magistrate, Sahaswan, District Budaun as well as the entire proceeding of Complaint Case No. 75 of 2018 (Acchan Miyan vs. Mahboob and others), under Sections 323, 504, 506, 452 I.P.C., Police Station Sahaswan, District Budaun, pending in the court of Judicial Magistrate, Sahaswan, District Budaun.

Basic Facts

3. Facts in brief of the case is that opposite party no. 2 filed an application under Section 156(3) Cr.P.C. on 09.04.2018 before the Judicial Magistrate, Sahaswan, District Budaun with a prayer to issue direction to the incharge Inspector of Police Station Sahaswan, District Budaun to lodge the first information report against the present applicants raising allegations that the complaint is the resident of same locality where the applicants reside. In the complaint it is said that there was a dispute relating to money transaction between the complainant and the applicant no. 4 & others but later it was settled on the intervention of the neighbours. On 02.04.2018 at about 06:00 P.M. when the complainant was lying on a cot in his house and his wife was cooking food, the accused persons entered into his house along with weapons and started abusing the complainant. On making objection, the accused persons assaulted him and his wife namely Smt. Chanda Bee due to which they have received injuries. It is further alleged that on raising alarm by the wife of the complainant, several other persons of locality namely Sakhi Ahmad, Shabab and others rushed to the place of occurrence and saved the complainant and his wife, Smt. Chanda Bee. It is submitted that on the next day, the complainant got himself medically examined and medical report along with application was sent to the police but no action was taken. Injury report of the complainant, Acchhan Miyan is on record which is appended as Annexure No. 2 to the affidavit filed in support of this application and on perusal of the same it is clear that the complainant Acchhan Miyan was examined by Medical Officer of the Government Hospital on 03.04.2018 at 09:30 P.M. and he received four injuries on his person. The said application dated 09.04.2018 of the complainant was treated as complaint which was registered as Complaint Case No. 75 of 2018 in the court of Judicial Magistrate, Sahaswan, District Budaun by order dated 03.07.2018.

4. Learned Magistrate has recorded the statement of the complainant under

Section 200 Cr.P.C. on 30.08.2018 in which he retreated the version as mentioned in his application dated 09.04.2018. From the side of complainant witnesses Mohd. Fasal, Smt. Chanda Bee and Sakhi Ahmad have been examined under Section 202 as PW-1, PW-2 & PW-3 respectively on 07.09.2018 are on record and appended as Annexures no. 2, 3 and 4 respectively to the affidavit filed in support of this application. Learned Magistrate by order dated 27.09.2018 summoned the applicants under Sections 452, 323, 504, 506 I.P.C. to face trial.

Submissions on behalf of applicants

5. It is submitted by the learned counsel for the applicants that prior to moving of application dated 09.04.2018, under Section 156(3) Cr.P.C. by the complainant of this case, the applicant no. 4 has also filed an application under Section 156(3) Cr.P.C. against the opposite party no. 2 and others. On 26.03.2018 it was also treated as complaint bearing Complaint Case No. 25 of 2018, on which learned Judicial Magistrate, Sahaswan, District Budaun after recording the statement of applicant no. 4 and his witnesses under Sections 200 and 202 Cr.P.C. respectively, summoned the opposite party no. 2 and others under Sections 323, 504 and 506 I.P.C. by summoning order dated 18.08.2018 and they are facing trial. Copy of the application dated 26.03.2018, under Section 156(3) Cr.P.C. of applicant no. 4 and summoning order dated 18.08.2018 passed by learned Judicial Magistrate, Sahaswan, District Budaun against opposite parties no. 2 and others are appended as Annexures no. 6 and 7 to the affidavit filed in support of application.

6. On the aforesaid fact, it is submitted by learned counsel for the applicants that the allegation in the impugned complaint against the applicants is false and infact true fact is that applicant no. 4 is a permanent resident of Delhi. On 04.03.2018, the applicant no. 4 came in the village of complainant to participate in the marriage, where complainant and other 13 persons associated with him for hatching conspiracy and assaulted the applicant no. 4, who in order to save his life entered into the house of his sister-in-law. Then the complainant side entered into the said house and assaulted him by tearing the clothes and also looted Rs. 40,000/-. It is submitted that the injury report as filed by the opposite party no. 2/complainant is fictitious and injuries are simple in nature. The witnesses of complainant are interested witnesses who cannot be relied upon. It is submitted that the launching of criminal proceeding by the opposite party no. 2 against the applicants is abuse of the process of law. No offence under Sections 452, 323, 504, 506 I.P.C. are made out against the applicants. The learned Magistrate has summoned the applicants by impugned summoning order dated 27.09.2018 is without recording his satisfaction.

7. Learned counsel for the applicants has placed reliance upon the judgment of this Court in the case of ***Mahboob & Ors. vs. State of U.P. Through Secy. Home Department Civil Secretariat & Anr., 2016 Law Suit (Allahabad) 3768***, decided on 20.12.2016, in which the co-ordinate Bench of this Court has quashed the summoning order with a direction to pass fresh order because in that case, learned Magistrate has passed a very cryptic order simply by saying that from the statement of the complainant as well as other witnesses recorded under Sections 200 and 202 Cr.P.C. there are no sufficient ground to summon the accused persons.

8. Learned counsel for the applicants has further placed reliance upon the

judgment of Apex Court passed in the case of ***Eicher Tractors Ltd. vs. Harihar Singh, 2008 Law Suit (S.C.) 1643***, wherein the Apex Court relying on the parameters indicated in category (7) of *Bhajan Lal's* case and quashed the proceedings under Sections 420, 468, 471 I.P.C.

Submissions on behalf of State

9. Per contra learned A.G.A. has submitted that the facts of the aforesaid two judgments, reliance upon which has been placed by learned counsel for the applicants are based on different facts and circumstances. It is submitted that in the present case, there are four injuries on the persons of the complainant, which is also apparent from the injury report dated 03.04.2018 of the opposite party no. 2. The learned Magistrate has passed the impugned summoning order dated 27.09.2018 after considering the entire facts narrated in the complaint as well as the affidavit, copy of application sent to S.S.P., copy of injury report and receipt of registered post as well as statements of the complainant and witnesses namely PW-1 Mohd. Fasal, PW-2 Smt. Chanda Bee and PW-3 Sakhi Ahmad. Learned A.G.A. has further submitted that the learned Magistrate has recorded the reason of satisfaction for summoning the accused applicants to face trial and also mentioned that from the material evidence available on record, prima-facie evidence against the applicants under Sections 323, 504, 506, 452 I.P.C. are made out, therefore, there is no illegality in the impugned summoning order dated 27.09.2018 and as such the present application is liable to be dismissed.

Discussion

10. After having heard the arguments advanced on behalf of learned counsel for the parties and examining the record, I find that the requirement of summoning the accused under Section 204 Cr.P.C. as settled by the Apex Court, has fulfilled by the learned Magistrate in the impugned order dated 27.09.2018. It is well settled that at the stage of summoning under Section 204 Cr.P.C., learned Magistrate is neither required to go into the merits and de-merits of the case nor to examine the genuineness of the allegations or otherwise. At the stage of summoning the accused, learned Magistrate is required to see, whether on taking the entire contents of the complaint on their face value as it is the prima-facie offence is made out against the accused or not.

11. In this case the complainant has received injuries. The injury report is on record. Accepting the contents of the complaint as true, this Court feel that prima-facie offence against the applicants are made out.

12. It is also well settled that the disputed questions of fact and the defence of the accused cannot be taken into consideration at the pre-trial stage. After going through the facts of the case of *Mahboob & Ors. vs. State of U.P. Through Secy. Home Department Civil Secretariat* (supra) and *Eicher Tractors Ltd. vs. Harihar Singh* (supra), I find that the fact of both the cases are on different footing. There was no injury report also in the aforesaid cases. The manner of passing summoning order, as it was in the case of *Mahboob & Ors. vs. State of U.P.* (supra) was also different. In that case, summoning order was cryptic and very laconic in nature, while the impugned order dated 27.09.2018 of this case is otherwise and the

same has been passed considering all the material evidence on record.

13. The Apex Court in ***R.P. Kapur vs. State of Punjab, AIR 1960 SC 866***, summarized come categories of cases where inherent power can and should be exercised to quash the proceedings :-

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

14. The Apex Court in ***State of Bihar and another vs. P.P. Sharma I.A.S. and another, 1992 SCC (Cri.) 192***, has observed that Supreme Court has repeatedly held that the appreciation of evidence is the function of the criminal courts. High Court in exercise of power under Article 226 and 227 of the Constitution of India cannot assume such jurisdiction and put an end to the process of investigation and trial provided under the law.

15. The Apex Court in ***Zandu Pharmaceutical Works Ltd. and Ors. vs. Mohd. Sharafful Haque and another, 2005 SCC (Cri.) 283***, has observed that when a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

Conclusion

16. Considering the nature of allegations, material available on record and findings recorded by the learned Magistrate, the present case does not fall in the category recognized by the Apex Court, where this Court can exercise its inherent power under Section 482 Cr.P.C. to quash the criminal proceeding at the initial stage. It is well settled by the Apex Court in catena of judgments that power under Section 482 Cr.P.C. should be used sparingly only to prevent the abuse of the process of the Court, when there is a patent error or gross injustice. On accepting the facts of the present case as mentioned in the complaint, as true, taking the same in their entirety, it cannot be said that no cognizable offence is made out against the applicants.

17. In view of the above, I do not find any merit in the arguments so advanced on behalf of applicants. The impugned order dated 27.09.2018 does not suffer from any illegality and there is no abuse of the process of law. The application lacks merit, it is accordingly **dismissed**.

(2020)03-05ILR A1775
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2020

BEFORE

THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal Defective No. 24 of 2020

State of U.P. & Anr. ...Appellants
Versus
S.M. College, Chandausi & Anr. ...Respondents

Counsel for the Appellants:
Archana Singh

Counsel for the Respondents:
Gautam Baghel

A. Allocation of Work, Roster and Benches - Allahabad High Court Rules: Chapter V: Rule 14(1) – There is a difference between "part heard"/"tied up" matters and nominated/specially assigned matters. If a nominated/specially assigned matter is released by a Bench – not being a "tied up" or a "part heard" case – the Registry ordinarily should place it before the Hon'ble, The Chief Justice, for an appropriate order of fresh assignment or a direction.
The Court proposed to hear out the matter on its merit after receiving appropriate orders from the Hon'ble Chief Justice. (E-4)

(Delivered by Hon'ble Biswanath Somadder, J.
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. On 20th January, 2020, the following order was passed:-

"The records reveal that the Hon'ble, The Chief Justice, nominated / assigned Special Appeal Defective No.24 of 2020 (State of U.P. through Principal Secretary Department of Higher Education Government of U.P. Lucknow and another v. S.M. College, Chadausi through its Secretary, Shantanu Kumar & another) to be listed before a Bench presided over by Hon'ble Mr. Justice Bala Krishna Narayana, as per order dated 16th January, 2020. However, the office report dated 20th January, 2020, reads as follows:-

"Reference Hon'ble Court's Order dt. 17/01/2020 and Hon'ble CJ's Order for the new roster w.e.f. 20/01/2020 and continuation of administrative orders dt. 16/12/13 regarding PH and TU cases.

The case is put up for orders before Hon'ble regular court of the case dealing with the roster."

The administrative order of the Hon'ble, The Chief Justice, dated 16th December, 2013 - which has been referred to in the office report dated 20th January, 2020 - reads as follows:

"No pending case, civil or criminal, shall be treated as part heard or tied up in a Court after the commencement of a new roster. All pending cases shall be listed before the appropriate Bench dealing with such matters in accordance with the fresh roster, unless so ordered by the Chief Justice in a specific case hereafter."

A plain reading of the administrative order of the Hon'ble, The Chief Justice dated 16th December, 2013, reveals that the same would be applicable only in respect of pending cases - civil or criminal- which have been treated as either "part heard" or "tied up" in a Court. This is neither a "part heard" matter nor a "tied up" matter. Rather, this is a matter which has been nominated / specially assigned by the Hon'ble, The Chief Justice, to be listed before a Bench presided over by the Hon'ble Mr. Justice Bala Krishna Narayana. In fact, "tied up" cases and "partly heard" cases have been clearly defined in Rule 14 (1) under Chapter V of the Allahabad High Court Rules, 1952, which reads as follows:

*"**14. Tied up cases.**-(1) A case partly heard by a Bench shall ordinarily be laid before the same Bench for disposal. A case in which a Bench has merely directed notice to issue to the opposite party or passed an ex parte order shall not be deemed to be a case partly heard by such Bench."*

The administrative order of the Hon'ble The Chief Justice dated 16th December, 2013, which has been relied on in the office report dated 20th January, 2020, as such, will not be applicable in the instant case.

If a nominated / specially assigned matter is released by a Bench - not being a "tied up" or a "part heard" case - the Registry ordinarily should place it before the Hon'ble, The Chief Justice, for an appropriate order of fresh assignment or a direction from the Hon'ble, The Chief Justice, for the matter to be listed before the regular Bench. In this case, however, the matter has been placed before us by virtue of the office report dated 20th January, 2020, which does not refer to any such direction of the

Hon'ble, The Chief Justice, consequent upon the order dated 17th January, 2020, passed by the Division Bench presided over by the Hon'ble Mr. Justice Bala Krishna Narayana.

The Registry is therefore directed to place the matter before the Hon'ble, The Chief Justice for necessary order."

2. Consequent thereto, the matter was placed before the Hon'ble the Chief Justice for necessary order.

3. It appears that the Hon'ble the Chief Justice, in His Lordship's administrative side, has passed the following order on 17th February, 2020:-

"Lay/list before appropriate Court dealing with such matters."

4. Since this is the appropriate Court dealing with such matters, we now propose to hear out the matter on its merit.

In Re.: Civil Misc. Delay Condonation Application No.1 of 2020

Special Appeal Defective No. 24 of 2020

State of U.P. & Anr. ....Appellants
Versus
S.M. College, Chandausi & Anr. .....Respondents

Counsel for Appellants:
Archana Singh

Counsel for Respondents:
Gautam Baghel

(Delivered by Hon'ble Biswanath Somadder, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. After considering the submissions made by the learned advocates for the parties and upon perusing the application for condonation of delay, it appears that sufficient cause has been shown to explain the delay in filing of the appeal and as such, the delay is condoned. The application for condonation of delay is accordingly allowed.

2. Office is directed to allot regular number to this appeal and list it on 24th February, 2020, under the same heading.

(2020)03-05ILR A1777
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.01.2020

BEFORE

THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE CHANDRA DHARI SINGH, J.

Special Appeal No. 397 of 2010

State of U.P. & Anr. ...Appellant
Versus
Akbar Naim & Ors. ...Respondent

Counsel for the Appellant:

C.S.C.

Counsel for the Respondent:
Sanjay Kumar

A. Service – Payment of salary – Constitution of India: Article 23 - Non-payment of arrears of salary to the writ petitioner for the period in question does not have any concern w.r.t. the question of qualification or experience of the petitioner/respondent at the time of the appointment on the post of Assistant Teacher in the Institution.

There is no order of the competent authority for withholding the salary of the writ petitioner/respondent. (Para 23)
The petitioner/respondent is continuously working on the post of Assistant Teacher in the institution since the date of the appointment, and is also getting salary from the said date except for the period in question. (Para 24)
No disciplinary proceeding or any action provided in the statute was taken either for an alleged absence for the period in question or for the lack of qualification (in education or experience). Petitioner admittedly lacking in experience and educational qualification was allowed to work on the post of Assistant Teacher since last several years and was also paid salary continuously except for the period in question. (Para 7, 24)

B. Meaning of 'Begar' discussed – ' Begar' can take different forms such as forced labour, taking work without remuneration or taking work without paying adequate remuneration or remuneration less than the minimum wages. (Para 16 to 22)

Appeal dismissed. (E-4)

Precedent followed:

1. S. Vasudevan Vs. S.D. Mital, AIR 1962 Bom 53 (Para 19)

2. People's Union for Democratic Rights Vs. U.O.I., (1982) 3 SCC 235; AIR 1982 SC 1473 (Para 21)

3. St. of Guj. Vs. Hon'ble High Court of Gujarat, (1998) 7 SCC 392 (Para 22)

Appeal against judgment and order dated 10.03.2010, passed in Writ Petition No. 1842 (SS) of 1994.

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. The instant intra-court appeal has been filed by appellants under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 against the judgment and order dated 10.03.2010 passed by the learned Single Judge in Writ Petition No.1842 (SS) of 1994 by which the writ petition has been allowed with a direction to the respondents to call for the records and go through the orders passed by the State Government and this Court and release the payment of held up salary to the petitioner (respondent no.1 herein) within six weeks for the period 01.10.1992 to 03.02.1995. While allowing the writ petition, a cost of Rs.5000/- was also imposed on the respondents.

2. Brief facts of this case are that respondent no.1, who was working as a teacher in a Madarsa Darul Uloom Pir Batawan, District-Barabanki, has approached this court seeking payment of his held up salary w.e.f. 01.10.1992 to 03.02.1995. The said Madarsa is duly recognized and aided by Government of U.P. Initially the District Basic Educational Officer, Barabanki was exercising administrative control over this institution, later on, the District Minorities Welfare Officer became the supervisory authority in the District. The respondent no.1 has discharged his duties and functions during the above said period with utmost dedication but the salary was not paid as the same could not be processed. The respondent no.1 approached the superior authorities including the State Government

and several letters and orders were issued by the District Minorities Welfare Officer, Barabanki and the State Government directed the Principal, Madarsa Darul Uloom Pir Batawan, Barabanki to settle accounts and released the payment of salary to the respondent no.1 for the abovesaid period but nothing has been done towards the payment of salary during the period as stated above. Thereafter, the respondent no.1 has filed Writ Petition No.1842 (SS) of 1994, which has been allowed vide impugned order dated 10.03.2010.

3. It has been submitted by learned Counsel for appellants-State that while passing the impugned order, the learned Single Judge has erred in law by not taking into consideration the fact that the writ petition was filed in the year 1994 in which on 19.02.1999, the appellant-District Minority Welfare Officer, Barabanki have been impleaded as respondents after control being taken by the appellants over the institution and also on 19.03.1999, the notices have been issued but the writ petition was dismissed for want of prosecution on 12.08.1999. Thereafter, it was restored on 20.08.1999 and the writ petition has been finally allowed only on the basis of the supplementary affidavit filed by the respondent no.1 placing on record several orders issued by the State Government directing the Principal to settle the account and release the payment of salary to the respondent no.1.

4. Learned Counsel for the appellants-State has submitted that the learned Single Judge while allowing the writ petition has also not considered the fact that two inquiries were conducted against the respondent no.1/ writ petitioner in which it was found that the respondent no.1 did not performed the duty as teacher from 01.10.1992 to 03.02.1995. In the inquiry, it was also found that the respondent no.1 did not work with Mr. Zaheer Anwar, Assistant Teacher during the said period and the said fact had also concealed by the respondent no.1.

5. It has again been submitted by learned Counsel for the appellants-State that while allowing the writ petition, the learned Single Judge has also not considered the fact that the Director Minority Welfare Department, Uttar Pradesh issued an order on 30.11.2005 to conduct an inquiry for verifying the presence of the respondent no.1 for the period in question and in the inquiry, it was found that the salary of the respondent no.1 was not paid due to his absence from duty though repeated notices were sent by the Principal and to that effect the inquiry report dated 08.12.2005 was submitted to the higher authorities and the respondent no.1 had resumed the duty on 04.02.1995 after submitting the undertaking that he would complete the requisite educational qualification for the post held by him within two years and to that effect an order dated 09.02.1995 has also been passed by the Basic Shiksha Adhikari, Barabanki.

6. Learned Counsel for the appellants-State has next contended that the respondent no.1 holding the post of Assistant Teacher Aaliya for which the basic qualification is Fazil or Kamil with three years teaching experience and respondent no.1 do not possess the requisite qualification and to that effect respondent no.1 submitted an affidavit before the Basic Shiksha Adhikari, Barabanki to permit him to resume his duties with the undertaking that he will complete his education qualification for the said post but till date,

the respondent no.1 had not completed the education qualification as provided in the Government Order. The respondent no.1 admittedly resumed his duties since 04.02.1995, which itself shows that he did not performed his duties from 01.10.1992 to 03.02.1995. The respondent no.1 after resuming his duty from 04.02.1995 had manipulated his service book from 1990 to 1999 and fixed his annual increments for the period, he has worked and succeeded in getting payment of Rs.43,486/- in collusion with the then District Minority Welfare Officer.

7. Per contra, learned Counsel appearing for the respondent no.1 has submitted that the respondent no.1 had not manipulated his service book from 1990-1999 after resuming his duties from 04.02.1995. He has also submitted that the annual increments were not given to the respondent no.1 w.e.f. 1990. The respondent no.1 had represented the matter to the higher authorities as well as the State Government. The State Government had scrutinized the matter and called for report from the authority concerned and thereafter came to the conclusion that since there is nothing adverse against the respondent no.1 and neither any disciplinary inquiry nor any department proceedings have ever been initiated against the respondent no.1 either for an alleged absence for the period in question or for the lack of qualification and, therefore, the State Government vide order dated 25.11.1999 directed the District Minority Welfare Officer, Barabanki that if there is no departmental/disciplinary proceedings against the respondent no.1, he should be awarded annual increments and also make payment of arrears of salary.

8. Learned Counsel appearing for the respondent no.1 has further submitted that in compliance of the order dated 25.11.1999, the then District Minority Welfare Officer, Barabanki inquired the matter and found that the question of qualification with respect to appointment of the respondent no.1 is not applicable against him and no reasonable ground is find out for not giving him annual increments in his salary and, therefore, his annual increments have been restored vide order dated 21.10.1999 and the proceedings are in process for preparation of arrears of salary bill with effect from October, 1992 up till 03.02.1995.

9. It has again been submitted by learned Counsel appearing for the contesting respondent that the salary of one Mr. Zaheer Anwar, Assistant Teacher and Mr. Siraj Ahsan, Assistant Teacher working with the petitioner were also stopped by the appellants but later on, the salary and arrears were paid to them in the year 1999 and 1993 respectively whereas the salary and arrears of the respondent no.1 from 01.10.1992 to 03.02.1995 have illegally been denied without assigning any reason. Therefore, the learned Single Judge after considering the entire material on record has found that the respondent no.1 is legally entitled for the salary and arrears for the said period as he had performed duty during the said period.

10. We have considered the submissions advanced by learned Counsel for the parties and perused the record.

11. Counter and rejoinder affidavits have been exchanged between the parties and the same are available on record.

12. After perusal of the record, we found that in the year 1992, the respondent no.1 had approached this Court by filing

Writ Petition No.901 (SS) of 1992 on behalf of all the teachers and employees for non-payment of their salary which was withheld by the then Shiksha Adhikari from July, 1991 onward, which was allowed vide order dated 13.02.1992 with a direction to the District Basic Education Officer, Barabanki to make the payment of the salary of the teachers and the other employees who are working in the institution taking into account the records of the institution as well as the employees and last salary bill of staff of the institution. It was further directed that the arrears of teachers and other employees should also be paid and in future salary of the teachers and other employees should also be paid regularly. In pursuance to the order dated 13.02.1992, the salary of the respondent no.1 was paid till September, 1992. Again the salary of the respondent no.1 was stopped from the month of October, 1992 and against non-payment of salary, the respondent no.1 represented his case before higher authorities and also before the District Basic Education Officer including the District Magistrate, Barabanki.

13. It has also been argued by learned Counsel appearing for respondent no.1 that inspite of all efforts, when the salary of respondent no.1 was not paid by the District Basic Education Officer and by the other authorities concerned of the department, the respondent no.1 agitated the matter again and ultimately vide an order dated 03.09.1993 and 27.09.1993, the District Basic Education Officer had passed an order stating therein that if the respondent no.1 submits an affidavit to the effect that he is working in the institution from October, 1992 till date and in future he will also continue to work and put his signature on the attendance register. Inspite of the affidavit submitted by the respondent no.1, the salary of the petitioner has not been paid.

14. In the instant case, the respondent no.1 has argued that he is working regularly in the institution and, therefore, he is entitled for salary as was received by him in the past. It has been well recognised and settled that right to education is a fundamental right under Part III of the Constitution of India. It is a pious obligation of the State and the Society to provide education at all levels to all citizens and the State may discharge this obligation either through State owned or State recognised educational institutions and may get the aforesaid activity supplemented by the private institutions as well.

15. The respondent no.1 is continuously working in the institution and the said institution is also taking the service of the respondent no.1 but the salary has been denied which is contrary to the constitutional obligation. It is evident from the record that the petitioner has continuously work in the institution as a Teacher for the period in question, therefore, the respondent no. 1 legitimately expects to be adequately compensated for the work he has done.

16. Article 23 of the Constitution of India prohibits "Begar', which reads as under:

"23. Prohibition of traffic in human beings and forced labour.

(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing

compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

17. The aforesaid Article envisages to solve three unsocial practices prevailing in the India society namely;

i) Traffic in human beings;
ii) Begar; and
iii) similar forms of forced labour

18. In the present context, we are concerned with one of the evils of "Begar.' The word "Begar' is of Indian origin and has been adopted in the English vocabulary. It is understood to be a labour or service which a person is forced to give without receiving any remuneration for it. In other words extracting labour or service from a person by the government or by person in power without giving remuneration for it amounts to "Begar.' "Begar' can take different forms such as forced labour, taking work without remuneration or taking work without paying adequate remuneration or remuneration less than the minimum wages.

19. It is very difficult to formulate a precise definition of the word *'begar'*, but there can be no doubt that it is a form of forced labour under which a person is compelled to work without receiving any remuneration. Molesworth describes *'begar'* as "labour or service exacted by a government or person in power without giving remuneration for it." Wilson's Glossary of Judicial and Revenue Terms gives the following meaning of the word *'begar'*: "a forced labourer, one pressed to carry burthens for individuals or the public. Under the old system, when pressed for public service, no pay was given. The *Begari*, though still liable to be pressed for public objects, now receives pay: Forced labour for private service is prohibited." *Begar* may therefore be loosely described as labour or service which a person is forced to give without receiving any remuneration for it. That was the meaning of the word *'begar'* accepted by a Division Bench of the Bombay High Court in S. Vasudevan v. S.D. Mital: AIR 1962 Bom 53. *'Begar'* is thus clearly a form of forced labour. Now it is not merely *'begar'* which is unconstitutionally (sic) prohibited by Article 23 but also all other similar forms of forced labour. This Article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values

20. In view of the above Constitutional mandate no Government or public body or a person can take work from anyone without paying remuneration or less remuneration then admissible or by force as it would be a clear violation not only of the fundamental right of a person but of a much superior human right which inheres in every individual.

21. In ***People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235 : AIR 1982 SC 1473***, it has been observed that Article 23 of the Constitution of India protects individual not only against State but against private citizens and that *Begar* means labour or servive which a person is forced to give without receiving any remuneration or which is less than minimum wages. It amounts to violation of fundamental enshrined under Articles 17, 23 and 24 of the Constitution. It has further been laid

down that it is the Constitutional obligation of the State to take necessary steps to stop such violation and ensuring observation of the fundamental right by private individuals who are transgressing the same.

22. The aforesaid decision has been followed in ***State of Gujarat v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392*** and where in context with the convicts it was held that all prisoners doing labour are entitle to equitable wages.

23. The learned Single Judge while passing the judgment and order dated 10.03.2010 found that there is no order of competent authority for withholding the salary of writ petitioner/ respondent no.1 for the period 01.10.1992 to 03.02.1995. The District Magistrate, Barabanki is neither the competent authority nor having any jurisdiction in the statute to withhold or stop the salary of respondent no.1/ writ petitioner rather the competent authorities were continuously directed to make payment of salary to the writ petitioner for the period in question.

24. Since the date of appointment i.e. 25.06.1987, the writ petitioner is continuously working on the post of Assistant Teacher in the institution of respondent no.4 and also is getting salary from the date of initial appointment except the period in question. It is admitted fact that the writ petitioner was not having experience qualification of three years for the post of Assistant Teacher at the time of initial appointment then why disciplinary proceedings or any action provided in the statute has not been taken against the writ petitioner by the competent authority rather the opposite parties allowed the writ petitioner to work on the said post of Assistant Teacher since last several years and also make payment of salary for the said post continuously except the period in question. The salary of the period in question has been withheld by the opposite parties is not on the ground of qualification rather the same has been withheld by the opposite parties on the ground that the attendance of the writ petitioner for the said period has not been verified by the Principal of the Institution whereas it is admitted fact that the regular principal of the Institution was placed under suspension by the Committee of Management at the relevant time and the writ petitioner being senior most Teacher of the Institution was allowed to work as Officiating Principal of the Institution.

25. From the perusal of the aforesaid facts and circumstances, it is clear that the dispute in question i.e. with respect to non-payment of arrears of salary to the writ petitioner for the period 01.10.1992 to 03.02.1995 is having no concerned with respect to the question of qualification or experience of the writ petitioner at the time of appointment on the post of Assistant Teacher in the Institution.

26. In view of above, we do not find any illegality or irregularity in the order dated 10.03.2010 passed by the learned Single Judge in Writ Petition No.1842 (SS) of 1994. Accordingly, the instant special appeal is ***dismissed.***

(2020)03-05ILR A1783
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

WRIT-A No. 7587 of 2006

Safkatullah Khan ...Petitioner
Versus
Food Corporation of India & Ors.
...Opposite Parties

Counsel for the Petitioner:
Sri Rahul Jain

Counsel for the Opposite Parties:
Sri N. Misra, Sri Satya Prakash, S.C.

A. Service – Compassionate appointment – The terminal benefits given to the family cannot be taken into consideration while deciding the status of the family for the purpose of consideration of compassionate appointment.
(Para 27 to 30)

B. No man should suffer because of the fault of the Court or delay in the procedure. It is evident that the petitioner has been vigilant in espousing his cause for compassionate appointment and his rightful claim was denied by the illegal and arbitrary act of respondent no. 3. There is no fault of the petitioner for the delay caused in adjudication of his claim, therefore, his rightful claim for compassionate appointment cannot be denied on the ground of delay. (Para 31 to 34)

C. Cause of action to claim compassionate appointment accrues on the date of death of deceased employee, therefore, the rules or scheme governing the compassionate appointment prevalent on the date of death of deceased employee is relevant for consideration of claim for compassionate appointment. In the present case, the F.C.I. had adopted the Central Government Circular dated 09.10.1998 by Circular No.EP-01200109 dated 14.05.2001 prior to the death of father of the petitioner, therefore, the Central Government Circular dated 09.10.1998 adopted by F.C.I. would govern the consideration of compassionate appointment of the petitioner. (Para 18, 19)

Writ petition allowed. (E-4)

Precedent followed:

1. Canara Bank & anr. Vs. A. Mahesh Kumar, 2015 AIR 2411 (Para 12, 18)

2. Adams Paul & anr. Vs. S.B.I. & ors., 2015 33 LCD 2449 (Para 13)

3. Nirdesh Kumar Vs. St. of U.P. & ors., 2013 (2) UPLBEC 1356 (Para 13, 29)

4. Krishna Kumar Vs. FCI & ors., Writ-A No. 31020 of 2002 (Allahabad) (Para 14)

5. Vijay Kumar Vs. Zonal Manager (N) Food Corporation & ors., Writ-A No. 27326 of 2005 (Para 14)

6. Atma Ram Mittal Vs. Iswhar Singh Punia, 1988 (4) SC 284 (Para 16, 32)

7. Jayantibhai Roojibhai Patel Vs. Municipal Council, Narkhed & ors., 2019 (9) JT 67 SC (Para 16, 33)

8. Govind Prakash Verma Vs. L.I.C. & ors., 2005 (10) SCC 289 (Para 28)

Petition assails order dated 09.11.2005, passed by Senior Regional Manager, Food Corporation of India, Lucknow.

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Rahul Jain, learned counsel for the petitioner and Sri Satya Prakash, learned counsel for the respondents.

2. The petitioner by means of the present petition has assailed the order dated 09.11.2005 passed by Senor Regional Manager, Food Corporation of India, Lucknow (respondent no.3) rejecting the claim of the petitioner for compassionate appointment.

3. The brief facts of the case are that one H.U. Khan, father of the petitioner, was

working as a Technical Assistant (Ist) in Food Corporation of India (hereinafter referred to as 'F.C.I.'), who died-in-harness on 10.03.2002 leaving behind his widow, five sons including petitioner and four daughters. Out of four daughters, one is married. The petitioner is the eldest son of Late H.U. Khan. The entire responsibility of the family came on shoulder of petitioner being eldest son of Late H.U. Khan. The petitioner has passed Class IX and fulfills the eligibility criteria for appointment on Category-IV post under dying-in-harness scheme.

4. The petitioner submitted an application to the District Magistrate, Allahabad, respondent no.2, seeking appointment on compassionate ground. The petitioner claimed appointment on the compassionate ground on the basis of Circular No.7 of 1997 dated 31.03.1997 of F.C.I. which provided condition and eligibility criteria for appointment on compassionate ground. On submission of the said application, three member committee conducted an enquiry and submitted report to the respondent no.2 stating therein that no member of the family of the petitioner is in government department and members of the family do not have any source of income. The said report also stated that the widow of Late H.U. Khan is burdened with the responsibility of good education and marriage of three daughters, and sons and daughters of late H.U. Khan had given consent for the appointment of the petitioner on Category-IV post. The said report recommended for appointment of the petitioner on the compassionate ground.

5. Pursuant to the aforesaid report, respondent no.2 directed the respondent no.3 by letter dated 28/30.10.2003 for granting compassionate appointment to the petitioner. When no action was taken on the letter of respondent no.2, petitioner approached this Court by means of Writ Petition No. 42840 of 2005 (Safkatullah Khan Vs. Food Corporation of India and Others) wherein this Court by judgement and order dated 26.05.2005 directed the respondent no.3 to consider the grievance of the petitioner and pass orders within a period of three months.

6. Pursuant to the order of this Court, respondent no.3 rejected the claim of the petitioner by order dated 09.11.2005. Relevant extract of the order dated 09.11.2005 is extracted hereinbelow:-

"...

As per directions of the Govt of India vide circular No.14014/6/94 Estt. (d)dt. 8/9.10.1998. The following provision has been provided for compassionate appointment.

a). Appointment on compassionate grounds should be made only on regular basis and that too only if regular vacancies meant for that purpose are available.

b). Compassionate appointments can be made upto a maximum of 5% of vacancies falling under direct recruitment quota in any group 'C' or 'D' post. The appointing Authority may hold back upto 5% of vacancies in the aforesaid categories to be filled by direct recruitment through staff Selection Commission or otherwise so as to fill such vacancies by appointment on compassionate grounds. A person selected for appointment on compassionate grounds should be adjusted in the recruitment roster against the appropriate category viz SC/ST/OBC/Genl. depending upon the category to which he belongs. For example if he belongs to SC category he will be

adjusted against the SC reservation point and if he belongs to ST/OBC he will be adjusted against ST/OBC point and if he belongs to Genl. category he will be adjusted against the vacancy point meant for Genl. Category.

c). While the ceiling of 5% for making compassionate appointment against regular vacancies should not be circumvented by making appointment of dependent family member of Govt. servant on casual case daily wage/adhoc/contract basis against regular vacancies, there is no bar to considering him for such appointment if he is eligible as per the normal rules/orders governing such appointments.

d). The ceiling of 5% of direct recruitment vacancies for making compassionate appointment should not be exceeded by utilising any other vacancy e.g. sports quota vacancy.

e). Employment under the scheme is not confined to the Ministry/Department/Office in which deceased/medically retired Government servant had been working. Such an appointment can be given any where under the Government of India depending upon availability of a suitable vacancy meant for the purpose of compassionate appointment.

f). If sufficient vacancies are not available in any particular office to accommodate the persons in the waiting list for compassionate appointment, it is open to administrative Ministry/Department/Office to take up the matter with other Ministries/Department/Offices of the Govt. of India to provide at an early date appointment on compassionate grounds to those in the waiting list.

So keeping in view the aforesaid provision and ceiling of 5% there exists no vacancy and hence the claim of the petitioner at this stage is not tenable and is hereby rejected. This disposes off the representation dated 17.9.2005 of the petitioner.

(Hukam Singh)
Senior Regional Manager"

7. A counter affidavit has been filed by respondents contending inter alia that Circular No.EP-01200109 dated 14.05.2001 of the F.C.I. had adopted the Central Government Circular dated 09.10.1998 for compassionate appointment, and such appointments are made as per the provisions contained in Government Circular dated 09.10.1998. It was further stated that F.C.I. had already paid terminal benefits of the father of the petitioner amounting to Rs.10,56,980/- (including GPF, Gratuity and other amounts); hence, petitioner had sufficient funds to meet immediate financial exigencies of the family. It further stated that since 5% posts of the direct recruitment on Category IV reserved for compassionate appointment were filled during the year 2000-01, therefore, no post was available in Category-IV and petitioner could not be considered for appointment due to non-availability of the post.

8. The F.C.I. further filed first supplementary affidavit wherein in paragraph 5(i), it is stated that no vacancy of Category-IV was available at the time of issue of order of respondent no.3 dated 9/10.11.2005. In paragraph 5(iv) of the said affidavit, it is stated that the cases upto Roaster No.516 were considered for Category-IV post for compassionate appointment during 2000-01, and no appointments were made thereafter as no vacancy existed. In paragraph 5 (v), it was further averred that petitioner's name in the roaster register is placed at 923. In

paragraph 5(vii), it was further averred that case of the petitioner will be considered as per the prevalent scheme for compassionate appointment as and when vacancy arises.

9. F.C.I. filed second supplementary affidavit annexing therewith the letter/order dated 04.11.2011 by which claim of the petitioner was again rejected by referring several judgements of the Apex Court on the ground that F.C.I. had released terminal benefits amounting to Rs.10,65,809/-. The relevant extract of the said order is extracted hereinbelow:-

"...

Reg: Compassionate Ground Appointment- Shri Shaflat Ula Khan.

Your candidature for compassionate ground appointment vides your application dated 5.11.2003 placed at zonal roster No. 923 for category IV post has been examined on merits for the years 2003 by the Zonal Empowered Committee and was rejected with the approval of the competent authority since no vacancy within ceiling limit of 5% of the DR quota exist. It may be noted that FCI follows Government of India instructions (and not by State Government rules) as contained in its Oms No. 14014/6/94-Estt (D) dated 9.10.1998 and No. 14014/19/2002-Estt (D) dated 5.5.2003

2. It has also observed that-

FCI released Rs.10,65,809/- as retiral benefits.

3. Further it may also be noted that Hon'ble Supreme Court in its various judgments has observed that - IN THE CASE OF UMESH KUMAR NAGPAL VERSUS HARYANA & OTHERS JT 1994(3) SC 525. Compassionate appointment cannot be granted after lapse of a reasonable period and it is not a vested right which can be exercised at any time in future.

IN THE CASE OF LIC ERSUS Mrs ASHA RAMCHANDRAN AMBEKAR & ORS (JT 1994(2) SC 183 DATED 28.2.1995 that the High Court and Administrative Tribunals cannot give direction for appointment of a person on compassionate grounds but can merely direct consideration of the claim for such an appointment.

IN THE CASE OF HARYANA STATE ELECTRICITY BOARD VS KRISHNA EVI 2002 Iij 773 the Apex Court while reiterating the objective of the compassionate appointment as laid down in the earlier cases further observed that the application made at a belated stage cannot be entertained for the reason that by lapse of time, the purpose of making such appointment stands evaporated.

IN STATE OF MANIPUR Vs MOHD RAJAODIN 2003 (7) SCC 511 the Apex Court reiterated that the purpose of giving compassionate appointment is only to mitigate hardship caused to the family of the deceased on account of his unexpected death in service, only to alleviate the distress of the family but at a belated stage as these grounds are no more in existence, therefore, the employment cannot be claimed or provided.

IN STATE BANK OF INDIA AND OTHERS Vs JASPAL KAUR JT 2007 (3) SC 35 that.....Hence a major criterion while appointing a person on compassionate grounds should be the financial condition of the family the deceased person left behind. Unless the financial condition is entirely penury, such appointments cannot be made."

IN THE CASE OF HARYANA STATE ELECTRICITY BOARD AND ANOTHER VS HAKIM SINGH JT 1997 (8) SC 332 the Apex Court cautioned that the object of providing compassionate employment is only to relieve the family

from financial hardship. Therefore, an ameliorating relief should not be taken as opening of alternative mode of recruitment to public employment.

Yours Faithfully,
(T P PUNJ)
ASSTT GENL MANAGER (E.IX)
For EXECUTIE DIRECTOR (NORTH)"

10. The F.C.I. also annexed the copy of report dated 14.09.2018 of the committee constituted by competent authority to reassess the vacancy position from the year 1995 to 2017. For the purposes of the present case, vacancy position as noted in the report for the year 2003, 2004, 2005, 2006, 2007 & 2008 is extracted hereinbelow:-

"I. Year 2003 (31.12.2003):-

Category-IV post (entry) level Post	*Sanction Strength*	*Men in position*	*Vacancies*	*No. of vacancies as per Hqrs. Instruction 5% of Vacancies advertised*	*No. of vacancies advertised*	*No. of Compassionate Appointment made during the year*
Mess (Peon)	*245*	*353*	*-108*	*0*	*0*	*0*
Watchman	*842*	*889*	*-47*	*0*	*0*	*0*
Helper		*0*		*0*	*0*	*0*
Labour		*3*		*0*	*0*	*0*
Sifter	*732*	*23*		*0*	*0*	*0*
Sweeper/Safaiwala		*535*		*0*	*0*	*0*
Mess (depot)		*344*		*0*	*0*	*0*
Oil Man	*7*	*5*	*2*	*0*	*0*	*0*
Tracer	*1*	*1*	*0*	*0*	*0*	*0*
Caretaker cum cook	*1*	*1*	*0*	*0*	*0*	*0*
Driver Gr.II	*43*	*36*	*7*	*0*	*0*	*0*
Wireman Gr.II	*6*	*7*	*-1*	*0*	*0*	*0*
Beldar	*14*	*18*	*-4*	*0*	*0*	*0*
Gardner	*1*	*1*	*0*	*0*	*0*	*0*
Dresser	*2*	*1*	*1*	*0*	*0*	*0*
TOTAL CAT.IV	*1894*	*2253*	*-359*	*0*	*0*	*0*

J. Year 2004 (31.12.2004):-

Category-IV post (entry) level Post	*Sanction Strength*	*Men in position*	*Vacancies*	*No. of vacancies advertised*	*No. of vacancies as per Hqrs. Instruction 5% of Vacancies advertised*	*No. of Compassionate Appointment made during the year*
Mess (Peon)	*245*	*328*	*-83*	*0*	*0*	*0*
Watchman	*842*	*556*	*286*	*0*	*0*	*0*
Helper		*03*		*0*	*0*	*0*
Labour	*732*	*199*	*-110*	*0*	*0*	*0*
Sifter		*305*		*0*	*0*	*0*
Sweeper/Safaiwala		*335*		*0*	*0*	*0*
Mess (Depot)				*0*	*0*	*0*
Oil Man	*7*	*4*	*3*	*0*	*0*	*0*
Gardner	*1*	*1*	*0*	*0*	*0*	*0*
Dresser	*2*	*1*	*1*	*0*	*0*	*0*
Beldar	*14*	*16*	*-2*	*0*	*0*	*0*
TOTAL CAT.IV	*1843*	*1748*	*95*	*0*	*0*	*0*

K. Year 2005 (31.12.2005):-

Category-IV post (entry) level Post	*Sanction Strength*	*Men in position*	*Vacancies*	*No. of vacancies advertised*	*No. of vacancies as per Hqrs. Instruction 5% of Vacancies advertised*	*No. of Compassionate Appointment made during the year*
Mess (Peon)	*237*	*312*	*-75*	*0*	*0*	*0*
Watchman	*827**	*306*	*521*	*0*	*0*	*0*
Helper			*0*	*0*		*0*
Laboure r	*0 698@3*		*0*	*0*		*0*
Sifter	*241*		*0*	*0*		*0*
Sweeper /Safaiwala	*119*		*0*	*0*		*0*

Mess (Depot)	*103*		*0*	*0*		*0*
Oil Man	*232*		*0*	*0*		*0*
	734					
Beldar	*14*	*14*	*0*	*0*	*0*	*0*
Gardner	*1*	*1*	*0*	*0*	*0*	*0*
Dresser	*2*	*0*	*2*	*0*	*0*	*0*
TOTAL CAT.IV	*1786*	*1093*	*693*	*0*	*0*	*0*

** 15 posts abolished due to VRS*
@ 34 posts abolished due to VRS

L. Year 2006 (31.12.2006):-

Category-IV post (entry) level Post	*Sanction Strength*	*Men in position*	*Vacancies*	*No. of vacancies advertised*	*No. of vacancies as per Hqrs. Instruction 5%*	*No. of Compassionate Appointment made during the year*
Mess (Peon)	*237*	*267*	*-30*	*0*	*0*	*0*
Watchman	*716*	*140*	*576*	*0*	*0*	*0*
Helper	*698*		*02*	*0*	*0*	*0*
Labour			*283*	*0*	*0*	*0*
Sifter			*58*	*0*	*0*	*0*
Sweeper/Safaiwala	*375*		*180*	*0*	*0*	*0*
Mess (Depot)				*0*	*0*	*00*
Oil Man	*75*		*2*	*0*	*0*	*0*
Gardner	*1*	*1*	*0*	*0*	*0*	*0*
Dresser	*2*	*0*	*2*	*0*	*0*	*0*
Beldar	*14*	*8*	*6*	*0*	*0*	*0*
TOTAL CAT.IV	*1675*	*741*	*934*	*0*	*0*	*0*

M. Year 2007 (31.12.2007):-

Category-IV post (entry) level	*Sanction Strength*	*Men in position*	*Vacancies*	*No. of vacancies*	*No. of Vacancies advertised*	*No. of Compassionate Appointment during the year*

Post	*gth*	*n*		*s ad ver tise d*	*c a n ci e s a s p e r H q rs . I n st r u ct io n 5 % of V a c a n ci e s a d v e rt is e d*	*made during the year*	*(Peon)*	*7*	*3*				
							Watch man	*71 6*	*10 7*	*609*	*0*	*0*	*0*
							Helpe r	*69 8*	*0 3 ---- ---- - 72 ---- ---- - 48 ---- ---- - 15 0*	*425*	*0*	*0*	*0*
							Labou rer				*0*	*0*	*0*
							Sifter				*0*	*0*	*0*
							Sweep er/Saf aiwala				*0*	*0*	*0*
							Mess (Depo t)				*0*	*0*	*0*
Mess	*23*	*24*	*-6*	*0*	*0*	*0*							

				0	0	0
Oil Man	7	2	5	0	0	0
Beldar	14	8	6	0	0	0
Gardner	1	0	1	0	0	0
Dresser	2	0	2	0	0	0
TOTAL CAT.IV	1675	633	1042	0	0	0

N. Year 2008 (31.12.2008):-

Category-IV post (entry) level Post	Sanction Strength	Men in position	Vacancies	No. of vacancies as per Hqrs. Instruction 5% of Vacancies advertised	No. of Compassionate Appointment made during the year
Mess (Peon)	237	210	27	0	0
Watchman	716	103	613	0	0
Helper		0		0	0
Labourer	69				
Sifter	8		503		
Sweeper/Safaiwala		3		0	
Mess (Depot)					
		40		0	
		48		0	
		104		0	
					0

				–		
				–		
				–		
				–		
				–		
				–		
Oil Man	*7*	*2*	*5*	*0*	*0*	*0*
Gardner	*1*	*8*	*6*	*0*	*0*	*0*
Dresser	*2*	*0*	*2*	*0*	*0*	*0*
Beldar	*14*	*7*	*7*	*0*	*0*	*0*
TOTAL CAT.IV	*167 5*	*51 7*	*1158*	*0*	*0*	*0*

Prakash Chaurasia *Arun Kumar*
Kausik Nayak
Manager (Genl.) *AGM*
(Legal) *DGM*
(Genl.)"

11. In the rejoinder affidavit to the supplementary affidavit, petitioner stated that terminal benefits paid to the mother of the petitioner cannot be a ground to deny the compassionate appointment to the petitioner. The petitioner further pleaded that no opportunity of hearing was afforded to him before passing the impugned order. It has also been averred that even as per the report of respondents, right from the year 2005 vacant posts under 5% ceiling were available in the F.C.I., therefore, the claim of the petitioner has been wrongly rejected by respondent no.3.

12. Learned counsel for the petitioner has submitted that the order impugned in the writ petition rejecting the claim of the petitioner is non-speaking and without application of mind inasmuch as the said order did not consider the report of the committee constituted to enquire about the financial condition of the family as well as the size of family of the petitioner and liability of the family. He submits that the said report clearly states that widow has the liability to look after her three unmarried daughters. He further submits that the only reason on which claim of the petitioner was rejected by respondent no.3 is that no vacancy under 5% quota of direct recruitment reserved for compassionate appointment was available which is contrary to record inasmuch as, as per the vacancy position shown in the report dated 14.09.2018, the vacancy in category-IV post was available. He further submits that in the first supplementary affidavit of F.C.I. in paragraph 5(i), it is averred that no vacancy was available at the time of passing of order dated 9/10.11.2005 whereas as per the report dated 14.09.2018, there were vacancies in category-IV from 2004 onwards and as such, the reason assigned for rejecting the claim of petitioner is not sustainable. He further submits that claim of the petitioner has to be considered as per the scheme of compassionate appointment applicable on the date of cause of action for appointment under dying-in-harness scheme. In support of the said contention, he has placed reliance upon the judgement of Apex Court in the case of ***Canara Bank and Another Vs. A. Mahesh Kumar 2015 AIR 2411.***

13. It is further urged by the learned counsel for the petitioner that the claim of the petitioner is to be considered in the light of scheme applicable for compassionate appointment, and in the present case, the scheme does not envisage

the rejection of claim of petitioner on the ground of financial condition of family of deceased person. He submits that terminal benefits cannot be taken into account in considering the financial condition of the family. Accordingly, he submits that the rejection of claim of the petitioner for compassionate appointment on the ground of payment of terminal benefits of the father of the petitioner which is sufficient to meet the financial exigencies as stated in the letter of communication dated 04.11.2011 annexed with the second supplementary affidavit is not sustainable in law. In support of the said contention, he placed reliance upon the judgement of this Court in the case of ***Adams Paul & Another Vs. State Bank of India and Others 2015 33 LCD 2449*** and ***Nirdesh Kumar Vs. State of U.P. & Others 2013 (2) UPLBEC 1356.***

14. Per contra, learned counsel for the respondents submits that father of petitioner had died in the year 2002, and more than 18 years have elapsed and family of petitioner has survived, therefore, family is not in any financial stress. Hence, he submits that the present is not a case where compassionate appointment is to be given to the petitioner in order to tide over the financial stress of the family. In support of his aforesaid contention, he has placed reliance upon the judgement of this Court in the cases of ***Writ-A No.31020 of 2002 (Krishna Kumar Vs. Food Corporation of India and Others) and Writ A No.27326 of 2005 (Vijay Kumar Vs. Zonal Manager (N) Food Corporation and Others).***

15. He further contends that terminal benefits of the father of the petitioner had been released, therefore, family of the petitioner is not in any financial stress and further, as there is no vacancy available with the F.C.I. in Category-IV, therefore, claim of the petitioner has rightly been rejected by respondent no.3. He further submits that Circular No.7 of 1997 dated 31.03.1997 of F.C.I. is not applicable in the present case.

16. To the aforesaid submission, learned counsel for the petitioner has submitted that petitioner is espousing his cause for compassionate appointment immediately after the death of his father, and the rightful claim of the petitioner for compassionate appointment was denied illegally and arbitrarily by the respondent no.3. Thus, the submission is that it is settled in law that no one should suffer for the fault of the court, and as there was no delay on the part of the petitioner in espousing his cause, the claim of the petitioner cannot be defeated on the ground of delay. In support of his contention, he has placed reliance upon the judgement of Apex Court in the case of ***Atma Ram Mittal Vs. Iswhar Singh Punia 1988 (4) SC 284*** and another judgement of Apex Court in the case of ***Jayantibhai Raojibhai Patel Vs. Municipal Council, Narkhed & Others 2019 (9) JT 67 SC.***

17. I have considered the rival submissions of the parties and perused the record.

18. As per petitioner, his claim for compassionate appointment is to be considered as per Circular No.7 of 1997 whereas according to the respondent the claim of the petitioner is to be considered as per Central Government Circular dated 09.10.1998 adopted by F.C.I. by Circular No.EP-01200109 dated 14.05.2001. To consider the said issue , it would be apt to refer paragraph 13 of the judgement of Apex Court in the case of ***Canara Bank***

and Another (supra) which is being extracted hereinbelow:-

"13. Applying these principles to the case in hand, as discussed earlier, respondent's father died on 10.10.1998 while he was serving as a clerk in the appellant-bank and the respondent applied timely for compassionate appointment as per the scheme "Dying in Harness Scheme' dated 8.05.1993 which was in force at that time. The appellant-bank rejected the respondent's claim on 30.06.1999 recording that there are no indigent circumstances for providing employment to the respondent. Again on 7.11.2001, the appellant-bank sought for particulars in connection with the issue of respondent's employment. In the light of the principles laid down in the above decisions, the cause of action to be considered for compassionate appointment arose when the Circular No.154/1993 dated 8.05.1993 was in force. Thus, as per the judgment referred in Jaspal Kaur's case, the claim cannot be decided as per 2005 Scheme providing for ex-gratia payment. The Circular dated 14.2.2005 being an administrative or executive order cannot have retrospective effect so as to take away the right accrued to the respondent as per circular of 1993."

19. The Apex Court in the aforesaid case has held that cause of action to claim compassionate appointment accrues on the date of death of deceased employee, therefore, the rules or scheme governing the compassionate appointment prevalent on the date of death of deceased employee is relevant for consideration of claim for compassionate appointment. In the present case, the F.C.I. had adopted the Central Government Circular dated 09.10.1998 by Circular No.EP-01200109 dated 14.05.2001 prior to the death of father of the petitioner, therefore, the Central Government Circular dated 09.10.1998 adopted by F.C.I. would govern the consideration of compassionate appointment of the petitioner.

20. Paragraph 7 of the Central Government Circular dated 09.10.1998 provides for Determination/Availability of vacancies which is being reproduced hereinbelow:-

"7. <u>DETERMINATION/AVAILABILITY OF VACANCIES.</u>

(a). Appointment on compassionate grounds should be made only on regular basis and that too only if regular vacancies meant for that purpose are available.

(b). Compassionate appointments can be made upto a maximum of 5% of vacancies falling under direct recruitment quota in any Group 'C' or 'D' post. The appointing authority may hold back upto 5% of vacancies in the aforesaid categories to be filled by direct recruitment through Staff Selection Commission or otherwise so as to fill such vacancies by appointment on compassionate grounds. A person selected for appointment on compassionate grounds should be adjusted in the recruitment roster against the appropriate category viz SC/ST/OBC/General depending upon the category to which he belongs. For example, if he belongs to SC category he will be adjusted against the SC reservation point, if he is ST/OBC he will be adjusted against ST/OBC point and if he belongs to General category he will be adjusted against the vacancy point meant for General category.

(c). While the ceiling of 5% for making compassionate appointment against regular vacancies should not be circumvented by making appointment of

dependent family member of Government servant on casual/daily wage/ad-hoc/contract basis against regular vacancies, there is no bar to considering him for such appointment if he is eligible as per the normal rules/orders governing such appointments.

(d). The ceiling of 5% of direct recruitment vacancies for making compassionate appointment should not be exceeded by utilizing any other vacancy e.g. sports quota vacancy.

(e). Employment under the scheme is not confined to the Ministry/Department/Office in which deceased/medically retired Government servant had been working. Such an appointment can be given anywhere under the Government of India depending upon availability of a suitable vacancy meant for the purpose of compassionate appointment.

(f). If sufficient vacancies are not available in any particular office to accommodate the persons in the waiting list for compassionate appointment, it is open to the administrative Ministry/Department/Offices to take up the matter with other Ministries/Department/Offices of the Government of India to provide at an early date appointment on compassionate grounds to those in the waiting list."

21. Now, the court proceeds to consider as to whether the respondent no. 3 has rightly rejected the claim of the petitioner for compassionate appointment. The father of the petitioner died on 10.03.2002. On the application of the petitioner, there was a report of three members committee which recommended that the petitioner be given compassionate appointment under dying-in-harness scheme considering the liability and financial exigencies of the family. The said report clearly stated that the widow had responsibility of three daughters whom she had to look after and the burden of their marriage is also on her. The respondent no.2 by letter dated 28/30.10.2003 directed the respondent no.3 to appoint petitioner on compassionate ground. When the respondent no.3 did not comply with the direction of respondent no.2, the petitioner filed Writ Petition No. 42840 of 2005 which was disposed off by this court by order dated 26.05.2005 directing the respondent no.3 to consider the claim of the petitioner. Pursuant to the direction of this court , the respondent no.3 passed order dated 09.11.2005 rejecting the claim of the petitioner on the ground that no vacancy under 5% quota for direct recruitment is available.

22. Perusal of order dated 09.11.2005, extracted above, clearly reveals that respondent noted the relevant provisions of Circular dated 8/9.10.1998 providing procedure for compassionate appointment and rejected the claim of the petitioner by cryptic finding that as no vacancy under 5% quota reserved for compassionate appointment is available with F.C.I., therefore, petitioner cannot be appointed.

23. In the first supplementary affidavit of F.C.I, it is stated that no vacancy on the date of passing of order dated 9/10.11.2005 was available under 5% quota. The said averment as well as reason assigned in the impugned order are contrary to record inasmuch as report dated 14.09.2018 containing the vacancy position from 1995 to 2018 reveals that there were vacancies in Category-IV post from the year 2004 onwards. The said report gives the actual vacancy position as on 31st December of the relevant year, but it does not give the vacancy position quota wise. It

is evident from the report that, there were 95 vacancies in Category-IV on 31st December 2004, 695 vacancies on 31st December 2005, 934 vacancies on 31st December 2006, 1042 vacancies on 31st December 2007 and so on. Thus, it is evident that sufficient number of vacancy were available with the F.C.I. from the year 2004 onwards.

24. At this juncture, it would be relevant to refer the order passed by this Court on 17.07.2019 whereby this Court directed the F.C.I. to file an affidavit giving total number of Category-IV posts as also 5% quota. The order of this Court dated 17.07.02019 is extracted hereinbelow:-

" A supplementary affidavit on behalf of respondents is stated to have been filed on 6.8.2009, which is not on record.

Office may trace it out and placed it on record.

Learned counsel for the respondents will also obtain instructions as to whether any vacancy has since been caused in the organization against which petitioner's compassionate appointment can be considered. The total number of class IV posts as also the 5% quota shall also be disclosed.

List on 31st July, 2019".

25. But despite the specific direction of this Court to provide details of 5% quota, the F.C.I. filed a report with the Second Supplementary Affidavit giving total number of vacancies, but nothing has been averred in the affidavit as to how no vacancy under 5% quota is available despite there is large number of vacancies in Category-IV.

26. It is further relevant to mention that the compassionate appointment is entirely different from an appointment by direct recruitment. The object and purpose of the compassionate appointment is to provide immediate succor to the family of deceased to tide over the financial crunch which had been caused due to the death of the bred earner of the family. The averment made in paragraph 5(1) of the first supplementary affidavit of F.C.I. that no vacancy under 5% quota exist is contrary to the report dated 14.09.2018 which gives year wise vacancy position of Category IV post. In this view of the fact, the reasons assigned in the impugned order that no vacancy under 5% quota is available with F.C.I. is contrary to record and not sustainable.

27. So far as the denial of claim of petitioner communicated by letter dated 04.11.2011 on the ground that terminal benefit to the family of petitioner had been released, therefore, family is not in any financial crunch is misconceived and not sustainable for the reasons that there is report of three members committee which recommended for appointment of petitioner on compassionate ground considering the hardship and liability of the family. The report clearly stated that the widow is burdened with the responsibility of three daughters whom she has to feed, provide good education and also perform their marriage.

28. At this stage, it would be pertinent to refer judgment of the Apex Court in the case of ***Govind Prakash Verma Vs. Life Insurance Corporation of India and Others 2005 (10) SCC 289*** wherein the Apex Court has held that terminal benefits given to the family cannot be taken into consideration while deciding the status of the family for the purpose of consideration of compassionate appointment. Paragraph 6

of the said judgement is being extracted hereinbelow:-

"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules. The scheme of compassionate appointment is over and above whatever is admissible to the legal representatives of the deceased employee as benefits of service which one gets on the death of the employee. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amounts admissible under the Rules. So far as the question of gainful employment of the elder brother is concerned, we find that it had been given out that he has been engaged in cultivation. We hardly find that it could be considered as gainful employment if the family owns a piece of land and one of the members of the family cultivates the field. This statement is said to have been contradicted when it is said that the elder brother had stated that he works as a painter. This would not necessarily be a contradiction much less leading to the inference drawn that he was gainfully employed somewhere as a painter. He might be working in his field and might casually be getting work as a painter also. Nothing has been indicated in the enquiry report as to where he was employed as a regular painter. The other aspects, on which the officer was required to make enquiries, have been conveniently omitted and not a whisper is found in the report submitted by the officer. In the above circumstances, in our view, the orders passed by the High Court are not sustainable. The respondents have wrongly refused compassionate appointment to the appellant. The inference of gainful employment of the elder brother could not be acted upon. The terminal benefits received by the widow and the family pension could not be taken into account."

29. It would be apposite to refer judgement of this Court in the case of ***Nirdesh Kumar (supra)*** wherein this Court has held that if the compassionate appointment is denied on the ground that family has received terminal benefits that would frustrate the object of dying-in-harness rules. Para 9 and 10 of the judgement is extracted hereinbelow:-

"9. Rule-5 provides that in case, the spouse of the deceased employee is not in government service then one member of his family who is not under the service of Government or Government Corporation be given suitable employment. Thus employment of any other member of family, except spouse, is irrelevant. The legislature was cautious of the fact that employed children of the deceased may not take responsibility of other unemployed children in the present atmosphere of the society. Rule-6 prescribes the content of the application for compassionate appointment. Under Rule-6 (d) details of financial condition of the family is required to be disclosed. As the very object of compassionate appointment is to provide employment to the one member of the family of the deceased employee which use to come to the stage of penury due to sudden death of bread earner as such financial condition of the family is a relevant consideration. This Court in the cases of ***State Bank of India and others Vs. Ram Piyare and others, 2001 (2)***

U.P.L.B.E.C. 1597; Sharda Devi (Smt.) Vs. District Magistrate/Collector, Ghaziabad and Others, 2003 (2) U.P.L.B.E.C. 1134; Pramod Kumar Rajak Vs. Registrar General High Court Allahabad, 2011(4) U.P.L.B.E.C. 2692 and Writ - A No. 64494 of 2009 Surem Devi vs. State of U.P. & Others, decided on 30.04.2012 *and Supreme Court* ***in Govind Prakash Verma v. LIC of India, (2005) 10 SCC 289*** *have held that while deciding the financial status of the family for the purposes of compassionate appointment, the terminal benefits received on the death of the employee or the pension granted to the widow are required to be ignored. Relevant portion of the judgment of Govind Prakash Verma (supra) is quoted below:*

"In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules. The scheme of compassionate appointment is over and above whatever is admissible to the legal representatives of the deceased employee as benefits of service which one gets on the death of the employee. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amounts admissible under the Rules. So far as the question of gainful employment of the elder brother is concerned, we find that it had been given out that he has been engaged in cultivation. We hardly find that it could be considered as gainful employment if the family owns a piece of land and one of the members of the family cultivates the field."

10. The condition of the family of the petitioner is that the two elder brothers are married and have their own family and are living separately. The burden of marriage of unmarried daughter of the deceased is still on the widow of the deceased. The pension received by the deceased will continue during the life of the widow only. Thus the terminal benefits as well as the pension received by the widow mother is not relevant consideration for deciding the application for compassionate appointment. In case, compassionate appointment is denied on account of terminal benefits and pension granted to the widow, then the object of the Rule, 1974 will be frustrated, as in most of the cases, these benefits are provided on the death of the employees".

30. Thus, in view of settled position of law that the claim of compassionate appointment cannot be rejected on the ground of payment of terminal dues to the bereaved family, the rejection of claim of the petitioner by respondent no.3 on the ground that terminal benefits have been given to the widow of the deceased is not sustainable for the reasons given above.

31. So far as the submission of learned counsel for the respondents that sufficient time has elapsed and as urgent need to provide financial succor to the family has lost its purpose on account of the delay, therefore, no relief can be granted to the petitioner at this stage, it would be worth to point out that the two judgements relied upon by the learned counsel for the respondents have not considered the settled principle of law that no person should suffer for the fault of the court.

32. It would be worth mentioning paragraph 8 of the judgment of the Apex Court in the case of ***Atma Ram Mittal (supra)*** wherein the Apex Court has held that no one should suffer for the fault of the court. Paragraph 8 of the judgment is extracted hereinbelow:-

"8 It is well-settled that no man should suffer because of the fault of the Court or delay in the procedure. Broom has stated the maxim "actus curiam neminem gravabit"-an act of Court shall prejudice no, man. Therefore, having regard to the time normally consumed for adjudication, the 10 years exemption or holiday from the application of the Rent Act would become illusory, if the suit has to be filed within that time and be disposed of finally. It is common knowledge that unless a suit is instituted soon after the date of letting it would never be disposed of within 10 years and even then within that time it may not be disposed of. That will make the 10 years holidays from the Rent Act illusory and provide no incentive to the landlords to build new houses to solve problem of shortages of houses. The purpose of legislation would thus be defeated. Purposive interpretation in a social amelioration legislation is an imperative irrespective of anything else"

33. It is also relevant to refer paragraph 38.6 of the judgement of Apex Court in the case of Deepali Surwase quoted in paragraph 11 of the Apex Court judgement in the case of ***Jayantibhai Raojibhai Patel (supra)***, which is being extracted hereinbelow:-

"11.In Deepali Surwase, the appellant had been employed as a teacher in a primary school run by a trust. The services of the appellant had been terminated by the management of the school pursuant to an ex-parte inquiry proceeding. The School Tribunal quashed the termination of the appellant"s services and issued a direction for the grant of full back wages. In appeal, the High Court affirmed the view of the Tribunal that the termination was illegal, but set aside the direction for grant of back wages. In appeal, a two-judge Bench of this Court laid down the following principles:

"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money...The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving

him of the obligation to pay back wages including the emolument."

(Emphasis supplied)

The Court laid down the following principles to govern the payment of back wages:

"38.1….

38.2. …

38.3.…

38.4…

38.5…

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P) Ltd. v. Employees [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L & S) 53] "

34. From the facts narrated above, it is evident that the petitioner has been vigilant in espousing his cause for compassionate appointment and his rightful claim for compassionate appointment was denied by the illegal and arbitrary act of the respondent no.3. Further, there is no fault of the petitioner for the delay caused in adjudication of the claim of the petitioner for compassionate appointment, therefore, the rightful claim of the petitioner for compassionate appointment cannot be denied on the ground of delay in view of the settled principle of law that no one should suffer for the fault of the court.

35. Thus, for the reasons given above, the impugned order dated 09.11.2005 and communication letter dated 04.11.2011 (Annexure no.1 to the second supplementary affidavit) are not sustainable in law and are set aside. The writ petition is ***allowed*** and the competent authority is directed to reconsider the claim of the petitioner in the light of observations made above and pass appropriate order within a period of two months from the date of production of certified copy of this order.

(2020)03-05ILR A1801

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 26.02.2020

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 17358 of 2018

Km. Pooja ...Petitioner

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:

Neeraj Chaurasiya, Arvind Kumar Jauhari, Ved Prakash Mishra

Counsel for the Respondents:

C.S.C., Gaurav Mehrotra, U.N. Mishra

A. Service Law – Appointment under Dying in Harness Rules – U.P. Recruitment of Dependent of Government Servants Dying in Harness Rules, 197-Section 2(c) – Unmarried sister may be included in the definition of 'family', if her brother i.e. the deceased government servant was unmarried. In the present case, the deceased government servant was married, therefore, the petitioner cannot be included in the definition of 'family'. (Para 6, 7)

Writ petition dismissed. (E-4)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri A.K. Jauhari, learned counsel for the petitioner, Sri Ran Vijay Singh, learned Addl. C.S.C. for the State respondents and Sri Gaurav Mehrotra, learned counsel for the opposite party no. 2.

2. By means of this petition the petitioner has prayed that the opposite parties be directed to appoint the petitioner under Dying in Harness Rules on suitable post.

3. The present petitioner is unmarried sister of late employee, namely Sanjay Kumar Singh who was serving on the post of 'Orderly' at District Judgeship, Lucknow.

4. The contention of learned counsel for the petitioner is that since the employee died on 15.6.2015 during the service period leaving behind old aged mother, daughters namely Km. Riya aged about 11 years, Km. Saloni aged about 9 years and the petitioner who is unmarried sister. The wife of late employee died on 4.7.2010, before the death of the deceased employee. All the aforesaid family members were totally dependent upon the late employee, therefore, learned counsel for the petitioner has contended that in view of the provisions of U.P. Recruitment of Dependent of Government Servants Dying in Harness Rules, 1974 the petitioner should be given any appointment under the aforesaid rules.

5. Sri Gaurav Mehrotra, learned counsel for the opposite party no. 2 has drawn attention of this Court towards the definition of 'family' which has been given under section 2(c) which reads as under :

"2(c) "family" shall include the following relations of the deceased Government servant:

(i) Wife or husband;

(ii) Sons / adopted sons;

(iii) Unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters and widowed daughter-in-law;

(iv) unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government Servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent Court;

Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him."

6. On the basis of aforesaid definition only that unmarried sister may be included in the definition of 'family' if her brother

i.e. the deceased government servant was unmarried. However, in the present case the deceased government servant was married and was having two minor daughters, therefore, present petitioner may not be included in the definition of 'family'.

7. Having heard learned counsel for the petitioner and having perused the material available on record, I am of the considered opinion that since the present petitioner who is unmarried sister of the deceased government servant who was married when he died in harness, therefore, she cannot be included in the definition of 'family'.

8. Accordingly no direction as prayed in the writ petition may be issued, therefore, the writ petition is ***misconceived and is accordingly dismissed.***

9. No order as to costs.

10. However, there is no need to provide liberty to the petitioner to challenge the rules inasmuch as it is always open for the aggrieved person to challenge any rules, if he / she is aggrieved out of those rules.

(2020)03-05ILR A1803
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2020

BEFORE

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

WRIT-A No. 27362 of 2017
&
WRIT-A No. 40115 of 2017
&
WRIT-A No. 7663 of 2017
&
WRIT-A No. 5123 of 2017

Ram Tirath & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Satya Prakash Pandey, Sri Rajiv Trivedi, Sri Tarun Agrawal, Sri Ravi Kant

Counsel for the Respondents:
C.S.C., Sri Ashish Mishra, Sri Manish Goyal

A. Service Law– Recruitment/Promotion – Violation of principle of natural justice - Constitution of India: Articles 14, 16, 311; U.P. State District Court Service Rules, 2013: Schedule B, Column 2 at Serial No. 5, Rules 3(3), 4, 5, 9, 10, 11, 12, 13, 19; U.P. Subordinate Civil Courts Ministerial Establishment Rules, 1947; U.P. Subordinate Civil Courts Inferior Establishment Rules, 1955; U.P. State District Court Services (First Amendment) Rules, 2017

Validity of Schedule B Column 2 at Serial 5 of Rules, 2013: Under Rules, 1947, there was no provision permitting promotion of Group D employees to Group C post but such a mode of recruitment was provided by Government Order dated 01.01.1970 and for promotion of Group D employees in Group C in District Judgeships the same was extended by this Court's Circular dated 05.02.1973 and since then till promulgation of Rules, 2013 promotions have been made from Group D to Group C to the extent of 20% as and when vacancies had occurred following the manner of such promotion, i.e., written examination, interview and typing test provided in the GO dated 01.01.1970 and on.

In supercession of all the Rules framed prior to enforcement of Rules, 2013, new set of Rules were framed wherein also there was no provision permitting Group D employees as one of the course of recruitment in Group C by considering eligible Group D employees for promotion. GO dated 01.01.1970 and subsequent GOs issued as such were not part of Rules, 1947 or any other Rule but issued independently containing own method of

promotion and eligibility conditions and applied for promotion of Group D employees to Group C in District Judgeships by this Court's Circular dated 05.02.1973.

Therefore, it was held that Rules, 2013, when provided that all earlier Rules are being superseded, did not include the independent Government orders issued from time to time commencing from 01.01.1970. Hence, what was practiced and followed in respect of Rules, 1947 after issue of GO dated 01.01.1970 and subsequent GOs, making amendment therein, continued even after enactment of Rules, 2013 and, therefore, promotion of petitioners cannot be said to be invalid or illegal as the same were made admittedly in accordance with procedure laid down in said Government orders. (Para 11, 25)

Court did not find it necessary to go into the validity of Rules, 2013, since inferred that relevant GOs had continued to provide source of recruitment by promotion of Group D employees to Group C. (Para 25)

B. Rules, 2013 as amended in 2017, are totally different than the Government orders (dated 01.01.1970, 31.08.1982 and 03.09.1995) and hence Government orders would cease to apply on and after 21.06.2017 when Amendment Rules, 2017, came into force and a different procedure for promotion to Group D employees has been adopted and till then earlier GOs, held the field hence promotion of petitioners made thereunder cannot be said to be vitiated in law and illegal, hence impugned orders cannot be sustained. (Para 26)

Writ petitions allowed. (E-4)

Precedent followed:

1. Rajesh Kumar Srivastava Vs. St. of U.P. & ors., 2009 (1) AWC 239 (Para 9)

2. Y.V. Rangaiah & ors. Vs. J. Sreenivasa Rao & ors., (1983) 3 SCC 284 (Para 11)

Present petition assails order dated 27.05.2017, issued by District Judge, Kannauj.

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

1. Writ-A No. **27362 of 2017** *(hereinafter referred to as '**WP-1**')* has been filed by seven petitioners, namely, Ram Tirath, Shailendra Kumar Awasthi, Subhash Chandra Shukla, Ravindra Singh, Sumit Kumar, Manoj Kumar Jaiswal and Raman Singh challenging validity of Schedule B Column 2 at Serial No. 5 relating to recruitment on the post of Junior Assistant/Copyist (Group-C post) of U.P. State District Court Service Rules, 2013 *(hereinafter referred to as 'Rules, 2013')* as ultra vires, being violative of Articles 14 and 16 of the Constitution of India. Petitioners have also prayed for issue of writ of certiorari to quash order dated 27.05.2017 *(Annexure-4 to the writ petition)* issued by District Judge, Kannauj in compliance of Administrative Committee's resolution dated 16.11.2016, communicated by Court's letter dated 19.05.2017, reverting petitioners to Group D cadre from Group C.

2. Facts, in brief, as pleaded in **WP-1** are that petitioners were appointed in Group D cadre in Judgeship Kannauj on 10.03.2005, 27.07.2005, 02.07.2002, 21.08.2003, 17.09.2005, 04.11.2004 and 04.11.2004 respectively. Earlier recruitment on the posts in ministerial cadre in Subordinate Courts in State of U.P. was governed by the provisions made in U.P. Subordinate Civil Courts Ministerial Establishment Rules, 1947 *(hereinafter referred to as 'Rules, 1947')*. Similarly, recruitment and appointments to the posts in Group D Inferior services were governed by U.P. Subordinate Civil Courts Inferior Establishment Rules, 1955 *(hereinafter referred to as Rules, 1955)*. In supersession of aforesaid Rules and some others, a comprehensive set of Rules regulating recruitment and other conditions of service of various Group D and Group C posts in

District Judgeships were made, i.e., Rules, 2013 published in U.P. Gazette (Extraordinary) dated 04.07.2013 and by virtue of Rule 1, it came into force from the date of publication in official gazette.

3. The posts, which were brought within the purview of Rules, 2013 are given by designations in Column 2 of Schedule A read with Rule 3 (2) of Rules, 2013. By virtue of Rule 3 (3) read with Schedule B Column 2, designations and categories of posts have been revised from the date of commencement of Rules, 2013 i.e. 04.07.2013. Chapter III deals with recruitment and contains Rules 4 to 18. Method of recruitment and qualification etc. are governed by Rule 4 read with Schedule B Columns 3 and 4 and procedure for appointment is provided in Rule 5. Both the Rules are reproduced as under:-

*"**4. Method of recruitment, qualifications etc.--In respect of each category of posts of the service specified in column (2)** of Schedule 'B', the **method of recruitment and minimum qualification shall be as specified in the corresponding entries in columns (3) and (4) thereof.***

*5. **Procedure of appointment**. - Subject to the provisions of these rules, recruitment to any category of post in the service shall be made by the Selecting Authority.-*

*(1) In the case of **recruitment by direct recruitment,** after giving wide publicity in at least two newspapers, one in Hindi and one in English of State level having wide circulation in that district concerned.*

*(2) In the case of **recruitment by promotion,** by the Selecting Authority on the basis of criteria laid down in Schedule 'B' subject to fitness of the candidate to discharge the duties of the post, from among the persons eligible for promotion."*

(emphasis added)

4. Rule 9 provides further procedure for direct recruitment which consists of written examination and interview and thereafter list of selected candidates is to be prepared as per Rule 12. Rule 13 provides the manner in which appointments are to be made. Rule 14 talks of duration of operation of select list prepared under Rule 12. Rules 9, 10, 11, 12, 13 and 14 are reproduced as under:-

*"**9. Direct Recruitment**:- (1) The Appointing Authority shall intimate the Selecting Authority in the month of July every year the number of vacancies existing and likely to occur during the year of recruitment for direct recruitment in different category of posts. The Selecting Authority shall **invite applications by giving vide publicity indicating the total number of vacancies notified for recruitment and the number of vacancies reserved for different reserved categories.***

(2) The Selecting Authority may short-list the candidates to be called for the written examination equal to twenty five times the number of vacancies notified on the basis of the marks obtained in the qualifying examination given in Schedule 'B' or by a preliminary objective test.

(3) Notwithstanding anything to the contrary in these Rules, the Appointing Authority and the Selecting Authority with regard to conduct of examination and selection shall act in accordance with general or special orders issued by Hon'ble Chief Justice of the High Court, from time to time.

***10. Eligibility of candidates for the interview**- (1) For the purpose of*

selection of the candidates for the interview, the appointing authority shall prepare a list of names of candidates on the basis of percentage of the total marks secured in the written examination in the order of merit and if two or more candidates have secured equal percentage of total marks in the written examination, the order of merit in respect of such candidates shall be fixed on the basis of their age, the person or persons older in age being placed higher in order of merit. From among the ***candidates whose names are included in such list****, as far as may be,* ***such number of candidates as is equal to five times the number of vacancies notified****, selected in the order of merit, shall be eligible for the interview:*

(2) For the purpose of this rule,-

''Written examination' means the competitive examination held by the Selecting Authority as per syllabus given in Schedule 'C'.

11. Interview*.--Selecting Authority shall interview the eligible candidates selected under Rule 10 and award marks on the basis of their performance in the interview. The object of such interview is to assess the suitability of the candidates for appointment to the cadre or the post applied for by them and their calibre including intellectual and social traits of personality.*

12. List of Selected candidates.- *(1) The Selecting Authority shall* ***on the basis of the aggregate of the percentage of the total marks secured in the written examination as determined under Rule 10 and of the marks secured at the interview under Rule 11 and taking into consideration the orders in force relating to reservation of posts for Scheduled Castes, Scheduled Tribes, Other Backward Classes and others prepare in the order of merit a list of the candidates eligible for appointment to the category of post*** *and if the aggregate of the percentage of total marks secured in the written examinations as determined under Rule 10, and of the marks secured at the interview under Rule 11, of two or more candidates is equal, the order of merit in respect of such candidates shall be fixed on the basis of their age, the person or persons older in age being placed higher in the order of merit. The number of names of the candidates to be included in such list shall be equal to the number of the vacancies notified for the recruitment.*

(2) The Selecting Authority shall in accordance with the provisions of sub-rule (1) also prepare an ***additional list of names of the candidates not included in the list prepared under sub-rule (1)*** *in which the number of candidates to be included* ***shall, as far as possible, be ten percent of the number of vacancies notified.***

(3) The lists so prepared under sub-rule (1) and (2) shall be pasted on the notice board of the Judgeship on the same day on which interview is held or on the next working day and a copy of the same shall be forwarded to the High Court.

13. Appointment of candidates.- *(1) Subject to Rules 15 and 16 candidates whose names are included in the list prepared under sub-rule (1) and published under sub-rule (3) of Rule 12 may be appointed by the appointing authority in the vacancies in the particular cadre in the order in which the names are found in the list after satisfying itself, after such inquiry as may be considered necessary that each such candidate is suitable in all respects for appointment to a post in the cadre. Candidates whose names are included in the list prepared under sub-rule (2) and published under sub-rule (3) of Rule 12 may be similarly appointed after the*

candidates whose names are included in the list prepared under sub-rule (1) of Rule 12 have been appointed.

(2) The inclusion of the name of a candidate in any list published under Rule 12, shall not confer any right of appointment.

14. Duration of operation of the lists.- The list of names of the candidates published by the Selecting Authority under Rule 12 in respect of any cadre shall cease to be operative on appointment of the last advertised vacancy or one year whichever is earlier." *(emphasis added)*

5. District Judge, Kannauj sent a letter dated 22.02.2016 with reference to Government Orders dated 01.01.1970, 31.08.1982 and 03.09.1995 dealing with subject of promotion of Group D employees to Group C, informing that there are total 117 Group C sanctioned posts, where against 103 employees are working and therefore, 14 posts of Junior Assistants are vacant; 23 vacancies of Group C comes within the quota of promotion from Group D to Group C where against 16 Group D employees after promotion are working, therefore, seven vacancies for promotion in Group D to Group C are available, hence, he sought permission of this Court to fill in those seven vacancies of Group C by promotion from Group D employees. Vide letter dated 30.03.2016 sent by Joint Registrar (Judicial), permission was granted with reference to Government Order dated 03.09.1995.

6. For making promotion of Group D employees to Group C in accordance with Government Order dated 03.09.1995, District Judge constituted a Committee which published notice dated 31.03.2016 inviting applications from Group D employees of District Judgeship Kannauj who have completed five years of continuous service, possess educational qualification upto High School or Intermediate or equivalent thereto and conversant with typing. Procedure for selection comprised of written test, evaluation of character rolls and interview.

7. In the aforesaid selection, all the petitioners were declared successful and selected whereupon, vide order dated 08.04.2016, District Judge, Kannauj promoted them in Group C posts and placed them on probation for two years with reference to Rule 19 Chapter IV of Rules, 2013.

8. All the petitioners joined pursuant to promotion order dated 08.04.2016, started working on their respective Group C post and were getting salary. Petitioners were also sent for computer training programme pursuant to this Court's order dated 03.11.2016 to Judicial Training and Research Institute, U.P., Lucknow where they completed their training.

9. All of sudden, District Judge, Kannauj passed impugned order dated 27.05.2017 cancelling petitioners' promotion and reverting them to Group D post. Aforesaid order has been challenged on the ground of violation of principle of natural justice and Article 311 of Constitution of India as no enquiry has been conducted.

10. It is further stated by petitioners that earlier recruitment and appointment to Group C was governed by Rules, 1947. For promotion from Group D to Group C first, a Government Order was issued on 01.01.1970. This Government Order providing promotion of Group D

employees to Group C was adopted and made applicable to Subordinate Courts, vide High Court's Circular dated 05.02.1973. Though under Rules, 2013, no such promotion of Group D employees to Group C has been recognized but in absence of anything to show that Government Orders providing promotion of Group D employees to Group C are superseded, the said Government Orders must be deemed to have continued in force despite enforcement of Rules, 2013. Relying on a Division Bench Judgment of this Court in **Rajesh Kumar Srivastava Vs. State of U.P. and others, 2009 (1) AWC 239**, it is said that manner in which promotions are made from Group D to Group C has been clearly stated in para 33 of said Judgement, which reads as under:-

"33. The menace of such illegal and arbitrary selection for whatever reasons has acquired alarming proportion and has almost continued unabated. Therefore, it requires to be dealt with an iron hand forthwith. Conscious of the fact that we are not supposed to legislate, but in order to ***control the malady of such unlawful selection at least in subordinate judiciary****, in exercise of supervisory jurisdiction, we consider it suitable in the fitness of things to lay down the* ***following guidelines to facilitate fair selection by supplementing the Rules in the area in which they are silent.***

1. A selection committee of three persons headed by the District Judge concerned and two senior most judicial officers of the judgeship be constituted in every judgeship.

2. First of all, every year all class - III posts within the promotional quota from amongst the class - IV employees be filled up and the process in this regard be completed latest by 31st December every year

3. Thereafter, all the vacancies of class - III and class - IV posts in each judgeship, as far as possible, may be advertised in a district level newspaper in the month of January/February every year so that the selection process is completed by 31st of March every year.

4. ***The selection process should be based upon a written test of maximum 75 marks to test the workable knowledge of Hindi followed by an interview of maximum 25 marks.***

5. On the basis of merit in written test candidates to a maximum of thrice the number of vacancies advertised to be filled up, should ordinarily be called for interview.

6. A combined merit list on the basis of the marks obtained in written test and interview should be drawn along with a waiting list of equal number of candidates as the vacancy advertised and then the selection be made from the said merit list. " (emphasis added)

11. Petitioners further have averred that Group C vacancies on which petitioners were selected occurred much before the enforcement of Rules, 2013 and, therefore, have to be filled in accordance with procedure as it was prior to enforcement of Rules, 2013 and, for this proposition reliance is placed on **Y.V. Rangaiah and others Vs. J. Sreenivasa Rao and others, (1983) 3 SCC 284**. In any case, promotions having been made after permission granted by this Court, it cannot be said that promotions were bad.

12. Challenging validity of Rules, 2013, which provided only direct recruitment as a source of recruitment to the posts of Junior Assistant/Copiest (Group C post), it is contended that right of Group D employees for promotion, which permits promotional avenues to them has been defeated by aforesaid Rules, 2013

after almost four decades without rhyme and reason and denial of promotion to Group D to Group C, therefore, is patently arbitrary, irrational and violative of Article 14 of Constitution. It is further stated that Rules, 2013 have now been amended by U.P. State District Court Services (First Amendment) Rules, 2017 *(hereinafter referred to as 'Amendment Rules 2017')* published in U.P. Gazette Extraordinary dated 21.06.2017. By virtue of Rule 1 (ii) of Amendment Rules, 2017, the amendment has come into force from the date of publication in official gazette. Rules 4, 5 and 12 of Rules, 2013 quoted above are amended by Amendment Rules, 2017 and the amended provisions are reproduced as under:-

*"**4. Method of recruitment, qualifications etc.**--In respect of each category of posts of the service specified in **column (2) of Schedule 'B', the method of recruitment and minimum qualification shall be as specified in the corresponding entries in columns (3) and (4) thereof."***

*"**5. Procedure of appointment.** - Subject to the provisions of these rules, recruitment to any category of post in the service shall be made by the Selecting Authority.-*

*(1) In the case of recruitment by direct recruitment, after giving wide publicity in at least two daily newspapers, one in Hindi and one in English of State level having wide circulation in that district **and also in Employment news and other like publication and also on the website of the High Court. In addition to it the names may be requisitioned from local Employment Exchange. The advertisement apart from other necessary particulars shall also specify in clear terms, the number of posts available for selection and recruitment, the qualifications and other eligibility criteria for such posts and the Rules under which the selection and recruitment is to be made.***

(2) In the case of recruitment by promotion, by the Selecting Authority on the basis of criteria laid down in Schedule 'B' subject to fitness of the candidate to discharge the duties of the post, from among the persons eligible for promotion."

*"**12. List of Selected candidates.**- (1) The Selecting Authority shall on the basis of the aggregate of the percentage of the total marks secured in the written examination as determined under Rule 10 and of the marks secured at the interview under Rule 11 and taking into consideration the orders in force relating to reservation of posts for Scheduled Castes, Scheduled Tribes, Other Backward Classes and others prepare in the order of merit a list of the candidates eligible for appointment to the category of post and if the aggregate of the percentage of total marks secured in the written examinations as determined under Rule 10, and of the marks secured at the interview under Rule 11, of two or more candidates is equal, the order of merit in respect of such candidates shall be fixed on the basis of their age, the person or persons older in age being placed higher in the order of merit. The number of names of the candidates to be included in such list shall be equal to the number of the vacancies notified for the recruitment.*

(2) The Selecting Authority shall in accordance with the provisions of sub-rule (1) also prepare an additional list of names of the candidates not included in the list prepared under sub-rule (1) in which the number of candidates to be included shall, as far as possible, be ten percent of the number of vacancies notified.

(3) The lists so prepared under sub-rule (1) and (2) shall be pasted on the notice board of the Judgeship on the same

day on which interview is held or on the next working day and a copy of the same shall be forwarded to the High Court."
(emphasis added)

13. Schedule B Serial No. 5 Column 2 has also been substituted by Amendment Rules, 2017 and substituted provision reads as under:-

"(a) ***Eighty percent by direct recruitment by holding competitive test.***
(b) ***Twenty percent by promotion from amongst Group "D"*** *employees on the basis of* ***seniority subject to rejection of the unfit with minimum of five years substantive and satisfactory service having qualification upto High School:***
Provided that the ***post of Amin Grade-II shall be filled only by the direct recruitment."*** *(emphasis added)*

14. It is contended that by way of amendment, now 20 per cent vacancies in Group 'C' are made available for promotion to Group D employees, therefore, result is that this promotion quota stands denied to Group D employees only for the period when Rules, 2013 were implemented, i.e., from 04.07.2013 till Amendment Rules, 2017 came into force, i.e., 21.06.2017. Denial of promotion to Group D employees only for this period of about four years i.e., 04.07.2013 to 20.06.2017, on account of faulty drafting of Rules, 2013 wherein right of promotion of Group D employees was excluded without any rhyme and reason, is patently discriminatory and arbitrary. It is further stated that while Rules, 2013 were being framed, this flaw was noticed and Court made correspondence for making proper correction but Rules, 2013 were published and State took four years in rectifying the mistake without any logic or rationale, therefore, denial of promotion for a limited period, that too, for the fault/ mistake committed in draft of Rules, 2013 is illegal. Petitioners and similarly placed other Group D employees cannot be made to suffer, hence, denial of promotion to petitioners during 04.07.2013 to 20.06.2017, under Rules, 2013, is patently arbitrary and discriminatory.

15. Contesting **WP-1**, a counter affidavit has been filed on behalf of Respondents 2, 3 and 4 sworn by Sri Ajay Kumar Srivastava, Additional District Judge, FTC-I, Kannauj. It is not disputed that petitioners were appointed on various posts in Group D in District Judgeship Kannauj and also confirmed thereon on various dates. The promotions of petitioners from Group D to Group C by District Judge Kannauj are also not disputed. However, it is submitted that under Rules, 2013, there was only one source of recruitment to Group C i.e. direct recruitment. Till amendment made on 21.06.2017, Rules, 2013 did not provide any promotion of Group D to Group C, hence, promotion of petitioners during that period was patently illegal being de hors Rules, 2013. Therefore, order passed by the District Judge, pursuant to resolution dated 16.11.2016 of Administrative Committee is in conformity of Rules, 2013, as they stood on the date when petitioners were promoted illegally, is correct and in accordance with law. The impugned order is not an order of demotion or reversal as such but promotions having been made illegally, the same have been cancelled and, therefore, Article 311 of the Constitution has no application. The amendment made in Rules, 2013 is prospective, hence, petitioners cannot claim any benefit thereof. So long as Rules govern the field, reliance placed on Government Orders is misplaced as Government Orders being

executive in nature cannot prevail over statutory rules.

16. We find that no reply has been given by respondents 2, 3 and 4 to the averments made in paragraphs 19A to 19W of the writ petition, which have been inserted after allowing amendment application on 17.07.2019.

17. Writ-A No. **40115 of 2017** *(hereinafter referred to as '**WP-2**')* relates to District Judgeship Baghpat wherein petitioners were initially appointed as Group D employees and subsequently promoted in Group C under Rules, 2013 and the said promotion order has been cancelled as there was no provision for promotion of Group D to Group C under Rules, 2013 prior to its amendment made by Amendment Rules, 2017. **WP-2** is filed by three petitioners, namely, Sanjay Kumar Singh, Navin Kumar Gupta and Ritesh Kumar Singh, who were appointed in Group D cadre on 22.04.2000, 22.04.2000 and 20.11.2006 respectively. Here also District Judge, Baghpat sought permission of this Court for filling Group C vacancies within promotion quota of Group D as per Government Order dated 03.09.1995 and the same was allowed by Court's letter dated 09.04.2015 sent by Joint Registrar (Judicial). District Judge, Baghpat, vide order dated 20.04.2015 constituted Selection Commitee for promotion of Group D employees to Group C with reference to Government Orders dated 01.01.1970, 31.08.1982 and 03.09.1995. Petitioners and one Krishna Gopal Mishra were declared successful, hence, District Judge, Baghpat issued order dated 06.10.2015 promoting them in Group C and placing on two years probation under Rules, 2013. This Court thereafter issued letter dated 25.01.2017 observing that some promotions have been made in Group 'C' from Group 'D' though there is no provision for such promotion under Rules, 2013 and, therefore, steps for cancellation of promotion should be taken. Pursuant thereto, order dated 31.01.2017 was issued to petitioners requiring them to show cause, why their promotion be not cancelled which was replied by petitioners, vide letter dated 06.02.2017. Ultimately, vide order dated 24.08.2017 (Annexure 13 to WP-2), promotions of petitioners were cancelled and consequential order was issued on 25.08.2017 (Annexure 14 to the writ petition). In all other respect, the submissions advanced in **WP-2** are similar to **WP-1**, hence, we are not adding the pleadings to avoid repetition.

18. Writ-A No. **7663 of 2017** *(hereinafter referred to as '**WP-3**')* also relates to District Baghpat and there are four petitioners, namely, Sanjay Kumar Singh, Navin Kumar Gupta, Krishna Gopal Mishra and Ritesh Kumar Singh. It is similar to **WP-2**, with only difference that in this writ petition show cause notice dated 31.01.2017 as also this Court's letter dated 25.01.2017 has been challenged. In respect of all other aspects, it is similar to WP-2, hence, we are avoiding repetition.

19. Writ-A No.**5123 of 2017** *(hereinafter referred to as "**WP-4**")* relates to District Sant Ravidas Nagar-Bhadohi at Gyanpur. It has been filed by eight petitioners, namely, Anis Ahmad, Jitendra Singh, Suresh Tripathi, Himanshu Srivastava, Virendra Kumar, Ram Kailash, Shyam Lal and Manager Ram, who were all initially appointed as Group D employees on 20.12.2005, 23.12.2005, 24.05.2000, 29.10.2005, 12.05.1997, 09.01.1997, 05.06.2006 and 27.01.2005 respectively. Pursuant to letter dated

05.10.2016 issued by In-charge, Registrar General directing all District Judges to fill in Group C vacancies which comes within the promotion quota of Group D, District Judge, Bhadohi, vide letter dated 07.10.2016 constituted a Selection Committee. As per District Judge's letter dated 07.10.2016, there were total 114 sanctioned posts in Group C including Stenographer. There against promotion quota for Group D employees being 20 per cent came to 29 posts. 14 Group D employees after promotion were working in Group C and, thus, there were 15 vacancies in Group C which could have been filled in by promotion of Group D employees. For filling these 15 vacancies, selection was held but only 10 persons could be selected out of which eight were given promotion vide order dated 18.10.2016. Subsequent to High Court's letter dated 25.01.2017 observing that there was no provision for promotion in Rules, 2013, promotions have been cancelled, vide order dated 28.01.2017. In all other respect grounds raised in **WP-4** are similar to earlier writ petitions, i.e., **WP-1, 2** and **3**, hence, we are not referring to further pleadings to avoid repetition.

20. In these writ petitions, certain facts which are undisputed may be summarized as under:-

(I) In Rules, 1947, there was no provision providing promotion of Group D employees to Group C. For the first time, a Government Order was issued on 01.01.1970, which was amended from time to time. The said Government Order made provision for promotion of Group D employees to Group C. Initially 15 per cent quota was provided for those, who had passed High School and worked five years continuously. This quota was subsequently increased to 20 per cent by providing 5 per cent to those who possess qualification of Intermediate.

(II) High Court adopted Government Order dated 01.01.1970 by circular dated 05.02.1973 and that is how, promotions have been made in District Judgeship, till enforcement of Rules, 2013.

(III) Rules, 2013 have superseded all earlier Rules inconsistent to it and provided only direct recruitment on Group C posts of Junior Assistant.

(IV) In 2016, when Registry issued general circular directing District Judges to fill in promotion quota in Group C from Group D employees, it clearly omitted to notice that under Rules, 2013, no promotion of Group D employees to Group C was contemplated and only direct recruitment was provided.

(V) District Judges mechanically followed directions contained in High Court's circular, without noticing that under Rules, 2013 no quota for promotion from Group D to Group C is provided, though interestingly in the promotion orders reference has been made to Rules, 2013.

(VI) Promotions were made but later on High Court itself detected illegality that without there being any provision under Rules, 2013 regarding promotion of Group D to Group C, promotions have been made, hence, it directed District Judges to cancel such illegal promotions. Orders passed by District Judges cancelling promotions are consequential to this direction of High Court.

(VII) Last, but not the least, Rules, 2013 have been amended by Amendment Rules, 2017 and whatever earlier was omitted in Rules, 2013, has now been removed and promotion quota upto 20 per cent in Group C has been provided for Group D employees.

(VIII) Thus, the only period which remains without any provision relating to promotion of Group D to Group C is 04.07.2013 to 20.06.2017.

21. In this backdrop, the following issues arise for our consideration:-

(I) Whether Rules, 2013, in so far as no provision for promotion of Group D employees to Group C was made initially, i.e., till 20.06.2017, are arbitrary and ultra vires of Articles 14 and 16 of the Constitution.

(II) Whether promotions of petitioners from Group D to Group C after enforcement of Rules, 2013 made prior to 21.06.2017, were ex-facie illegal and void ab initio.

(III) Whether vacancies in which promotions have been made, are those which already occurred before enforcement of Rules, 2013 and eligible Group D employees were entitled to be considered for promotion in accordance with the provision as available before Rules, 2013.

22. Now, we proceed to examine the above issues and, first of all, we propose to consider the issue of vires of Rules, 2013 in so far as it did not make any provision for promotion of Group D employees to Group C.

23. On the question of vires the matter has been argued from two angles:-

(I) Group D employees were entitled to have at least two avenues of promotion and the promotion quota which they were already enjoying for the last more than four and half decades, was denied abruptly making provision of only direct recruitment. It is per se arbitrary and discriminatory.

(II) Whether the defect having been removed by Amendment Rules, 2017, operating aforesaid amendment prospectively, in stead of giving effect from the date Rules, 2013 were framed, is arbitrary and discriminatory.

24. First of all we propose to consider question of validity of Rules, 2013 prior to its amendment in 2017 in so far as it provided recruitment in Group C only by direct recruitment and not by promotion of Group D employees.

25. It is not disputed that under Rules, 1947 there was no provision permitting promotion of Group D employees to Group C post but such a mode of recruitment was provided by Government Order dated 01.01.1970 and for promotion of Group D employees in Group C in District Judgeships the same was extended by this Court's Circular dated 05.02.1973 and since then till promulgation of Rules, 2013 promotions have been made from Group D to Group C to the extent of 20% as and when vacancies had occurred following the manner of such promotion, i.e., written examination, interview and typing test provided in the Government Orders dated 01.01.1970 and on. In supercession of all the Rules framed prior to enforcement of Rules, 2013 new set of Rules were framed wherein also there was no provision permitting Group D employees as one of the course of recruitment in Group C by considering eligible Group D employees for promotion. Government Order dated 01.01.1970 and subsequent Government orders issued as such were not part of Rules, 1947 or any other Rule but issued independently containing own method of promotion and eligibility conditions and applied for promotion of Group D employees to Group C in District Judgeships by this Court's Circular dated 05.02.1973. We find it difficult to hold that Rules, 2013, therefore, when provided that all earlier Rules are being superseded, would include the independent Government orders issued from time to time commencing from 01.01.1970. If that be

so, what was practiced and followed in respect of Rules, 1947 after issue of Government Order dated 01.01.1970 and subsequent Government orders, making amendment therein, in our view, that would have continued even after enactment of Rules, 2013 and, therefore, promotion of petitioners cannot be said to be invalid or illegal as the same were made admittedly in accordance with procedure laid down in said Government orders. Respondents also treated the same position inasmuch as when process of recruitment for promotion was initiated by respective District Judges as also on the Administrative Side, by this Court, they always referred to one or other Government orders, referred to above, in relation of promotion of Group D employees to Group C. In these circumstances, we find that it is not necessary to go into the validity of Rules, 2013 since relevant Government orders had continued to provide source of recruitment by promotion of Group D employees to Group C to the extent of 20% and, therefore, cancellation of petitioners' promotion and reversion to Group D post is patently illegal.

26. Learned Standing Counsel then contended that this argument will not prevail for the reason that in 2017 an amendment was made in Rules, 2013 which suggest that Government orders were not available. This argument, in our view, is also fallacious and ignores the fact that amendment made in Rules, 2017, in fact makes a provision of promotion of Group D employees to Group C in a manner which was not consistent with procedure prescribed in aforesaid Government orders. That being so, aforesaid Government orders became contrary to what was specifically provided in Rules, 2013 after amendment in 2017, and when Rules contained a provision specifically inconsistent to executive orders, i.e., Government orders, obvious consequence is that rules will prevail. Aforesaid Government orders thus came to an end on the enforcement of Amendment Rules, 2017 and thereafter field is covered by Rules, 2013 as amended in 2017. Then on, Government order would cease to apply. This is evident from the fact that under aforesaid Government orders procedure for promotion included written examination, interview etc. but the Rules, 2013 as amended in 2017 now provides promotion of Group D to Group C only on the basis of seniority subject to rejection of unfit and only eligibility for Group D employees is confined to 5 years satisfactory substantive service having qualification upto High School. In earlier Government orders 20% promotion quota was divided as 15% to those who had qualification upto High School and 5 years substantive service and 5% to those who had 5 years substantive service and Intermediate qualification. Now eligibility has been modified. Entire eligibility is now confined to those Group D employees who have educational qualification upto High School and have 5 years substantive and satisfactory service to their credit. All such Group D employees are entitled to be considered for promotion on the criteria seniority subject to rejection of unfit. Court has also made a distinction in respect of Amin Grade II post which earlier did not exist. Now it is provided that recruitment to Amin Grade II would be made only by direct recruitment and those posts shall not be available for promotion to Group D employees. Rules, 2013 as amended in 2017, therefore, are totally different than the Government orders and hence Government orders would cease to apply on and after 21.06.2017 when Rules, 2017

were amended and a different procedure for promotion to Group D employees has been adopted and till then earlier Government orders, in our view, held the field hence promotion of petitioners made thereunder cannot be said to be vitiated in law and illegal, hence impugned orders cannot be sustained.

27. In view of the fact that writ petitions can be allowed on above ground also, we do not find necessary to go into other aspects of the matter and, therefore, we leave other questions open to be considered in some appropriate time.

28. For the reasons stated above, writ petitions are allowed. Orders impugned in the writ petitions cancelling promotion of petitioners and reverting them from Group C to Group D post, are hereby set aside. Petitioners shall be treated to be validly promoted Group C employees and entitled for all consequential benefits.

(2020)03-05ILR A1815
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

WRIT-C No. 3973 of 2020

Ziaul Islam ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prabhakar Awasthi, Sri Azizur Rahman Khan

Counsel for the Respondents:
A.S.G.I., Sri Anand Tiwari

A. Constitution of India – Article 226 – Scope of Interference – Petition barred by Time – If a relief otherwise has become barred by time under common law, would not be granted in writ jurisdiction under Article 226 of the Constitution of India except where the case is of violation of a fundamental right. (Para 10)

B. Right to Property – Fundamental Right – Common Law Remedy – The right to property or for that matter, any other right flowing from any agreement by itself is not a fundamental right – It is all dependent upon the enforcement of such agreement and getting the right declared as maintainable only through common law remedy. (Para 10)

C. Validity of Document – Competent Court – If the rights between the litigating parties flow from an instrument, it is necessary to get it declared valid by a Court of Law competent to pass a declaratory decree to that extent – Similarly, if the validity of a document on the basis of which rights are claimed by the parties and being objected to by a third party to such document, then such a document is also required to be declared as *void* by a Court of Law competent to pass a declaratory decree to that effect. (Para 9)

Held –

9. … The common law remedy are meant to resolve such disputed rights between the parties by inviting evidence both written and oral and in the absence of any challenge to an instrument, a person is equally entitled to get his rights perfected through law of acquiescence or permissive action and conduct of the other party. It is when the right of one party pitted against the rights of the others which might have accrued due to passage of time, the law of limitation steps in.

Writ Petition dismissed (E-1)

Cases relied on :-

1. Venkatlal Baldeoji Mahajan Vs. Kanhiyalal Jankidas & ors. (AIR 1763 MP 153)

2. P. S. Sadasivaswamy Vs. St. of T.N. (AIR 1974 SC 2271)

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

1. Sri Ishan Shishu, learned Advocate, has filed his memo of appearance on behalf respondent no.1-Union of India today in Court, which is taken on record.

2. Heard Sri Prabhakar Awasthi, learned counsel for the petitioner, Sri Anand Tiwari, learned counsel appearing for the respondents Corporation, Sri Ishan Shishu, learned counsel appearing for respondent no.1-Union of India and perused the record.

3. By means of this writ petition, under Article 226 of the Constitution of India, the petitioner has questioned the order dated 21st August, 2019 (Annexure No.17 to the writ petition) passed by the Executive Director, UPSO-II of the Indian Oil Corporation, namely, the respondent No.3 disposing of the complaint of the petitioner dated 1st August, 2018 in compliance of the order of this Court dated 23rd May, 2019 passed in Writ-C No.17850 of 2019, holding the complaint to be devoid of any merits besides being barred by limitation and laches.

4. The facts of the case can be drawn in a narrow compass like this that a partnership firm constituted as M/s. Siyana Filling Station, Garh Siyana Road was commissioned with a retail outlet of the petroleum products on 1st January, 1970. The partnership firm had partners, namely, Ziaul Islam and Sri Viquarul Islam. On 9th August, 1990 a request was made to the Corporation for recognizing the change in the constitution of the firm with Sri Mashqoorul Islam as a new partner with existing partner Sri Ziaul Islam having partnership of 49 % and 51% respectively and Sri Viquarul Islam was shown as to have resigned from the partnership firm. The approval was accorded to the request of the new partnership firm by the Company vide its letter dated 28th March, 1992 and a dealership agreement got executed with new set up on 25th March, 1992. It appears that soon thereafter on 12th May, 1994 another request was made on behalf of the firm M/s. Siyana Filling Station of the reconstitution of the firm with existing partners Sri Mashqoorul Islam and Smt. Tahira Choudhary, W/o Mashqoorul Islam as a new partner with share of 49% and 51% respectively and this time Ziaul Islam, who is the petitioner before this Court, was shown to have resigned from the firm. Ever since then the firm started working in the name of M/s. Siyana Filling Station with new partnership firm with Sri Mashqoorul Islam and Smt. Tahira Choudhary as partners.

5. This above partnership agreement between the firm and the Oil Company came to be questioned, it appears for the first time by the petitioner and for the redressal of their grievance they even approached the Delhi High Court invoking extraordinary writ jurisdiction vide Writ-C No.13964 of 2018 which, however, came to be dismissed on 21st December, 2018. Thereafter, the petitioner filed another writ petition before this Court bearing number Writ-C No.17850 of 2019 seeking a direction for the disposal of his complaint dated 1st October, 2018 in accordance with law and this Court passed an order on 23rd May, 2019 directing the respondents competent authority to consider and decide the matter within a period of two months.

The competent authority of the respondent Oil Company has finally disposed of the objection/complaint of the petitioner under its order dated 28th August, 2019 holding the complaint of petitioner to be baseless and devoid of merits and hence this petition.

6. Assailing the order rejecting the objection of the petitioner, it has been vehemently urged by the learned counsel for the petitioner that the complaint and the point raised in the complaint has virtually remained unaddressed to in the order passed by the respondent competent authority and, therefore, on merits the order is quite unsustainable. It is argued that the respondents have got carried away by the order passed by the Delhi High Court dismissing the writ petition and the delay involved in the matter in approaching the authority.

7. *Per contra*, learned counsel appearing for the respondents has defended the order for the reasons assigned therein.It has been vehemently urged by the learned counsel for the respondents that the matter relates to the rights between the parties for which the proper course would have been to avail a common law remedy but since the petitioner knew that any suit seeking declaration of the partnership agreement to be *void* had become barred by law of limitation, the present writ petition has been filed. It is thus argued that if the time has run out and the suit is barred by limitation, the civil rights flowing from any document cannot now be tested in writ proceedings and, therefore, it is submitted that the writ petition deserves to be dismissed.

8. Having heard learned counsel for the parties, their arguments across the bar and having perused the records, what we find is that the basic question involved in the matter is the validity of the partnership agreement between the Sri Mashqoorul Islam and Smt. Tahira Choudhary, namely, the respondent nos. 5 & 6 respectively and the agreement between the Oil Company and the said firm for continuation of the retail outlet dealership, entered on 13th June, 2000. The question therefore is whether such an agreement is *void* and no right can flow from it and the earlier partnership agreement to which the petitioner was a party should have continued and consequently the dealership agreement dated 13th June, 2000 should also be rendered *void.*

9. The settled legal position is that in civil jurisprudence if the rights between the litigating parties flow from an instrument, it is necessary to get it declared valid by a Court of Law competent to pass a declaratory decree to that extent.Similarly, if the validity of a document on the basis of which rights are claimed by the parties and being objected to by a third party to such document, then such a document is also required to be declared as *void* by a Court of Law competent to pass a declaratory decree to that effect.The common law remedy are meant to resolve such disputed rights between the parties by inviting evidence both written and oral and in the absence of any challenge to an instrument, a person is equally entitled to get his rights perfected through law of acquiescence or permissive action and conduct of the other party. It is when the right of one party pitted against the rights of the others which might have accrued due to passage of time, the law of limitation steps in. The Limitation Act provides limitation for a suit of declaratory decree to be 3 years from the date of knowledge. In the present case what

we find is that the new partnership firm namely the respondent no 4 with partners respondent nos. 5 and 6 entered into a agreement with the Oil Company in the year 2000, to be specific 13th June,2000 and since then the retail outlet of the petroleum product is functioning. The respondents cannot deny the knowledge of functioning of the retail outlet by the firm, to which he himself was a party prior to his resignation in the year 1994 and yet he remained silent for a pretty long time. A person who has ceased to be partner in the partnership firm and if he permits the firm to continue with new partners and enter into an agreement with the Oil Company, it would attract the law of acquiescence *qua the* new partnership agreement and consequently fresh agreement with the Oil Company. No representation business to an authority of Oil Company would have fetched the result of condoning the limitation because there is no law as such authorizing the authority to declare a partnership agreement to be *void* except a competent court of law having civil jurisdiction to that count. The petitioner remained silent and could be said to have awakened from a long slumber only in the year 2018 when he unsuccessfully knocked the door of Delhi High Court. It is not denied to the petitioner that the petition filed by him before Delhi High Court, had been dismissed. A second writ petition for the same cause of action in the garb of a representation/ complaint would not have been maintainable, however, instead of going into question of maintainability of the second writ petition as the first one having been dismissed by a High Court, we hold that the petitioner now cannot be granted relief in this petition for which a proper course would have been to approach the Civil Court of competent jurisdiction and for which the limitation has already run out.

10. The legal position in this regard is very sound that if a relief otherwise has become barred by time under common law, would not be granted in writ jurisdiction under Article 226 of the Constitution of India except where the case is of violation of a fundamental right. The right to property or for that matter, any other right flowing from any agreement by itself is not a fundamental right and it is all dependent upon the enforcement of such agreement and getting the right declared as maintainable only through common law remedy. We are here reminded of a judgement of Gwalior Bench of High Court of Madhya Pradesh in **Venkatlal Baldeoji Mahajan Vs. Kanhiyalal Jankidas and others (AIR 1763 MP 153)** in which it has been observed thus:-

"It is clear that the question of laches comes in when the plaintiff seeks to obtain an equitable relief. But the principle of laches, which is based on the equitable doctrine is not applicable to a case where the Court has to determine the legal rights of a party. An objection as to delay or laches does not avail the defendant when a legal relief is sought against him except as a circumstance to show abandonment. He can or course rely on the statute of limitation but if the suit is instituted within the period prescribed by the Limitation Act his suit cannot be thrown out because of any amount of laches or delay. This position is plain enough. But if any authority is needed 1 may quote with respect a decision of Abdur Rehman J. in Krishnamachari v. Chengalraya, MANU/TN/0391/1938: AIR 1940 Mad 281."

11. In the case of **P.S.Sadasivaswamy Vs. State of Tamil Nadu (AIR 1974 SC 2271)**, the Apex Court has held thus:-

"A person aggrieved by an order or promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion..

It is not that there is any period of limitation for the Court to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claim and try to unsettle settled matters. The petitioner's petition should, therefore, have been dismissed in limine.

12. In view of the above, we decline to interfere with the order impugned in the present writ petition. The writ petition fails and is, accordingly, **dismissed.**

(2020)03-05ILR A1819
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

WRIT-C No. 6407 of 2020

Smt. Vimlawati Devi ...Petitioner
Versus
Tehsildar, Tehsil – Hata, District – Kushi Nagar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Akhilesh K Dwivedi

Counsel for the Respondents:
C.S.C.

A.Civil Law- UP Revenue Code, 2006 – Agricultural Dispute – Significance of need to decide it expeditiously – State of Uttar Pradesh has a substantial agrarian economy and majority of its citizens live in villages – Agricultural land is, therefore, of utmost importance to the citizenry living in the villages – Issues and disputes relating to agricultural lands are to be dealt with by the revenue courts/authorities – The fact that such large number of writs are being filed only with the prayer to expedite proceedings pending before revenue authorities/courts is a matter of serious concern – Apart from creating discord amongst otherwise closely knit social set up it is one of the primary cause for commission of crimes/offences in villages. (Para 3)

B. Revenue Court – Adjudication of agricultural disputes – Need of knowledge of law and Separate Cadre of judicially trained persons – Propriety of allocating the judicial work before the revenue courts to administrative officers lacking the basic awareness of law – Held, the Revenue Courts also perform judicial functions and their Presiding Officers are expected to be legally trained persons who can work independently – Knowledge in the field of Law is otherwise expected of such officers as they interpret various provisions of law and their decisions attain finality – This aspect does not appear to have been examined – Quality of determination by those who even do not have a law degree is likely to suffer. (Para 15 and 16)

C. Revenue Tribunal and Officers – Appointment – Independence of process – Need of Consultation of Chief Justice – The Revenue Courts established under the Code of 2006 apparently have all attributes of a Tribunal – The officers manning Revenue Courts are

therefore expected to be at least law graduates and adequately trained to deal with the disputes arising before the Revenue Courts – Apex Court's observation that the appointment of the President of the Revenue Tribunal had to be made only after consultation with the Chief Justice of that State, relied upon – Held that being a part of the judicial dispensation system of State the Revenue Courts are also expected to be given their independence in accordance with the constitutional scheme – The issue was treated as an issue of larger public interest – Additional Chief Secretary was called upon to file affidavit. (Para 17, 18 and 19)

Writ Petition kept pending (E-1)

Cases relied on :-

1. PIL No. 53556 of 2015; Yashpal Singh Vs. St. of U.P. & ors. decided on 01 March 2016

2. Writ Petition No. 1184 (M/B) of 2016; Ayodhya Prasad Tripathi & ors. Vs. St. of U.P. & ors. decided on 09 January 2018

3. St. of Mah. Vs. Labour Law Practitioners' Assc. & ors., (1998) 2 SCC 688

4. St. of Guj. Vs. Guj. Revenue Tribunal Bar Assc. & anr., (2012) 10 SCC 353

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioner is permitted to implead State of Uttar Pradesh through its Additional Chief Secretary, Revenue, U.P. at Lucknow as well as Chairman of the Board of Revenue, U.P. at Allahabad as respondent nos.4 and 5 respectively, and notices on behalf of said respondent is also accepted by learned Standing Counsel.

2. Twenty eight writ petitions filed under Article 226 of the Constitution of India have been assigned by Hon'ble The Chief Justice to be heard by this Court. Eighteen out of these twenty eight petitions i.e. Writ Petition Nos.6407 of 2020, 6419 of 2020, 6453 of 2020, 6461 of 2020, 6462 of 2020, 6435 of 2020, 6448 of 2020, 6472 of 2020, 6473 of 2020, 6474 of 2020, 6478 of 2020, 6483 of 2020, 6491 of 2020, 6495 of 2020, 6501 of 2020, 6513 of 2020, 6519 of 2020 and 6525 of 2020, raise a common grievance that proceedings before the revenue courts/authorities under the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as "Act of 1950'), U.P. Land Revenue Act, 1901 (hereinafter referred to as "Act of 1901') and U.P. Revenue Code, 2006 (hereinafter referred to as "Code of 2006') are being kept pending for unduly long (even decades in some cases) causing innumerable difficulties for the petitioners. Prayer is, consequently, made to command the authorities concerned to expedite the proceedings. Writ Petition No.6407 of 2020 is taken as the leading case and all other petitions have been connected to it.

3. State of Uttar Pradesh has a substantial agrarian economy and majority of its citizens live in villages. Agricultural land is, therefore, of utmost importance to the citizenry living in the villages. Issues and disputes relating to agricultural lands like mutation, demarcation, partition, removal of encroachment, title disputes etc. are to be dealt with by the revenue courts/authorities. The fact that such large number of writs are being filed only with the prayer to expedite proceedings pending before revenue authorities/courts is a matter of serious concern. Apart from creating discord amongst otherwise closely knit social set up it is one of the primary cause for commission of crimes/offences in villages. It is, therefore, necessary for this Court to examine the concern in wider perspective and issue necessary directions in that regard.

4. The Act of 1950 made provisions for constitution of the Revenue Courts specified in Schedule II, referred to in Section 331 of the Act of 1950, and also specified the nature of jurisdiction to be exercised by them. By virtue of Section 330 and 331 of the Act of 1950 the jurisdiction of civil courts stood ousted in so far as the issues triable by Revenue Courts were concerned. These Revenue Courts in the State of Uttar Pradesh functioned under supervision and control of the Board of Revenue, established under The United Provinces Board of Revenue Act, 1922 (hereinafter referred to as "Act of 1922'). The orders passed by revenue courts attain finality under the Act(s). The Act of 1950 as also the Act of 1901 and the Act of 1922 etc. have been repealed by the Code of 2006.

5. The Code of 2006 also provides for the Board of Revenue in Chapter III. By virtue of Section 8 the Board is to be the Chief Controlling Authority in all matters relating to disposal of cases, appeals or revisions and subject to the superintendence, direction and control of the State Government, in all other matters provided for in the Code of 2006. Chapter XIII of the Code of 2006 provides for jurisdiction and procedure of Revenue Courts. Section 206 of the Code of 2006 clearly provides that no civil court shall exercise jurisdiction over any of the matters specified in the Second Schedule and no other court than the Revenue Court or the Revenue Officer specified in Column 3 of Third Schedule shall entertain any suit, application or proceedings specified in Column 2 thereof. Section 207 provides for the remedy of first appeal while Section 208 provides a remedy of second appeal in a case involving substantial question of law. The Board of Revenue or the Commissioner are vested with power of revision and the Board also has the power of review. Section 212 permits the Board to transfer cases from one Revenue Officer to another. By virtue of Section 214 of the Code of 2006 the provisions of the Code of Civil Procedure, 1908 and that of the Limitation Act, 1963 are made applicable unless otherwise provided for in the Code of 2006.

6. Section 4 (16) of the Code of 2006 defines Revenue Court in following terms:-

"4(16) "Revenue Court" means all or any of the following authorities (that is to say) the Board and all members thereof, Commissioners, Additional Commissioners, Collectors, Additional Collectors, Chief Revenue Officers, Assistant Collectors, Settlement Officers, Assistant Settlement Officers, Record Officers, Assistant Record Officers, Tahsildars, Tahsildars (Judicial) and Naib Tahsildars;"

7. The proceedings which are sought to be expedited in this bunch of petitions raise issues/disputes pending before the Revenue Court/Revenue Authorities and lie exclusively in the realm of the Code of 2006. The jurisdiction in that regard of Civil Court stands ousted by virtue of Second Schedule and lies exclusively in the Revenue Court by virtue of Third Schedule appended to the Code of 2006. The functioning of the Revenue Authorities/Revenue Courts, therefore, arise substantially for consideration in this matter.

8. At the outset, it is worth noticing that this is not the first occasion when the concern in this regard is being noticed by this Court. After the Revenue Code of 2006

was enforced on 29.11.2012 a Division Bench of this Court in PIL No.53556 of 2015 (Yashpal Singh Vs. State of U.P. and others) took note of the provisions of the Code of 2006, as per which Additional Commissioners, Additional Collectors and Assistant Collectors were to be appointed only to exercise judicial duties as is assigned to them by State Government. On 30th October, 2015 the Division Bench after considering the report submitted by the District Judge with regard to functioning of revenue courts made following observations:-

"....The vast proportion of disputes before the Revenue Courts relate to agricultural land and property. It has been reported that the Presiding Officers of the Revenue Courts do not observe regular and disciplined sittings in the Revenue Courts and because of their administrative duties and law and order responsibilities, they do not get much time to devote to judicial functioning. The report of the District Judge suggests that one option is to create a separate cadre of revenue officers, who are devoted to only judicial functioning in the Revenue Courts or to appoint one or two Executive Officers in every district who can sit in the Court throughout the day and perform judicial duties."

This Court observed in the subsequent order dated 4.12.2015 as under:-

"Having regard to this background, in our view, it would be necessary for the State Government to act in the matter to ensure that a cadre of officers, exclusively to the resolution of revenue cases, is created along the lines as suggested by the Board of Revenue. Moreover, due and appropriate attention should be bestowed on the need to ensure that persons so appointed have sufficient knowledge of law so as to facilitate the disposal of revenue cases. Since this proposal is pending consideration before the State Government, we direct that a decision in that regard be taken within a period of two months from today".

The petition ultimately came to be disposed of vide following directions dated 1.3.2016:-

"We are of the view that the State Government must immediately take steps under the enabling provisions of sub section (5) of Section 11 and Section 12 and sub section (6) of Section 13. This would ensure that judicial work is assigned to officers who would only perform judicial duties on the revenue side and would be exempted from administrative functions. Judicial work requires a frame of mind, qualification and experience which are quite different from the discharge of administrative duties and it is but necessary that the provisions which have been contained in the newly enforced provisions of the Code are implemented in the State expeditiously. As regards the proposal for the creation of a cadre, it has been stated that the Finance Department to whom a proposal was submitted for consent had raised certain queries which has been responded to on 22 February 2016 by the Board of Revenue. After the consent of the Finance Department, the proposal would be placed before the Cabinet after obtaining the consent of the Law Department and the Department of Personnel. Since the proposal is now pending before the Government and the Government has indicated its intention to finalize the matter expeditiously, we direct that a final decision thereon should be taken within a

period of six months from the receipt of a certified copy of this order."

It would be worth noticing that more than six lakh cases were pending as on 1.1.2015 before the revenue courts.

9. Again in Ayodhya Prasad Tripathi and others Vs. State of U.P. through Principal Secretary, Department of Revenue and others, in Writ Petition No.1184(M/B) of 2016, the directions issued in the case of Yashpal Singh (supra) were reiterated by a subsequent Division Bench and the State Government was directed to take necessary decision in the matter within two months. The petition has been ultimately disposed of on 9.1.2018.

10. A period of about five years have passed since the above directions were issued in the matter but no satisfactory measures appear to have been taken and the situation has not improved.

11. In the leading writ petition no. 6407 of 2020 a prayer has been made to direct the Tehsildar, District Kushinagar, to dispose of the proceedings of Case No. T.201905440205022 pending since April, 2010 under Section 34 of the U.P. Land Revenue Act, 1901. In some of the other petitions which are directed to be connected with this case such proceedings are pending for the last about two decades. According to petitioner in the present case she has purchased certain land situated in Village Ahirauli, Tappa Bachholi, Pargana Sahjahanpur, Tehsil Hata, District Kushinagar on 8th March, 2010 and has applied for mutation of her name but even after expiry of 10 years, the proceedings have not been concluded. The ordersheet has been annexed, according to which hundred of dates have been fixed but the Tehsildar concerned has not decided the matter, so far. Similar are the facts in other seventeen cases which are clubbed with the present writ petition.

12. Learned counsel for the petitioner states that there is only one Tehsildar (Judicial) in Tehsil Hata, District Kushinagar, who is mostly engaged in other Protocol and VIP Duty etc. and has no time to attend judicial proceedings. It is stated that even summary proceedings are kept pending for decades together and even routine orders are not passed. Thereafter, unless this Court intervenes the situation is not likely to change.

13. Prima facie, this Court finds petitioner's grievance to have substance. Mutation proceedings are admittedly summary in nature and ought to be concluded, expeditiously, or else various other complications arise for the parties.

14. Learned counsel for the petitioner states that neither any separate cadre of judicially trained persons is created to discharge the work of Revenue Courts including Tehsildar (Judicial) and the work assigned to them is virtually placed at the bottom with priority given to other administrative and protocol matters. The ordersheet of the pending case is a sad reflection of the casual manner in which proceedings are routinely adjourned, which results in no orders being passed, as is expected of the revenue authority/court.

15. It would also be relevant to note that the judicial work before the revenue courts is being allocated to administrative officers who even lack the basic awareness of law, inasmuch as a law degree is not even mandatory for them. While dealing with appointment of Presiding Officers of

the Labour Court the Supreme Court of India in the case of The State of Maharashtra Vs. Labour Law Practitioners' Association and others, reported in (1998) 2 SCC 688, observed that Industrial Tribunals have the trappings of a court and the functions performed by their Presiding Officers has to be regarded as judicial functions. After referring to Article 234 to 236 of the Constitution of India the Supreme Court observed as under:-

"The District Judge, therefore, covers a judge of any Principal Civil Court of Original Jurisdiction. With an increase in the numbers of a specialised courts and tribunals which are being set up to deal with specific kinds of civil litigation which would otherwise have been dealt with b y the ordinary civil courts, we now have a number of specialised courts exercising different categories of civil original jurisdiction. It can be specialised civil original jurisdiction pertaining to Labour and Industrial disputes specified in the relevant Acts as in the case of Labour and Industrial Courts, or it could be pertaining to recovery of bank debts and so on. The structure of civil courts exercising original jurisdiction is no longer monolithic. The judge of the Principal Civil Court heading the concerned set of courts under him an d exercising that jurisdiction can also fall in the category of a "District Judge" by whatever name called. Learned single judge and learned Judges of the Division Bench have, therefor, held t hat and Industrial Court is a civil court exercising civil original jurisdiction; and the person presiding over it could well be termed as a District Judge. The term "District Judge" should not b e confined only to the judge of the Principal Civil Court in the hierarchy of general civil courts. The term would now have to include also the hierarchy of specialised civil courts, such as a hierarchy of Labour Courts and Industrial Courts. The fact that the Chief Presidency Magistrate and the Sessions Judge were also included in the definition of "District" Judge indicates that a wide interpretation is to be given tot he expression "District Judge". The extensive definition of a District Judge under Article 236 is indicative of the same.

Under Article 236 (b), the expression "judicial service" is defined to mean "a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge." Judicial service thus postulates a hierarchy of courts with t he District Judge as the head an d other judicial officers under him discharging only judicial functions.

.....…

We need not refer at length to various other judgment which have dealt with the question whether a Tribunal set up under different Acts which were before the Court in each case was a judicial body or a court, and whether it was a court subordinate to the High Court. In Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala & Ors. [AIR 1951 SC 1559], the Central Government exercising appellate powers under Section 111 of the Companies Act was held to be acting as a judicial body and not as an administrative body. In t he case of Shripatrao Dajisahab Ghatge & Anr v. The State of Maharashtra & Anr. [AIR 1977 Bombay 384], the term "courts" was held to cover all tribunals which were basically courts performing judicial functions giving judgments which were binding and exercising sovereign judicial power transferred tot hem by the State. It was held that High Court could exercise its jurisdiction under Article 227 over such tribunals. A Full Bench of the

Gujarat High Court in the case of Shaikh Mohammedbhikhan Hussainbhai & etc. v. The Manage, Chandrabhanu Cinema & Ors, etc. [1986 Lab I.C. 1749] held that Labour Courts and Industrial Courts were courts for the purposes of contempt of Courts Act and were also courts subordinate to the High Court.

.....…

The constitutional scheme under Chapter V of Part VI dealing with the High Courts and Chapter VI of Par VI dealing with eh subordinate courts shows a clear anxiety on the part of the framers of the Constitution to preserve and promote independence of the judiciary from the executive. Thus Article 233 which deals with appointment of District judges requires that such appointments shall be made by the Governor of the State in consultation with the High Court. Article 233(2) has been interpreted as prescribing that "a person in the service of the Union or the State" can refer only to a person in the judicial service of the Union or the State. Article 234 which deals with recruitment of persons other that District Judges to the judicial service requires that their appointments can be made only in accordance with the Rules framed b y the Governor of the State after consultation with the State Public Service Commission and with the High Court. Article 235 provides that he control over district courts and courts subordinate thereto shall be vested in the High Court; and Article 236 defines the expression "District Judge" extensively as covering judges of a city civil court etc, as earlier set out, and the expression "judicial service" as meaning a service consisting exclusively of persons intended to fill the post of the District Judge and other civil judicial posts inferior to the post of District judge. Therefore, bearing in mind the principle of separation of powers and independence of the judiciary, judicial service contemplates a service exclusively of judicial posts in which their will be a hierarchy headed by a District Judge. The High Court has rightly come to the conclusion that the persons presiding over Industrial and Labour Courts would constitute a judicial service so defined. Therefore, the recruitment of Labour Court judges is required to be made in accordance with Article 235 of the Constitution."

16. The Revenue Courts also perform judicial functions and their Presiding Officers are expected to be legally trained persons who can work independently. Knowledge in the field of Law is otherwise expected of such officers as they interpret various provisions of law and their decisions attain finality. This aspect does not appear to have been examined. Quality of determination by those who even do not have a law degree is likely to suffer. Large number of writ petitions are, therefore, entertained against the orders passed by the revenue courts as the rights of parties, including title matters, are decided finally by such courts.

17. The Revenue Courts established under the Code of 2006 apparently have all attributes of a Tribunal. The officers manning Revenue Courts are therefore expected to be at least law graduates and adequately trained to deal with the disputes arising before the Revenue Courts. It would be worth referring at this stage to a judgment of the Supreme Court of India arising out of a challenge laid to the appointment of President of the Gujarat Revenue Tribunal, wherein the Gujarat High Court had set aside the appointment of the President of the Gujarat Revenue Tribunal. While affirming the view taken

by the Gujarat High Court the Hon'ble Supreme Court extensively examined the statutory provisions relating to constitution of Tribunal as also the procedure to be followed by it and the duty cast upon it to act judicially. The orders of Tribunal were found amenable to exercise of jurisdiction of the High Court under Article 226 and 227 of the Constitution of India. In such circumstances the Apex Court held that the appointment of the President of the Gujarat Revenue Tribunal had to be made only after consultation with the Chief Justice of that State. Following observations of the Apex Court in State of Gujarat Vs. Gujarat Revenue Tribunal Bar Association and another reported in (2012) 10 SCC 353, are reproduced hereinafter:-

"16. Although the term "court" has not been defined under the Act, it is indisputable that courts belong to the judicial hierarchy and constitute the country's judiciary as distinct from the executive or legislative branches of the State. Judicial functions involve the decision of rights and liabilities of the parties. An enquiry and investigation into facts is a material part of judicial function. The legislature, in its wisdom has created tribunals and transferred the work which was regularly done by the civil courts to them, as it was found necessary to do so in order to provide efficacious remedy and also to reduce the burden on the civil courts and further, also to save the aggrieved person from bearing the burden of heavy court fees, etc. Thus, the system of tribunals was created as a machinery for the speedy disposal of claims arising under a particular statute/Act. Most of the tribunals have been given the power to lay down their own procedure. In some cases, the procedure may be adopted by the tribunal and the same may require the approval of the competent authority/Government. However, in each case, the principles of natural justice are required to be observed. Such tribunals therefore, basically perform quasi-judicial functions. The system of tribunals is hence, unlike that of the regularly constituted courts under the hierarchy of judicial system which are not authorised to devise their own procedure for dealing with cases. Under certain statutes tribunals have been authorised to exercise certain powers conferred under some provisions of the Code of Civil Procedure (hereinafter referred to as "CPC") or the Code of Criminal Procedure (hereinafter referred to as "CrPC"), but not under the whole Code, be it Civil or Criminal. However, in a regular court, the said Codes, in their entirety, Civil as well as Criminal, must be strictly adhered to. Therefore, from the above, it is evident that the terms "court" and "tribunal" are not interchangeable.

17. A tribunal may not necessarily be a court, in spite of the fact that it may be presided over by a judicial officer, as other qualified persons may also possibly be appointed to perform such duty. One of the tests to determine whether a tribunal is a court or not, is to check whether the High Court has revisional jurisdiction so far as the judgments and orders passed by the tribunal are concerned. The supervisory or revisional jurisdiction is considered to be a power vesting in any superior court or tribunal, enabling it to satisfy itself as regards the correctness of the orders of the inferior tribunal. This is the basic difference between appellate and supervisory jurisdiction. The appellate jurisdiction confers a right upon the aggrieved person to complain in the prescribed manner to a higher forum whereas, supervisory/revisional power has a different object and purpose altogether as

it confers the right and responsibility upon the higher forum to keep the subordinate tribunals within the limits of the law. It is for this reason that revisional power can be exercised by the competent authority/court suo motu, in order to see that subordinate tribunals do not transgress the rules of law and are kept within the framework of powers conferred upon them. Such revisional powers have to be exercised sparingly, only as a discretion in order to prevent gross injustice and the same cannot be claimed, as a matter of right by any party. Even if the person heading the tribunal is otherwise a "judicial officer", he may merely be persona designata, but not a court, despite the fact that he is expected to act in a quasi-judicial manner. In the generic sense, a court is also a tribunal, however, courts are only such tribunals as have been created by the statute concerned and belong to the judicial department of a State as opposed to the executive branch of the said State. The expression "court" is understood in the context of its normally accepted connotation, as an adjudicating body, which performs judicial functions of rendering definitive judgments having a sense of finality and authoritativeness to bind the parties litigating before it. Secondly, it should be in the course of exercise of the sovereign judicial power transferred to it by the State. Any tribunal or authority therefore, that possesses these attributes, may be categorised as a court.

29. The present writ petition was filed on the premise that the post of the President of the Gujarat Revenue Tribunal was covered by the expression "District Judge", as has been defined under Article 236 of the Constitution; the definition being an exclusive one, and thus, in view of the provisions of Article 233 of the Constitution, the appointment of the President of the Tribunal can be made only upon consultation with the High Court. In the alternative it was suggested that the said Tribunal is a court and that the post of the President is one of judicial service, and in view of the provisions of Article 234 of the Constitution, the appointment of the President can be made only upon consultation with the High Court, as well as the Gujarat Public Services Commission. Even otherwise, having regard to the functions, powers and duties vested in the President, a person with legal qualification and long judicial experience should alone be appointed as President. Reference to the Bombay Legislative Assembly debate dated 18-4-1939, as expressed by the then Revenue Minister, revealed that the intention of the legislature had been that the post be filled by a retired High Court Judge, or a District Judge of not less than ten years' standing. Further, the Tribunal dealing with various cases under the Gujarat Agricultural Lands Ceiling Act, 1960, the Gujarat Private Forests Act, the Bombay Public Trusts Act, the Bombay Tenancy and Agricultural Lands Act, the Bombay Jagirdari and Other Tenure Abolition Act, and with questions of title under Section 37(2) of the Bombay Land Revenue Court has to deal with large number of civil disputes between the citizens, as well as between the Government and citizens and, it is pertinent to note that at the relevant time of filing of this writ petition, 6500 cases were pending before the Tribunal. With these assertions, the prayers made by the writ petitioners were mainly to declare Sections 4 and 20 of the 1958 Act as ultra vires and unconstitutional on the grounds that they gave absolute unguided power to the State Government in relation to the appointment of the President, and further, to declare Rule 3(1) so far as it authorises the

appointment of the Secretary, as ultra vires and void, and also to quash the appointment of the respondent as the President.

33. During the course of arguments before the High Court, the learned Additional Advocate General had conceded that the judgments and orders passed by the Tribunal can be challenged under Article 227 of the Constitution. Thus, it has been conceded before the High Court that the High Court has supervisory control over the Tribunal to the extent that it can revise and correct the judgments and orders passed by it. In such a fact situation, the consultation/concurrence of the High Court, in the matter of making the appointment of the President of the Tribunal is required."

18. The provisions of the Code of 2006, referred to above, would prima facie suggest that it has all attributes of a Tribunal and the provisions of Chapter VI of the Constitution of India would be attracted. In the Revenue Code, 2006 the legislature has also fixed a timeline within which various proceedings are required to be performed by the Revenue Courts/Authorities. More often than not such timelines are not adhered to and writ petitions are routinely filed for issuing necessary directions to conclude the proceedings. Contempt petitions are also being filed in large numbers before this Court as proceedings are not being concluded even despite directions issued by this Court. This is not a desirable situation. State Legislature having fixed specific time frames for disposal of matters must also provide for necessary supporting infrastructure for implementing the statutory provisions limiting the period within which disputes are to be resolved. Merely creating rights or fixing timelines for disposal of cases in the Legislation will not yield any results and would remain a farce unless necessary supporting infrastructure is created for the purpose. As the task of adjudication is assigned in specific areas exclusively to the Revenue Courts it is in utmost public interest that competent officers in the field of law (atleast law graduates) having adequate training are made available in sufficient numbers or else the malaise will continue. Being a part of the judicial dispensation system of State the Revenue Courts are also expected to be given their independence in accordance with the constitutional scheme.

19. In such circumstances, instead of issuing a routine direction to the Revenue Court/Revenue Authority to dispose of the proceedings pending before it, it would be necessary to confront the State with the pressing issues, noticed in this order, and to call upon the Additional Chief Secretary of the Department concerned to examine it in larger public interest and to file his personal affidavit clarifying the stand of the State on following issues:-

(i) What is the total number of cases pending before the Revenue Courts in the State of Uttar Pradesh as on 1.1.2020?

(ii) Whether any specialized cadre of law knowing officers has been created to man the Revenue Courts and what is the minimum qualification prescribed for them at different levels? The strength of cadre at different levels would also be specified both in terms of its sanction and the officers existing as on 1.1.2020.

(iii) Whether the officers manning the Revenue Courts are exclusively entrusted with the task specified in the Revenue Code 2006 or are given other administrative and protocol duties, etc.?

(iv) How the State proposes to provide fair and early disposal of cases

pending before Revenue Courts/Revenue Authorities?

(v) Whether the Chairman and the Members of the Board of Revenue are appointed in consultation with Hon'ble The Chief Justice?

The required affidavit would be filed by the Additional Chief Secretary of Revenue Department of the State of Uttar Pradesh, within four weeks.

20. Since the issues noticed in this order are predominantly found to be in public interest, as such, the Registry is directed to treat this matter alongwith connected petitions as a Public Interest Litigation and to place it on 6th April, 2020 before a bench to be nominated by Hon'ble the Chief Justice.

(2020)03-05ILR A1829
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2019

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

WRIT-C No. 11448 of 2017

Rajiv @ Raju Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sudeep Dwivedi

Counsel for the Respondents:
C.S.C., Sri Sher Bahadur Yadav, Sri Shiv Shankar Gupta

क. उत्तर प्रदे ा आव यक वस्तु (विक्रय एवं वितरण नियन्त्रण का विनियमन) आदे ा, 2016 – उचित मूल्य की दुकान – अनुबन्ध पत्र का निरस्तीकरण – नैसर्गिक न्याय का सिद्धान्त – जांच रिपोट की प्रति उपलब्ध न कराने का प्रभाव – कार्यवाही चाहे न्यायिक हो या प्र ाासनिक या अर्ध–न्यायिक, नैसर्गिक न्याय के सिद्धान्त का पालन होना आव यक है – निर्णय लेने की प्रक्रिया में निश्पक्षता सुनि ित करना निश्पक्ष निर्णय के अधिकार का एक महत्त्वपूर्ण स्तम्भ है – समस्त कार्यवाही का एकमात्र आधार जांच आख्या है, जिसकी प्रति उपलब्ध न कराना नैसर्गिक न्याय के सिद्धान्त का उल्लंघन है – निर्धारित किया गया कि नैसर्गिक न्याय के सिद्धान्त का अनुपालन न करने के आधार पर समस्त कार्यवाही निरस्त किया जा सकता है। (पैरा 13, 14 एवं 15)

A. Civil Law-Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 – Fair Price Shop – Cancellation of Licence – Principle of Natural Justice – Effect of not providing the copy of Enquiry Report – The principle of natural justice is required to be followed in every proceeding, it is either judicial or administrative or quasi-judicial – Ensuring the fairness during adjudicating process is significant for right to get fair justice – Not providing the copy of the enquiry report, which is the sole basis of the entire process, is violation of principle of natural justice – Held, non-compliance of principle of natural justice may result into quashing of entire process. (Para 13, 14 and 15)

रिट याचिका निस्तारित (ई-1)

Writ Petition disposed off (E-1)

उल्लेखित पूर्व–निर्णय

1. रिट याचिका संख्या 4011 सन् 2010 रामकृपाल यादव बनाम उ0 प्र0 सरकार एवं अन्य का निर्णय दिनांकित 05.05.2011
2. एस0 एल0 कपूर बनाम जगमोहन एण्ड सन्स 1980 (4) एस.सी.सी. 379
3. एस एस गिल बनाम चीफ इलेक ान कमि ानर 1978 (1) एस.सी.सी. 405

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

1. वर्तमान व्यवहार प्रकीर्ण याचिका के माध्यम से याची ने प्रार्थना की है कि, आयुक्त, आजमगढ़ मण्डल, आजमगढ़

द्वारा पारित निर्णय दिनांक 25.01.2017, जिससे याची के द्वारा दायर की गई अपील संख्या 256/F (अन्तर्गत 13 (3) उत्तर प्रदेश अनुसूचित वस्तु वितरण आदेश 2016 (संक्षेप में 'आदेश 2016') बलहीन होने के कारण निरस्त की गयी है तथा उप जिलाधिकारी निजामाबाद, आजमगढ़ द्वारा पारित आदेश दिनांक 06.09.2016, जिससे द्वारा याची के उचित दर दुकान का अनुबन्ध पत्र निरस्त किया गया था, उक्त आदेश की पुष्टी की गई है, को निरस्त किया जाये।

2. याची सरकारी सस्ते गल्ले, मिट्टी तेल का विक्रेता है एवं उसे उचित दर दुकान (ग्राम पंचायत खानपुर चितरविल, विकासखण्ड मिर्जापुर) का अनुबन्ध पत्र जारी किया गया था तथा याची सन् 1992 से उचित दर दुकान कॊ लगातार चला रहा था। दिनांक 24.06.2016 को दूरभाष पर की गयी शिकायत के क्रम में याची की उचित दर दुकान पर आकास्मिक स्थलीय निरीक्षण क्षेत्रीय पूर्ति निरिक्षक, निजामाबाद द्वारा किया गया। निरीक्षण के दौरान मौके पर उपस्थित ग्रहस्थियों/ अंत्योदय कार्ड धारको व उनके परिवार से खाद्यान वितरण सम्बधी पूछ-ताछ भी करी गई। दुकान पर पात्र गृहस्थियों/ अंत्योदय कार्ड धारकों की सूची, सामान की दराे का पट्ट, सामाग्री पट्ट, सूचना पट्ट आदि प्रदर्शित नहीं किया गया था। पूछताछ के दौरान यह भी विदित हुआ कि याची का व्यवहार ग्राहको के प्रति अच्छा नहीं रहता था। याची ने अंत्योदय कार्ड धारको कॊ शासन द्वारा निर्धारित मात्रा से कम एवं अधिक मूल्य पर खाद्यान का वितरण किया एवं अन्य शिकायतें भी पायी गई। अतः यह माना गया कि याची ने आदेश 2004 व अनुबन्ध पत्र की शर्तो का उल्लंगन किया है। तदानुसार उप जिलाधिकारी, निजामाबाद आजमगढ़ ने क्षेत्रिय पूर्ति निरीक्षक, निजामाबाद की जाँच आख्या दिनांक 26.06.2016 पर संज्ञान लेते हुए, अपने आदेश दिनांक 29.06.2016 के द्वारा याची का अनुबन्ध पत्र तत्काल प्रभाव से निलम्बित कर दिया तथा याची को एक सप्ताह के अन्दर अपना पक्ष रखने का समय दिया। साथ ही साथ याची के उचित दर दुकान का समस्त कोटा दूसरी दुकान से सम्बन्ध कर दिया गया।

3. याची के अपना स्पष्टीकरण एक निवेदन के रूप में दिया जिसमें कहा गया कि सूची सम्रागी दर पट्ट व समाग्री पट्ट प्रदर्शित किया गया था। यह भी कहा कि कुछ कार्ड धारक दुबारा बयान देना चाहते है, क्योंकि पहले उन्होने किसी दबाव में आकर याची के विरूद्ध ब्यान दिया था। याची के विरूद्ध शिकायत मात्र चुनावी रंजिश के कारण की गई है। अन्तः प्रार्थना की गई कि निलम्बित दुकान बहाल करी जायॆ। याची ने माह अप्रैल, मई, जून सन् 2016 की वितरण पंजिका व स्टाक पंजिका की छाया प्रति व समस्त योजनाओ के कार्ड धारको का सामूहिक हस्ताक्षर किया गया प्रार्थना पत्र भी प्रस्तुत किया।

4. याची के स्पष्टीकरण देने के उपरान्त उपजिलाअधिकारी, निजामाबादा, आजमगढ़ ने प्रकरण की सुनवाई करी तथा क्षेत्रीय पूर्ति निरिक्षक की जाँच आख्या दिनांक 26.06.2016, याची द्वारा दिया गया लिखित स्पष्टीकरण एवं संलग्न प्रदर्शों का

ध्यान पूर्वक परिशीलन करने के उपरान्त प्राधिकारी इस निष्कर्ष पर पहुचे की याची (उचित दर विक्रेता) ने आवश्यक वस्तुओ के वितरण में गम्भीर अनियमतायें कारित की है। फलस्वरूप याची का अनुबन्ध पत्र निरस्त करने योग्य है। तदनानुसार अनुबन्ध पत्र निरस्त करने का आदेश दिनांक 16.09.2016 पारित किया। उक्त आदेश के प्रमुख अंश निम्न है।

" इस प्रकार उचित दर विक्रेता ग्रामपंचायत खानपुर चितरावल द्वारा दिनांक 12.07.2016 को प्रस्तुत स्पष्टीकरण व साक्ष्यों का क्षेत्रीय पूर्ति निरीक्षक द्वारा परीक्षणोपरान्त आख्या दिनांक 14.09.2016 प्रस्तुत किया गया कि विक्रेता द्वारा अन्तयोदय कार्डधारको में शासन द्वारा निर्दारित मात्रा से कम मात्रा एवं निर्धारित मूल्य से अधिक मूल्य 95 रू० के स्थान पर 100रू० लेकर खाद्यान का वितरण किया गया है विक्रेता द्वारा प्रस्तुत की गयी स्पष्टीकरण में अधिक मूल्य लिया जाना स्वीकार किया गया है तथा चीनी का वितरण निर्धारित मात्रा 02 किग्रा० के स्थान पर 01 किग्रा० शासन द्वारा निर्धारित मूल्य 13.50 रू० प्रति किग्रा० न लेकर 15.00 रू० लिया जाना विक्रेता द्वारा स्वीकार किया गया है। पात्र गृहस्थी के अधिकांश कार्डधारकों में राशन वितरण नहीं किया गया है। पात्र गृहस्थी के अधिकंश कार्ड धारकों में राशन वितरण नहीं कियागया है। कुछ पात्र गृहस्थी कार्डो पर वितरण किया गया है तो दर्ज यूनिट के अनुसार वितरण न करके मनमाने ढंग से कम मात्रा व अधिक मूल्य पर वितरण किया गया है। समस्त योजना के कार्ड धारकों में मिट्टी तेल शासन द्वारा निर्धारित मात्रा पर वितरण किया गया है किन्तु अधिक मूल्य लिया गया है। विक्रेता द्वारा प्रस्तुत वितरण पंजिका में कार्डधारकों के नामों के सम्मुख मात्रा व मूल्य अंकित है किन्तु प्राप्तकर्ता के हस्ताक्षर वाले कालम में अधिकतर अंगूठा निशानी लगा है , ऐसा प्रतीत होता है कि बाद में निशानी अंगूठा लगा दिया गया है तथा वितरण पंजिका किसी भी सक्षम अधिकारी द्वारा प्रमाणित नहीं है। समस्त पात्र गृहस्थी योजनाओं के कार्डधारकों एक ही मात्रा में खाद्यान्न का वितरण करना अंकित है जबकि यूनिट के अनुसार खाद्यान वितरण किया जाना था जिससे स्पष्ट है कि विक्रेता द्वारा कपटपूर्ण नीति से वितरण पंजिका तैयार की गयी है। विक्रेता द्वारा प्रस्तुत स्पष्टीकरण के पुष्ट भाग पर संयुक्त रूप से लोगो का हस्ताक्षर व निशानी अंगूठा लगवाया गया है इन लोगो का न तो कार्ड संख्या अंकित है और न तो किस योजना के कार्डधारक है, इसका भी उल्लेख नहीं है। विक्रेता द्वारा कार्डधारको से दुर्व्यवहार का दोषी पाया गया है। विक्रेता द्वारा अन्तयोदय कार्डधारकों में शासन द्वारा निर्धारित मात्रा से कम एवं अधिक मूल्य पर खाद्यान्न का वितरण किया जाना, चीनी निर्धारित मात्रा॥मूल्य पर वितरण न करना, मिट्टी तेल का वितरण निर्धारित मूल्य पर न करना, कार्डधारको से दुर्व्यवहार करना उचित दर दुकान पर पात्र गृहस्थीयों॥अन्त्योदय कार्डधारको की सूची, रेट व स्टाक बोर्ड, साइन बोर्ड, टोलफ्री नं० प्रदर्शित न करना जो उ०प्र० अनूसूचित वस्तु वितरण आदेश 2004 व अनुबन्ध पत्र की शर्तो का उल्लघंन है। उचित दर विक्रेता श्री राजू कुमार द्वारा निलम्बन के क्रम में प्रस्तुत स्पष्टीकरण व साक्ष्य बलहीन व तथ्यहीन

पाये जाने के फलस्वरूप उचित दर की दुकान का अनुबन्ध-पत्र बनाये रखना जनहित व अनुसुचित वस्तु वितरण आदेश 2004 के प्राविधानो के क्रम में उचित नहीं है, जिसके फलस्वरूप क्षेत्रीय पूर्ति निरीक्षक द्वारा निलम्बित विक्रेता श्री राजू कुमार के उचित मूल्य की दुकान का अनुबन्ध- पत्र निरस्त किये जाने की संस्तुति की गयी है।"

5. याची अपने अनुबन्ध पत्र के निरस्त करने के आदेश दिनांक 16.09.2016 के क्षुब्द होकर कण्डिका सं 28(3) , उत्तर प्रदेश आवश्यक वस्तु (विक्रय एवं वितरण नियंत्रण का अधिनियम) आदेश 2016 (संछेप में 'आदेश 2016') के अंतर्गत आयुक्त आजमगढ़ मण्डल, आजमगढ़ के समक्ष अपील दायर की। अपील के मुख्य आधार निम्न लिखित है :-

"10- यह कि क्षेत्रीय पूर्तिनिरीक्षक की जॉच आख्या 14.09.2016 की भी कापी अपीलकर्ता को नहीं दी गयी जो नैसर्गिक न्याय के सिद्धान्त के विपरीत है।

11- यह कि उपरोक्त से यह भी स्पष्ट होता है कि क्षेत्रीय पूर्ति निरीक्षक ने दिनांक 24.06.2016 की शिकायत पर दिनांक 26.6.2016 को जॉच रिपोर्ट दिया और फिर प्रार्थी के स्पष्टीकरण एवं समस्त अभिलेखों का परीक्षण भी पूर्ति निरीक्षक द्वारा किया गया बताया गया और पुनः जॉच आख्या दिनांक 24.09.2016 को दी गई। इस प्रकार शिकायतकर्ता ही जॉच अधिकारी के रूप में अनुबन्ध पत्र निरस्त करने का निर्णय भी लिया जो कानूनन गलत है। क्योंकि उपजिलाधिकारी द्वारा स्वयं स्वतंत्र रूप से कोई निर्णय नहीं लिया गया।

12- यह कि उपजिलाधिकारी द्वारा जॉच आख्या दिनांक 14.09.2016 के आधार पर आदेश पारित किया गया है जॉच आख्या से संतुष्ट होने का कोई निष्कर्ष आदेश में नहीं दिया है कि किस आधार पर अनुबन्ध पत्र निरस्त किया गया है।"

6. आयुक्त, आजमगढ़ मण्डल, आजमगढ़ ने अपने आदेश दिनांक 2.1.2017 के माध्यम से याची की अपील संख्या 256/ए को बलहीन मानते हुए निरस्त कर दिया। आदेश के प्रमुख अंश निम्न है।

"पत्रावली के अवलोकन से स्पष्ट है कि अपीलकर्ता की ओर से दिनांक 12.07.2016 को स्पष्टीकरण दिया गया है, जिसके साथ सादे पेपर पर कतिपय ग्रामवासियों के हस्ताक्षर है, एवं अभिलेखों की छायाप्रति एवं कुछ अभिलेखों की मूल प्रति प्रस्तुत की गयी है। वितरण रजिस्टर किसी भी अधिकारी द्वार प्रमाणित नहीं किया गया है, जबकि वितरण रजिस्टर के अन्तिम पृष्ठ पर यह प्रमाणित नहीं किया गया है, जबकि वितरण रजिस्टर के अन्तिम पृष्ठ पर यह प्रमाणित किया जाता है कि रजिस्टर में क्रमांक इतने से इतने पन्ने हैं। केवल माह अप्रैल 2016 के मिट्टी तेल का रजिस्टर प्रमाणित किया गया है। विद्वान उपजिलाधिकारी द्वारा अपीलकर्ता की ओर से प्रस्तुत स्पष्टीकरण व अभिलेखों का क्षेत्रीय पूर्ति निरीक्षक से परीक्षण कराया गया है। क्षेत्रीय पूर्ति निरीक्षक द्वारा दिनांक 14.09.2016 को प्रस्तुत किया गया, जिसमें उल्लेख किया गया कि समस्त पात्र गृहस्थी योजना के कार्डधारकों को एक ही मात्रा में खाद्यान्न वितरण किया जाना अंकित किया

गया है। जबकि यूनिट के आधार पर खाद्यान्न वितरण किया जाना चाहिए। विक्रेता द्वारा प्रस्तुत वितरण पंजिका में कार्डधारकों के नाम के सम्मुख मात्रा व मूल्य अंकित है, किन्तु प्राप्त कर्ता के हस्ताक्षर वाले कालम में अधिकतर निशानी अंगूठा लगा है तथा वितरण रजिस्टर सक्षम अधिकारी द्वारा प्रमाणित नहीं है। समस्त योजनाओं के कार्डधारकों के मिट्टी तेल शासन द्वारा निर्धारित मात्रा पर वितरण किया गया है, किन्तु निर्धारित मूल्य से अधिक मूल्य लिया गया है। विक्रेता द्वारा अपने स्पष्टीकरण के पुष्ट भाग पर संयुक्त रूप से लोगों का हस्ताक्षर निशानी अंगूठा लगवाया गया है, जबकि न तो उन लोगो कार्ड संख्या अंकित किया गया है और न तो किस योजना के कार्डधारक हैं, इसका भी कोई उल्लेख नही किया गया है। अपने परीक्षण रिपोर्ट में यह भी अंकित किया है कि विक्रेता द्वारा कार्डधारकों से दुर्व्यवहार का दोषी पाया गया है। अन्त्योदय बी०पी०एल० एवं पात्र गृहस्थी योजना के खाद्यान्न, चीनी, मिट्टी तेल आदि निर्धारित मात्रा से कम व निर्धारित मूल्य से अधिक मूल्य पर वितरण किया गया है। इस प्रकार स्पष्टीकरण व साक्ष्य बलहीन व तथ्यहीन पाये जाने के कारण अनुबन्ध पत्र बनाये रखने का कोई औचित्य न पाते हुए दुकान निरस्त किये जाने की संस्तुति की गयी है।

इस प्रकार विद्वान उपजिलाधिकारी द्वारा अपीलकर्ता के वितरण के विरूद्ध पूर्व में भी की गयी शिकायत तथा दूरभाष पर की गयी शिकायत के आधार पर पूर्ति निरीक्षक से आकस्मिक स्थलीय निरीक्षण कराकर कार्डधारकों के बयान के आधार पर जांच में पायी गयी गम्भीर अनियमितताओं के दृष्टिगत अपीलकर्ता की दुकान का अनुबन्ध पत्र, स्पष्टीकरण प्राप्त कर पुनः स्पष्टीकरण व अभिलेखों का परीक्षण कराकर जांच में पायी गयी गम्भीर अनियमितताओं के दृष्टिगत अपीलकर्ता की दुकान को बनाये रखने का कोई औचित्य न पाते हुए आलोच्य आदेश दिनांक 16.09.2016 द्वारा अपीलकर्ता की दुकान का अनुबन्ध पत्र निरस्त किया है। इस प्रकार विद्वान उपजिलाधिकारी द्वारा पत्रावली उपलब्ध अभिलेखों व साक्ष्यों का विधिवत परीक्षण करने के उपरान्त ही आलोच्य आदेश दिनांक 16.09.2016 पारित किया है, जिसमें किसी प्रकार के हस्तक्षेप का कोई औचित्य नहीं पाया जाता है। अपील निरस्त होने योग्य है।

अतः अपीलकर्ता द्वारा प्रस्तुत अपील बलहीन होने के कारण निरस्त की जाती है। अवर न्यायालय की पत्रावली आदेश की प्रति सहित वापस की जाती है। बाद आवश्यक कार्यवाही इस न्यायालय की पत्रावली दाखिल दफ्तर हो।"

7. याची ने वर्तमान याचिका के द्वारा उपरोक्त वर्णित आक्षेपित आदेश दिनांक 25.1.2017 व 16.9.2016 को निरस्त करने की प्रार्थना की है। याची नें याचिका के प्रस्तर 20 व आधार प्रस्तर (I) व (II) में उल्लेख किया है, कि क्षेत्रीय पुर्ति अधिकारी द्वारा की गई जॉच आख्या दिनांक 26.06.2016 की प्रति-याची को नहीं दी गयी थी। अतः याची के विरुद्ध समस्त कार्यवाही नैसर्गिक न्याय के सिद्धान्तो के विरूद्ध की गई है, अतः ऐसी कार्यवाही निरस्त किये जाने योग्य है। याची ने अपने

कथन के समर्थन में कुछ विधि वयवस्थाओ का भी उल्लेख किया है।

8. प्रति-पक्षी संख्या 3 ने प्रति शपथ पत्र दाखिल किया है तथा याचिका के प्रस्तर संख्या 20 के उत्तर में निम्न लिखा है।

"यह कि याचिका के प्रस्तर संख्या-20 में उल्लिखित विधि व्यवस्थाओं पर टिप्पणी की आवश्यकता नहीं है शेष जिस प्रकार लिखित है, स्वीकर नहीं है क्योंकि याची द्वारा आवश्यक वस्तुओं के वितरण में अनियमितता किया जाना सिद्ध पाये जाने के फलस्वरूप याची का अनुबन्ध-पत्र निरस्त किया गया। याची द्वारा उल्लिखित विधि व्यवस्थाए याची के प्रकरण मे लागू नहीं है।"

प्रति पक्षी संख्या ३ ने आधार संख्या (I) व (II) का कोई प्रति उत्तर नहीं दिया है। याची द्वारा प्रतिशपथ का उत्तर भी दाखिल किया जिसमे जाँच आख्या दिनाँक 26.06.2016 को याची को न देने का तथ्य फिर से उल्लेखित किया है।

9. याची के विद्वान अधिवक्ता हरीश चन्द्र दूबे ने प्रबल प्रतिवेदन किया और कहा कि याची के विरूद्ध समस्त कार्यवाही नैसर्गिक न्याय के सिद्धान्तों के विरूद्ध की गई है। याची को जाँच आख्या की प्रति नहीं दी गई है। याची के द्वारा दिये गये दस्तावेजो का परिशीलन ध्यान पूर्वक नहीं किया गया है। उप जिलाधिकारी ने मात्र जाँच आख्या पर ही केन्द्रित होकर अपना आदेश पारित किया। उप जिलाधिकारी ने अपना कोई स्वतंत्र निष्कर्ष नहीं दिया है। इसी क्रम में आयुक्त महोदय ने भी याची की अपील सतही व अनौपचारिक रूप से निरस्त कर दी एवं अपील में लिये गये विभिन्न आधार पर कोई ध्यान या टिप्पणी नहीं करी है।

10. याची के विद्वान अधिवक्ता ने इस न्यायालय की एकल पीठ द्वारा पारित विधि वयवस्था (रामकृपाल यादव बनाम उ०प्र० सरकार एवं अन्य रिट पिटिशन नं० 4011 (एम०आई०एस) आफ 2010 व अन्य याचिकाओं का निर्णय दिनांक 05.05.2011) पर इस न्यायालय का ध्यान आकृषित कराया, कि उक्त व्यवस्था में यह प्रतिपादित किया है कि, किसी अनुबन्ध पत्र को निरस्त करना एक गंभीर विषय है, जिसपर अनौपचारिक रूप में निर्णय नही लिया जा सकता। निर्णय लेने वाले प्राधिकारी को निष्पक्षता से निर्णय लेना चाहिये एवं नैसर्गिक न्याय के सिद्धान्तो का पालन करना चाहिये। ऐसा दस्तावेज (जैसे जाँच आख्या, निरीक्षण आख्या आदि) जिसका उपयोग पीड़ित के विरूद्ध किया गया हैं, उसकी प्रति उसको न देना, ऐसे स्थापित नियमों के विरूद्ध होगा तथा ऐसे आदेश निरस्त किये जाने योग्य होगे।

11. प्रति उत्तर में उ०प्र० सरकार के स्थाई अधिवक्ता ने कथन किया की याची ने वृहद स्तर पर आदेश 2004 व निबन्धन पत्र की शर्तो के विरूद्ध कार्य किया एवं गम्भीर अनियमिताये बरती है। क्षेत्रीय पूर्ति निरीक्षक की जांच आख्या में उल्लेखित है कि याची ने ग्राहको को अधिक मूल्य में कम सामग्री प्रदान करी व दुकान पर सूचना पट्ट इत्यादि भी नहीं लगाये थे। याची का व्यवहार भी ठीक नहीं रहा। याची ने ऐसा कोई स्पष्टीकरण नहीं दिया है जिससे,

निरस्तीकरण आदेश में लिये गये आधार असत्य माने जाये। याची को अपना पक्ष रखने के लिए समय दिया गया तथा याची ने लिखित स्पष्टीकरण के साथ आवश्यक दस्तावेज भी लगाये थे, जिनका परिशीलन किया गया। अतः नैसर्गिक न्याय के नियमो का पूर्णतः पालन हुआ है।

12. याची व प्रतिवादीगण के विद्वान अधिवक्ताओं के कथनो का श्रवण किया एवं उपलब्ध दस्तावेजो तथा विधि व्यवस्थाओ का परिशीलन ध्यान पूर्वक किया।

13. नैसर्गिक न्याय के सिद्धान्तो का पालन किसी भी कार्यवाही चाहे वो न्यायिक, प्रशासनिक, न्यायिकल्प ही क्यो न हो आवश्यक है। यह विधि सम्मत है कि सही, निष्पक्ष एवं पारदर्शी निर्णय के लिए इन सिद्धान्तो का पालन करना अनिवार्य है। निर्णय लेने की प्रक्रिया में निष्पक्षता सुनिशिक्षित करना निष्पक्ष निर्णय के अधिकार का एक महत्वपूर्ण स्तम्भ है। ऐसी प्रक्रिया जिसमें इन सिद्धान्तो का परिपालन नहीं किया जाता है, तो ऐसा माना जायेगा कि पीड़ित व्यक्ति के अधिकारो पर प्रतिकूल प्रभाव हुआ है।

14. सर्वोच्च न्यायालय ने अपने कई निर्णय मे निरंतर यह प्रतिपादित किया है कि नैसर्गिक न्याय के सिद्धान्तो का पालन अनिवार्य रूप से किया जाना चाहिये। ऐसा न करने से समस्त कार्यवाही निरस्त की जा सकती है। सिद्धान्तो का परिपालन न करने से यह माना जायेगा की कार्यवाही मे निष्पक्षता नहीं रखी गयी है। ***एस एल कपूर बनाम जगमोहन एंड सन्स (1980 (4) एस सी सी, 379)*** मामले में यह प्रश्न उठा था कि क्या नैसर्गिक न्याय के नियमो का पालन तब भी किया जाना चाहिये जब कोई ऐसे अविवादित तथ्य जो निर्णय लेने के लिए पर्याप्त हो और नोटिस देने के बाद भी अन्त परिणाम वही होगा। इस पर सर्वोच्च न्यायालय नॅ प्रतिपादित किया कि केवल इसलिए क्योंकि तथ्य स्वीकार किये जा सकते है या निर्विवाद है, नैसर्गिक न्याय के सिद्धान्तो का पालन न करने का कोई कारण नहीं हो सकता है। सर्वोच्च न्यायालय की पाँच न्यायमूर्ति की संवैधानिक पीठ ने ***एस एस गिल बनाम चीफ इलेक्शन कमिशनर (1978 (1) एस सी सी 405),*** में यह प्रतिपादित किया कि प्राशासनिक एवं अर्धन्यायिक कार्यो में नैसर्गिक न्याय के सिद्धान्तो का परिपालन अनिवार्य है। नैसर्गिक न्याय के नियमों का उद्देश्य "न्याय को विफल होने से रोकना" है। ये नियम न्यायिक तथा न्यायिक-कल्प कार्रवाईयों में तो लागू होते ही हैं, वरन प्रशासनिक कार्रवाईयों में भी लागू होते हैं। न्यायिक-कल्प जाँच तथा प्रशासनिक जाँच, दोनों, का उद्देश्य यही होता है कि न्यायसंगत विनिश्चय पर पहुँचे। प्रशासनिक कार्यवाहियों मे भी 'निष्पक्षता', एवं 'मनमानेपन का बहिष्करण', होना तथा उचित एवं न्यायसंगत रूप से कार्य करना, अनिवार्य है। यह सुप्रतिष्ठित विधि है कि, ऐसी प्रशासनिक कार्यवाही में, जो सिविल दुष्परिणाम उत्पन्न करती हो, नैसर्गिक न्याय के सिद्धान्त अनिवार्य रूप से लागू होते है। अर्थात् किसी प्रशासनिक आदेश से सिविल दुष्परिणाम उत्पन्न होते हों तो ऐसा प्रशासनिक आदेश भी नैसर्गिक न्याय के नियमों के अनुपालन के उपरान्त ही पारित कियॅ जा साकतॅ है। "विधिसम्मत

शासन" का अंतनिर्हित सिद्धान्त है कि सिविल दुष्परिणाम उत्पन्न करने वाला आदेश, नैसर्गिक न्याय के सिद्धान्तों का अनुपालन करके ही पारित किया जाये।

15. वर्तमान याचिका के तथ्यो से यह विदित 15होता है, कि याची के विरूद्ध समस्त कार्यवाही का आधार क्षेत्रिय पूर्ती अधिकारी की जाँच आख्या दिनांक 26.06.2016 है। उप जिलाधिकारी एवं आयुक्त ने उक्त जांच आख्या को ही आधार मान कर अपने निर्णय पारित किये है। इस तथ्य15 से कि उक्त जांच आख्या के प्रति याची को नहीं दी गई है, प्रति वादी के अधिवक्ता इंकार नहीं कर पाये है। अतः यह सिद्ध होता है कि उक्त जांच आख्या की प्रति याची को कभी भी नही दी गई है। मै याची के विद्वान अधिवक्ता के कथन से पूर्णत: सहमत हूँ की निर्णय लेने की प्रक्रिया में निष्पक्षता नहीं रखी गयी है व नैसर्गिक न्याय के सिद्धान्तों का परिपालन नहीं किया गया है।

16. उपरोक्त विवेचना के प्रकाश में एवं उपरोक्त वर्णित न्यायिक प्रतिपादनों के गहन अध्ययन के उपरान्त, मै इस निष्कर्ष पर पहुँचता हूँ कि वर्तमान वाद मे नैसर्गिक न्याय के सिद्धान्तो का अनुपालन नहीं हुआ है। इस कारण से निर्णय लेने की सम्पूर्ण प्रक्रिया दूषित हो गई है। अतः ऐसी प्रक्रिया को न्यायपूर्ण व दोषरहित नहीं कहा जा सकता है। अतः आक्षेपित आदेश दिनांक 16.09.2011 (उपजिलाधिकारी निजामाबाद, आजमगढ़) एवं 25.01.2017 (आयुक्त, आजमगढ़ मण्डल, आजमगढ़) न्यायपूर्ण न होने के कारण निरस्त किये जाने योग्य है, अतः निरस्त किये जाते है। यह याचिका इस आदेश के साथ अंतिम रूप से निस्तारित की जाती है, कि वर्त्तमान प्रकरण उप जिलाधिकारी आजमगढ़ को प्रतिशरण इन निर्देशों के साथ किया जाता है, वो वर्त्तमान प्रकरण को नैसर्गिक सिद्धान्तों का पालन करते हुए, इस आदेश की प्रमाणित प्रतिलिपि के मिलने के चार सप्ताह के अंतर्गत, गुण दोष के आधार पर ***निस्तारित*** करेंगे। यहां यह उल्लेखित करना आवश्यक है कि इस न्यायालय ने वर्तमान प्रकरण के गुण दोष पर कोई टिप्पणी नहीं की है।

(2020)03-05ILR A1836
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2019

BEFORE

THE HON'BLE AJAY BHANOT, J.

WRIT - C No. 25122 of 2019

Satyam Rai ...Petitioner
Versus
Banaras Hindu University, Varanasi & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Kumar Srivastava, Sri Ajay Kumar Rai, Sri Ratnakar Upadhyay, Sri R.K. Ojha

Counsel for the Respondents:
Sri Krishna Raj Sigh Jadaun, Sri Rijwan Ali Akhtar, Sri V.D. Chauhan, Sri V.K. Upadhyay

A. Constitution of India – Fundamental Rights – Nature – Exhaustive or Evolving – The Constitutional law defines the substance of fundamental rights – The text of the Constitution, is a conceptual philosophy of fundamental rights, and not an exhaustive guide

to fundamental rights – The text of the Constitution is fixed, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence – There is a method in the evolution of constitutional law jurisprudence. (Para 50 and 54)

B. Constitution of India – Interpretation – Role of the Court – Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point – Development of constitutional law happens on these sure foundations. Constitutional rights are distilled from this process – The judicial process would have to evolve, to meet the felt needs of the time – For the process to be credible and efficacious, a change has to come from within the judicial system – But change is inevitable, if judicial adjudication is to be just and remain relevant. In this regard, the High Court has **a responsibility to fulfill, if not an obligation to discharge.** (Para 55, 60 and 62)

C. Education – Importance – Education is the supreme act of nation building, which essentially means nurturing of constitutional values, realization of constitutional goals, and strengthening the rule of law – The quest for knowledge defines the Indian civilization. A salient feature in the search for learning, distinguishes the Indian civilization – Knowledge in Hellenic civilization was founded on reason. The human thirst for knowledge was also quenched by revelation – The distinctive feature of learning in Indian civilization, is that India's search for knowledge, while always embracing reason as a method and never denying revelation as a source, insists on realization as its goal. (Para 63 and 65)

D. University – Role and contribution – The universities are the custodians of the old values, even as they ceaselessly push the boundaries of modern knowledge – Through knowledge they will learn, that humanity unites more than diversity differentiates. With learning they will understand, that diversity enriches human life, and does not divide humankind – University is a paternal institution. By the act of suspension or debarment of a delinquent student, the university abandons its ward. The university has solved its problem, but the society has one at its hands – The role of the University does not end in punishing perpetrators of violence. It begins with the identification of the causes of violence, communal hatred, and other forms of deviant conduct – The fruit of knowledge imparted by the universities lies in the manifestation of human values in the human personality and expression of humanity in human conduct. (Para 67, 68, 162 and 163)

E. Constitution of India – Article 21 – Human dignity – Fundamental Right – Human dignity made a decisive contribution in the development of the rights of life and liberty, in jurisprudential systems of free societies across the world – Human dignity is not inserted in the text of the fundamental rights under the Constitution of India. Human dignity occurs in the Preamble to the Constitution of India – Consistent and high authority have thus entrenched human dignity as fundamental to right to life, which flows from Article 21 of the Constitution of India. (Para 92, 97 and 121)

F. Constitution of India – Article 21 – Fundamental Right – Right against dehumanizing elements of punishment – Every form of punishment should protect the essential sanctity of human life and comport with fundamental norms of decency evolved by a civilized society – Dignity of an individual/student is injured, when it is found that the punishment precludes reform by rehabilitative measures, and prevents self enhancement by further education – The degrading or dehumanizing elements of the punishment have to be eliminated to bring it in conformity with requirement of human dignity, contemplated by Article 21 of the Constitution of India. (Para 136 and 146)

G. Constitution of India – Article 21 – Rehabilitation and Reformation – Absence of an environment of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation – The individual is permanently discarded by the institution, and loss of human self worth is total – This system of punishment is destructive of fundamental elements of human dignity, and

violative of Article 21 of the Constitution of India. (Para 137)

H. Therapeutic Approach – Significance – Solution of Social Dysfunction – Under the therapeutic method, however, an individual's happiness depends on his or her self-esteem, and self-esteem is a by-product of public recognition – With the rise of therapeutic approaches by mid century, they were increasingly seen as social pathologies that needed to be treated through counseling and psychiatric intervention – Therapeutic solutions to social problems, are being increasingly recognized by social scientists, medical experts, psychologists, and jurists alike. (Para 153 and 194)

I. Nudge – Methodology – Behavioral Change – Importance of Yoga, Meditation and Vipassana – The methodology of 'nudges', in creating behavioral change has been gaining acceptability. The organization 'Nudge' in Lebanon, has done noteworthy work with refugee children, and on environmental protection – The Behavioral Insights Teams sometimes called 'Nudge Units', are also existing in many nations including Australia, Canada, Germany, Qatar, the United Arab Emirates, Japan, the United States, and the United Kingdom – Ancient branches of knowledge and wellness like yoga, meditation, vipassana and so on may prove to be rich resources to benefit from. (Para 189, 190 and 191)

J. Doctrine of Proportionality – Punishment – Balance between Institutional discipline and Individual rights – The essence of proportionality is that, the competent authority while imposing a punishment upon a delinquent student, has to co-relate and balance the imperatives of institutional discipline with the demands of individual rights – Too light a punishment will not be conducive to institutional discipline. Too harsh a punishment will not be consistent with norms of justice – Held, the impugned action fails the test of proportionality – Writ of mandamus regarding rehabilitation program issued to the Universities. (Para 214 and 217)

Writ Petition disposed of. (E-1)

Cases relied on :-

1. S.B.I. & ors.Vs. P. Soupramaniane; (2019) SCC OnLine SC 608

2. Vishaka Vs. St. of Raj.; 1997 (6) SCC 241

3. Rattan Chand Hira Chand Vs. Askar Nawaz Jung, reported at (1991) 3 SCC 67

4. Sajjan Singh Vs. St. of Raj., AIR (1965) SC 845

5. Kesavananda Bharati Vs. St. of Kerala; (1973) 4 SCC 225

6. Maneka Gandhi Vs. U.O.I.; (1978) 1 SCC 248)

7. Olga Tellis Vs. Bombay Municipal Corpn.; (1985) 3 SCC 545)

8. Prem Shankar Shukla Vs. UT of Delhi; (1980) 3 SCC 526

9. Francis Coralie Mullin Vs. UT of Delhi; (1981) 1 SCC 608

10. Bandhua Mukti Morcha Vs. Union of India; (1984) 3 SCC 161

11. Khedat Mazdoor Chetna Sangath Vs. St. of M.P.; (1994) 6 SCC 260

12. M.Nagaraj Vs. U.O.I., (2006) 8 SCC 212

13. Shabnam Vs. U.O.I., (2015) 6 SCC 702

14. Jeeja Ghosh Vs. U.O.I., (2016) 7 SCC 761

15. Mehmood Nayyar Azam Vs. St. of Chhattisgarh; (2012) 8 SCC 1

16. National Legal Services Authority Vs.U.O.I., (2014) 5 SCC 438

17. Maharasthra University of Health Sciences Vs.Satchikitsa Prasarak Mandal; (2010) 3 SCC 786

18. Selvi Vs.St. of Karnataka; (2010) 7 SCC 263

19. Sunil Batra (II) Vs. Delhi Administration; 1980 (3) SCC 488

20. T.K. Gopal Vs. St. of Karnataka; (2000) 6 SCC 168

21. Asfaq Vs. St. of Raj. & ors., (2017) 15 SCC 55

22. K.S. Puttaswamy Vs. U.O.I., (2017) 10 SCC 1

23. Rosenblatt Vs. P Baer; 1966 SCC OnLine US SC 22 : 383 US 75 (1966)

24. Armoniene Vs. Lithuania; (2009) EMLR 7

25. Procunier, Corrections Director, ET AL. Vs. Martinez ET AL; 416 U.S. 396 (1974)

26. Trop Vs. Dulles; 356 US 86 (1958)

27. Avinash Nagra Vs. Navodaya Vidyalaya Samiti & ors, (1997) 2 SCC 534

28. Devarsh Nath Gupta Vs. St. of U.P. & ors, 2019(6) ADJ 296 (DB)

29. Ranjit Thakur Vs. U.O.I., (1987) 4 SCC 611

(Delivered by Hon'ble Ajay Bhanot, J.)

This judgment has been structured by dividing it into various sections to facilitate analysis and for easy read. They are:

A. Reliefs sought

B. Arguments of learned counsels for the parties

C. Facts
(i). Background
(ii). Suspension order : Consequences
(iii). Suspension order : Validity

D. Legal Issues common in all writ petitions

E. Stands of various respondents on affidavits
(i).Response of IIT BHU
(ii).Response of AMU
(iii).Response of BHU
(iv).Response of UGC
(v).Response of UoI

F. Evolution of Fundamental Rights by courts
(i) Legislative lag, executive inertia and fundamental rights

G. Process of law and the courts : Current State & Contemporary Challenges

H. Education
(i). Importance and scope
(ii). Role and obligation of universities

I. Discipline in Universities: Concept, Need & Challenges
(i). Violence, intimidation and moral turpitude
(ii). Communal disturbances in universities
(iii). Discipline in universities
(iv). Statutory approach to maintaining discipline

J. Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality

K. Punishments & Article 21
(i). Right to human dignity
(ii). Supreme Court on human dignity
(iii). Comparative International Jurisprudence
(iv). Constitutionality of punishments under the statutes
(v). Systemic responses : Responsibilities of the State and the universities

L. Reform, Self Development & Rehabilitation:
(i). Role of universities in achieving behavioural change
(ii). Imbibing constitutional values and purging communal hatred
(iii). Present discontents of students and solutions
(iv). Creation of reform, self development, rehabilitation programmes
(v). Concerns of universities regarding discipline & restraints during the reformation, self development & rehabilitation programme

M. Proportionality and Punishment

N. Conclusions & Reliefs

O. Appendix

A. *Reliefs sought*

1. The petitioner has assailed the order dated 27.12.2017 passed by the respondent no. 4, Assistant Registrar (ACAD), Banaras Hindu University, Varanasi, suspending him from all privileges and activities of the University and hostel. The petitioner has further challenged the consequential order dated 03.07.2019, wherein the respondent University declined to consider the case for admission to any of the courses in the University to the academic sessions 2019-20.

2. The petitioner has also prayed for a writ in the nature of mandamus to command the respondents to consider the case of the petitioner for admission in M.A. History for the academic session 2019-21.

B. *Arguments of the learned counsel for parties*

3. Sri R. K. Ojha, learned Senior Counsel assisted by Sri Ratnakar Upadhyay, learned counsel for the petitioner submits that the impugned order was passed in violation of the statutes of the university. The punishment imposed upon the petitioner is disproportionate. There is no provision for reform and rehabilitation of delinquent students in the statutes, which has resulted in violation of the fundamental right of the petitioner guaranteed under Article 21 of the Constitution of India.

4. Sri Anish Kumar, Sri Pankaj Misra and Sri Gaurav Pundir, learned counsels for the petitioner in connected writ petitions adopt the aforesaid arguments of the learned Senior Counsel, apart from raising factual issues peculiar to the respective writ petitions in which they appear.

5. Sri V.K. Upadhyaya, learned Senior Counsel assisted by Sri V.D. Chauhan, learned counsel for the BHU submits that the BHU has taken action as per law.

6. The learned Senior Counsel relied on the affidavits filed by the B.H.U., on creation of a reform and rehabilitation programme for delinquent students.

7. Sri Ajit Kumar Singh, learned Senior Counsel assisted by Sri V. D. Chauhan, learned counsel for the IIT BHU, contends that the IIT BHU, as a matter of policy accepts and is willing to adopt a professionally designed reform and rehabilitation programme for delinquent students. However, good order and discipline have to be maintained in the university, at all costs. In fact IIT BHU is currently even running a reform programme. He fairly conceded that the programme is not fully developed, and does not have a supporting statutory/legal frame work.

8. Sri Shashank Shekhar Singh, learned counsel for the respondent-AMU, submits that the AMU fully accepts the idea of a reform and rehabilitation programme for delinquent students on an institutional basis. He however contends that no compromise with the good order, discipline, and the stability of the academic atmosphere can be made in any manner.

9. Sri Rizwan Akhtar, learned counsel for the UGC, Sri Rakesh

Srivastava, and Sri Abrar Ahmed, learned counsels for the Union of India, have also been heard.

C. Facts

(i) Background

10. The petitioner claims that he is eligible for admission to the M.A. History course in the respondent University, in the academic session 2019-21. He has been denied admission on the foot of the impugned order of suspension dated 27.12.2017 and the consequential order dated 03.07.2019.

(ii) Suspension order : Consequences

11. The petitioner was suspended from all privileges and activities of the University and hostel by order dated 27.12.2017 purportedly passed under ECR No. 264 of 1979 as contained in Chapter VIII of the BHU Calender Part I Volume II, providing for ordinances governing maintenance of discipline and grievances procedure.

12. Consequent to the order dated 27.12.2017, the petitioner shall remain suspended, till his acquittal by the court in the criminal case. No terminal date can be set for conclusion of the criminal trial. Hence the suspension is for an indefinite period. The suspension order bars the petitioner, from entering the university campus, or accessing any facilities therein. All further academic pursuits are denied to the petitioner during the suspension. The effect of the order of suspension is punitive.

(iii) Suspension order : Validity

13. The order dated 27.12.2017, has been passed in purported exercise of powers of the ECR No. 264 of 1979, as contained in Chapter VIII of the BHU Calender Part I, Volume II, providing for ordinances governing maintenance of discipline and grievances procedure.

14. The order dated 27.12.2017 passed by the Assistant Registrar (ACAD), Banaras Hindu University, Varanasi which suspends the petitioner from all privileges and activities of the University and hostel, records that an F.I.R. No. 1510 of 2017 was registered under Sections 147, 148, 427, 435, 341, 323, 34 I.P.C and ¾ Prevention of Damage to Public Property Act, 1984, against a number of students including the petitioner. The order references the communication of the Chief Proctor, B.H.U. dated 26.12.2017, which recommends disciplinary action against the students named in the F.I.R., along with the petitioner.

15. The validity of the impugned suspension order, on its merits shall be considered, in the following sequence. The examination of the material available before the authority passing the order, will be followed by the consideration of scope of the provisions. Finally, adherence to the procedure prescribed by law will be tested.

16. The provision under which the suspension order was passed, empowers the competent authority of the University, to suspend a student from all privileges and activities of the University, when such student is "accused of, or involved in, an offence involving moral turpitude or heinous crime (including those involving violence or intimidation) and is wanted by the police or has been released on bail in connection with any such offence, or

detained under any provision, or against whom Police investigation or criminal prosecution for any such offence is pending, of enquiry under U.P. Goonda Act is initiated;"

17. Lodgement of an F.I.R. for any criminal offence, does not automatically lead to a suspension, under the aforesaid provision.

18. The intention of the legislature is not far to seek. Lodgement of false criminal cases, is not uncommon in the country. Further criminal trials take an inordinately long time to conclude. No terminal date can be set, once criminal proceedings are set in motion.

19. Mechanical exercise of power of suspension, upon mere lodgement of a criminal case, will lead to unintended consequences. On many occasions, it would lead to an indefinite suspension, and denial of opportunities of education. At times causing a stigma, without any enquiry.

20. The provision obligates the authority, to record its satisfaction whether the FIR is in respect, of an offence involving moral turpitude, or a heinous crime (including those involving violence and intimidation). This condition precedent has to be followed before an order of suspension is passed.

21. Moral turpitude is a phrase of wide ambit. Some definitions of moral turpitude, from good authority will be extracted, to take the discussion forward. The Black's Law Dictionary defines "moral turpitude" as under:

"An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

22. According to Bouvier's Law Dictionary, meaning of "moral turpitude" is under:

"Bad faith, bad repute, corruption, defilement, delinquency, discredit, dishonor, shame, guilt, knavery, misdoing, perversion, shame, ice, wrong."

23. The mere commission of a criminal offence, will not lead to an inference, that the act is one of moral turpitude. Offences which can be categorised, as those involving "moral turpitude", will be depend on the facts of each case.

24. The scope and terms of such enquiry, were elaborated by the Hon'ble Supreme Court, in the case of **State Bank of India and Others Vs. P. Soupramaniane**, reported at **2019 SCC OnLine SC 608**, by holding that:

"10. There is no doubt that there is an obligation on the Management of the Bank to discontinue the services of an employee who has been convicted by a criminal court for an offence involving moral turpitude.Though every offence is a crime against the society, discontinuance from service according to the Banking Regulation Act can be only for committing an offence involving moral turpitude. Acts which disclose depravity and wickedness of character can be categorized as offences involving moral turpitude. Whether an offence involves moral turpitude or not depends upon the facts and the circumstances of the case. Ordinarily, the tests that can be applied for judging an offence involving moral turpitude are:

a) Whether the act leading to a conviction was such as could shock the moral conscience or society in general;

b) Whether the motive which led to the act was a base one, and

c) Whether on account of the act having been committed the perpetrators could be considered to be of a depraved character or a person who was to be looked down upon by the society.8

11.The other important factors that are to be kept in mind to conclude that an offence involves moral turpitude are :- the person who commits the offence; the person against whom it is committed; the manner and circumstances in which it is alleged to have been committed; and the values of the society.9According to the National Incident - Based Reporting System (NIBRS), a crime data collection system used in the United States of America, each offence belongs to one of the three categories which are: crimes against persons, crimes against property, and crimes against society. Crimes against persons include murder, rape, and assault where the victims are always individuals. The object of crimes against property, for example, robbery and burglary is to obtain money, property, or some other benefits. Crimes against society for example gambling, prostitution, and drug violations, represent society's prohibition against engaging in certain types of activities. Conviction of any alien of a crime involving moral turpitude is a ground for deportation under the Immigration Law in the United States of America. To qualify as a crime involving moral turpitude for such purpose, it requires both reprehensible conduct and scienter, whether with specific intent, deliberateness, willfulness or recklessness."

25. A similar fact based enquiry, will determine if the offending act, was a "heinous crime (including those involving violence & intimidation)".

26. Satisfaction of these jurisdictional prerequisites, is not recorded in the impugned order. No enquiry in that regard was conducted. The issue whether the offending act attributed to the petitioner, fell in the categories of "heinous crime (including violence and intimidation) or was an act of moral turpitude", is wholly absent from consideration. The impugned order suffers from non application of mind, and was passed mechanically.

27. In light of the preceding discussion, this Court finds that, the order dated 27.12.2017 was passed in violation of ECR No. 264 of 1979, as contained in Chapter VIII of the BHU Calender Part I, Volume II, providing for ordinances, governing maintenance of discipline and grievances procedure, and is arbitrary.

28. The order dated 03.07.2019, being a consequential one, has no legs to stand on after it is found that the order dated 27.12.2017 is illegal and arbitrary.

D. *Legal Issues common in all writ petitions*

29. Absence of any reform and rehabilitative measures, in the administrative and legal frameworks of the universities, has serious legal and constitutional implications.

30. The impugned action and the statutory regime, of imposing punishments, will also be judged in such constitutional and legal perspectives. The discussion on these issues, shall be common in all the companion writ petitions.

31. Calling attention to the statutes of the universities namely, BHU, IIT BHU and AMU, the learned counsels for the petitioners; contended that the said statutes do not contain provisions for reform and rehabilitation of delinquent students. The action against delinquent students, is governed and regulated, solely by the penal provisions, of the statutes of the respective universities. The punitive scheme is a common thread, in the statutes of all the three universities.

32. In response, all the counsels for the various respondents universities', in fact conceded, that as on date no structured and professionally designed programmes for reform, self development and rehabilitation of delinquent students, backed by a proper legal frame work, exist in the respective universities.

33. Accordingly, various orders were passed by this Court, from time to time, requiring the respective universities namely, Banaras Hindu University, Indian Institute of Technology Banaras Hindu University, and Aligarh Muslim University, as well as the University Grants Commission and the Union of India through the Ministry of Human Resource Development, New Delhi, to submit their responses in regard to creation of a reform and rehabilitation frame work, for delinquent students in universities and institutions of higher learning. The respondents were also required to indicate, whether they had any opposition or even reservation, in regard to the creation of the reform and rehabilitative programme for delinquent students in the universities.

34. All the respondents namely Banaras Hindu University (hereinafter referred to as BHU), Indian Institute of Technology, Banaras Hindu University (hereinafter referred to as IIT BHU), Aligarh Muslim University (hereinafter referred to as the AMU) as well as Union of India through Ministry of HRD and University Grants Commission (hereinafter referred to as UGC) have submitted their responses to the aforesaid issues.

E. *Stands of respective respondents on affidavits*

(i) *Response of IIT BHU*

35. The IIT BHU in its affidavit has recorded its full agreement with a reform oriented approach, to deal with deviant behaviour in students. Thus IIT, B.H.U., has made a ringing endorsement, of the need to adopt a reform and rehabilitation programme for delinquent students. However, it has also underscored the need for punitive action, to maintain a peaceful environment in the campus. The relevant paras of the affidavit are quoted hereinunder:

"2. That the present affidavit is being filed in compliance of the order dated 19.9.2019 passed by this Hon'ble Court.

4. That the Institute as indicated in the foregoing paragraph, is in full agreement with a reform oriented approach. However, in cases where reformative steps do not yield the desired corrections in behavior and actions of erring students, the Institute

has to resort to punitive action in order to maintain the peaceful environment in the campus."

36. By categorically stating its commitment to reform of delinquent students, the IIT BHU has been true to its founding principles, and has faithfully discharged its obligations, under law and to the society.

(ii) Response of AMU

37. Upon orders being passed by this Court, the AMU to its credit, constituted an expert committee. The report of the expert committee has been submitted, and is made part of the record of the Court. The relevant parts of the Committee Report are extracted hereinbelow:

"In the light of the above the committee observes as under:

1. Our criminal justice system envisages two type of laws: one for Juveniles and second for other than Juveniles. There is a separate law for Juveniles known as Juvenile Justice Act, 2015 whereas others are covered under Code of Criminal Procedure, 1. 1976 and Indian Penal Code, 1860. The application of AMU Discipline and Conduct Rules, 1985 does not come primarily under the definition of Juvenile therefore the protection available to Juveniles are not available to the Students of the university in general. It becomes more relevant in view of the fact that at the time of admission every the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University is required to sign a declaration to the effect that he submits himself to the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University.

2. That it is also pertinent to mention here that Aligarh Muslim University is primarily a RESIDENTIAL UNIVERSITY and there are approximately 36,665 Students [22.593 University Students and departments/courses/Schools in the Aligarh Muslim University. Among these students 12,158 students reside in 56 Hostels (22 for girls) in the campus within the radius of 10 KM. Therefore, the future career of thousands of the students cannot be allowed to be jeopardized for the sake of handful of students who are involved in the indiscipline act and are destroying the whole atmosphere of the University.

3. In principle that criminal activity has no role to play in our education system therefore the students who are involved in the criminal activity have also no role to play in our education system. The students who are indulged in the criminal activity have different mind-set and have nothing to do with their studies. They are not at all interested to pursue their studies and their presence only hampers the study of the other students who are interested to pursue their study. It is the duty of the University to marginalize such type of students so that the students at large, who are more interested to pursue their studies, may pursue their studies in cordial and peaceful/ atmosphere.

4. That as per existing rules of the University, there is no compulsory/ mandated counselling available to students against whom the discipline and conduct rules are invoked. These rules are also not invoked in a routine way but being a residential University there are day-today interactions/counselling with the Wardens, Provost Tutors, Teachers and Senior Students holding positions of Senior Hall/Food etc.

5. That the extreme punishments as provided in the 1985 rules are invoked

when there is an extreme situation and continuance/presence of the students became a threat to the academic environment and campus life of the University.

6. At the same time the observations of the Hon'ble Mr. Justice Ajay Bhanot in this matter are highly appreciable in the context to infuse a reformative approach that the solution lies in engaging with the students, and harnessing their energies creatively. Errant behavior has to be reformed and not condemned. Erring students have to be transformed and not judged. The purpose of education is to unlock the immense potentiality in the human resource of the nation. This is possible by bringing about a conceptual shift in the concept of enforcing discipline, in the portals of the University. Indiscipline unchecked is indiscipline unleashed. But it is equally true. that expelling students from the University is a short term, if not a myopic view of the issue. A balance has to be drawn by the University authorities. The University has to create an ecosystem, with qualified staff and detailed programs of engaging with such students, with a view to give them an opportunity to reform themselves. Expulsion of students would abandon them to their own devices, close the doors of reformation to them, and shut them out from the redeeming light of knowledge. Leaving children accused of misconduct or deviant behavior, to fend for themselves would create issues for the society at large. In case Universities decline to shoulder the responsibilities of bringing such children back to the correct path, and do not provide the frame work for mainstreaming this class of students, the consequences would be detrimental to the society at large. There is no better institution in our democratic frame work, to embrace the young and questing spirits who have strayed from their path of morally upright and correct conduct. The Universities are uniquely equipped to deal with the challenge on an institutional basis. The Universities are repositories of knowledge, resources and experience to meet the challenge at hand. What is at stake, is not merely the future of an individual, but stability of the society The concerns of the society have to be handled by the University. The magnitude of the challenge is large, but it is imperative for the Universities to accept it and provide the adequate response.

After detailed deliberations and in the backdrop of above the committee proposes that:

1. Structural reformative approach may be included in the AMU Students Conduct and Discipline Rules of 1985 as this committee has identified some areas (not all inclusive) for counselling by a psychologist as enumerated above.

2. As the misconduct offences/crimes related to internet and cyberspace were not available when the Discipline Rules were framed, the same needs to be identified and appropriately included in the AMU Students Conduct and Discipline Rules of 1985 as it is growing among young and youth.

3. Outside campuses were not established when these rules were framed, hence, there is also need to amend these rules to include a structure for those centres.

The committee therefore recommends to the Vice-Chancellor as follows:

AMU Students Conduct and Discipline Rules 1985 were framed almost 30 years back and in the light of the observations given above, a detailed and exhaustive exercise may be undertaken by a

committee to be appointed by the Vice-Chancellor under the convenorship of the Proctor of the University to formulate and propose a draft of revised AMU Students Conduct and Discipline Rules, inclusive of reformative approach, after exploring similar rules already enforced by sister universities and institutions in India and abroad for further consideration of the Vice-Chancellor and Academic Council of the University."

38. The AMU has thus in principle, recognized the need for a reform and rehabilitation programme for delinquent students in some areas in the university. The AMU too has accorded top priority, to the maintenance of discipline in the campus, and is rightly unwilling to compromise with the same.

(iii) Response of BHU

39. The initial affidavit filed by the BHU, in regard to their stand on a reformative and rehabilitation programme for delinquent students, stated in effect that the reformation of the students indulging deviant behaviour is achieved, by providing for various categories of punishments, depending upon the nature of indiscipline. It further asserted, that in the name of reformation, the University cannot give a "go by", to the objectives of the university. The relevant paras 17 and 18 of the affidavit dated 17.09.2019 are extracted hereunder:

"17. In the present case no such conditions exist and as such the continuance of the order of suspension of the petitioner from the privileges of the University and Hostel is in accordance with law. That 17. it is the University humbly that submitted administration and the Vice-Chancellor in particular is the custodian of the interests of all the students involved in various academic pursuits in the University. In the case of Banaras Hindu University the number of all the students at various levels runs into more than 30 thousand. For the smooth functioning of the University and maintenance of an environment conducive to academic pursuits the interest of an individual student must give way to the larger interests of all the students as a whole. This is not only in the interest of the students themselves but also in public interest. In the of reformation of the students the University name administration cannot give a go by to the objectives of the University nor can it take an action which may have the potential of destroying the smooth functioning of the University embroiling the University in large scale unrest both in the student as well as in the teaching community. If the University such situation is brought about a administration would be failing in its duty. The fact that Banaras Hindu University is the largest residential University in the country if not the world cannot be lost sight of. Even small spark has the potential of turning into a conflagration which may become difficult to contain.

18. That the facility and provisions aimed at reformation of the erring students found indulging in deviant behavior is inherent in the Ordinances of the University dealing with students' indiscipline by providing for various categories of punishments depending upon the nature of indiscipline."

40. However, subsequently, the BHU filed an affidavit on 26th September, 2019, easing its reservations, against a reform and rehabilitation programme. The affidavit

exhibited a shift in stand, indicating a willingness to consider a reformative approach. The para 7 of the affidavit is extracted hereunder:

"7. That all the aforesaid mechanisms and provisions exist in the University for creation and preservation of an academic ambience conducive to teaching and learning and vibrant and peaceful community life. However, there exist no provision in the Rules of the University for any formal reformative mechanism or process for such students as are found involved in an offence involving moral turpitude or heinous crime and hence are suspended from the privileges of the University. However, the University is not averse to considering this aspect, if it is found appropriate by the University through Constitution of a Committee of stakeholders which may look into as to whether such a mechanism is desirable in principle in the context of maintenance of academic ambience of the University or it may be detrimental to it, particularly, to the interest of larger group of the students, teachers and employees."

41. In substance the BHU was open to the concept of a structured reformative programme. It has however, desisted from taking a categorical position, on this most critical issue. While openness to new ideas is appreciated, failure to take a specific stand is also noticed. The Court will go no further.

(iv) Response of UGC

42. Sri Rizwan Ali Akhtar, learned counsel for the UGC has relied on the affidavit filed by the UGC. The UGC in its affidavit, stated that the universities are autonomous institutions. The academic and administrative decisions, are to be taken by the universities concerned, as per law. It was also stated that "the UGC has no role to play on day to day function of the Central Universities".

(v) Response of UoI

43. The Ministry of Human Resource Development, Government of India has chosen not to file any affidavit, despite orders passed by the Court and opportunities granted by the Court. The Court has to proceed, with the hearing in the interests of justice.

44. It was informed that the Ministry of Human Resource Development, Government of India, on its part had sent communications to the AMU and BHU, to protect its interests. The Court finds that the interests of the Union of India, are in no manner adversely affected. In these cases the interests of the Union of India, are not converse to the universities.

"The best lack all conviction."
~WB Yeats

45. Present discontents cannot be addressed by rote responses. Contemporary problems cannot be resolved by jejune formulae.

46. The universities cannot avoid a stand at the decision point. By prevarication at the decision point, the university may postpone the reckoning, but cannot escape responsibility.

47. Law has to hold institutions accountable to their obligations, to the founding purposes, to the students and to the society at large.

48. Universities of eminence cannot justify present inertia on the foot of past glory. Universities have to be aware of the

risks, of basking in the reflected glory of the past. Eminence is achieved by past glory, however, reputation is retained by present endeavours.

49. Universities at certain critical decision points, would be true to their founding purposes and extant obligations by making clear and creative interventions. The universities as well as other authorities cannot show ineptitude in the face of crises, and equivocation in the face of solutions. In these critical situations the universities as well as other authorities, have to stand up and intervene and not stand by and equivocate.

F. *Evolution of Fundamental Rights by courts*

50. The fundamental rights of citizens are stated in Part III of the Constitution of India. But as in all cases, text of the rights can never be the exhaustive description of all rights. Rights have to be interpreted from the text of the Constitution. The process of interpretation of the text, often results in the evolution of rights. The Constitution is the textual origin of fundamental rights. Constitutional law defines the substance of fundamental rights.

(i) *Legislative lag, executive inertia and fundamental rights*

51. The fast pace of life in modern times often, outstrips the capacity of the legislature, to cope with the consequences of social change. There is a limit to human foresight, but the possibilities of life are limitless. The limits of legislation are the constraints of human foresight. The legislative process is complex and even time taking. Human affairs do not wait on the legislative process. These facts frequently create a legislative lag. It is almost inevitable in the nature of things.

52. The first intersection of life with law, at times happens in courts, even before the legislature grapples with the problems. The courts are often seized, of various emerging issues in social and individual lives, before the legislatures are cognizant of them.

53. A legislative hiatus or executive lethargy, cannot cause a constitutional stasis. The enforcement of fundamental rights, cannot be forestalled by a legislative lag or executive inertia. Constitutional guarantees and Fundamental Rights, have to be enforced on demand. Constitutional overhang is perpetual. Law is always in motion, and never on a holiday.

54. The text of the Constitution, is a conceptual philosophy of fundamental rights, and not an exhaustive guide to fundamental rights. The text of the Constitution is fixed, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence. There is a method in the evolution of constitutional law jurisprudence.

55. Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point. The march of law is also assisted by consensus of values, in the comity of civilized nations. These universal values are often manifested in International Conventions and Treaties. Another source of such values is comparative international jurisprudence. The felt needs of the times are also factored in by the courts.

Development of constitutional law happens on these sure foundations. Constitutional rights are distilled from this process. In this process, the courts discharge their constitutional obligations. This is not judicial activism by courts. It is judging.

56. The Hon'ble Supreme Court in the case of ***Vishaka Vs. State of Rajasthan,*** reported at ***1997 (6) SCC 241***, issued various guidelines for the safety of women at working places. The guidelines held the field, till the Parliament enacted the legislation in that regard. Judicial directions in that case preceded, the legislative enactment. Infact the legislature was alerted, to the need of a legislation to cover the field, by the judgment of the Hon'ble Supreme Court.

57. This narrative will profit from the observations of the Hon'ble Supreme Court, in the case of ***Rattan Chand Hira Chand v. Askar Nawaz Jung***, reported at ***(1991) 3 SCC 67***:

"The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not refurbish them, their role in this respect has to be welcomed.

All courts have at one time or the other felt the need to bridge the gap between what is and what is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute or a document or of an action of an individual which is certain to subvert the societal goals and endanger the public good."

G. *Process of law and the courts : Current State & Contemporary Challenges*

58. The pace of technological, social and economic developments, often pose a challenge to the courts. Courts of today often have to deal with complex issues ranging from science, technology, economics, archaeology, medicine, social sciences and across other fields of highly specialized knowledge.

59. Lawyers on occasions lack the expertise, to grasp and simplify issues of varying complexity, from fields unrelated to law. Judges do not fare any better. Parties have their interests to protect.

60. The intellectual capital created by traditional resources of the judicial process, may not be adequate to manage such contemporary challenges. The judicial process would have to evolve, to meet the felt needs of the time. The rising tides of

human knowledge, cannot pass the courts by. This shall require change in procedures, and development of infrastructure.

61. The intellectual resource base has to be widened. The debate has to be broadbased, to include direct inputs from experts as well. This would also entail well equipped libraries, which are staffed by qualified personnel and research assistants, and may be even experts. Institutional arrangements for interface of the courts with experts, have to be in place to ensure procedural propriety.

62. Debate on these issues will pave the way for the most important change, i.e. change in mindset. For the process to be credible and efficacious, a change has to come from within the judicial system. But change is inevitable, if judicial adjudication is to be just and remain relevant. In this regard, the High Court has a responsibility to fulfill, if not an obligation to discharge.

H. *Education*

(i) Importance and scope

"Where the mind is without fear
and the head is held high,
Where knowledge is free".
~Tagore

63. In education mankind discovered the message of unquenchable optimism, that humans could be separated from the cycle of repetitive thought and action. Learning was the key to the uninterrupted progress of any society. Knowledge instilled the belief that human life could be improved. Through knowledge alone, the hope is realized that humans can be reformed, and humanity can be transformed. Education is the supreme act of nation building, which essentially means nurturing of constitutional values, realization of constitutional goals, and strengthening the rule of law.

64. The idea of the Indian nation is founded, on the ideals of the Indian civilization. Many of these ideals are manifested in the Constitution, and find expression in constitutional law.

65. The quest for knowledge defines the Indian civilization. A salient feature in the search for learning, distinguishes the Indian civilization. Knowledge in Hellenic civilization was founded on reason. The human thirst for knowledge was also quenched by revelation. The distinctive feature of learning in Indian civilization, is that India's search for knowledge, while always embracing reason as a method and never denying revelation as a source, insists on realization as its goal.

66. The diversity of thought is reflected in the plurality of discourse in India. The enduring values which define India, have been preserved and propagated by the tradition of civilized debate. The unity of our nation is protected by respect and affirmation of a multi hued cultural heritage and embracement of varied traditions of thought.

(ii) Role and obligation of universities

"Where the mind is led forward by thee
Into ever widening thought and action."
~Tagore

67. The universities are the custodians of the old values, even as they ceaselessly push the boundaries of modern knowledge.

68. In universities students of diverse backgrounds, and different beliefs, congregate in a common pursuit of knowledge. Through knowledge they will learn, that humanity unites more than diversity differentiates. With learning they will understand, that diversity enriches human life, and does not divide humankind. University experience will help them, cultivate constitutional values, and transcend violent and other aberrational tendencies.

69. Universities are not teaching shops, nor are they mere examining bodies. Universities nurture the intellect and develop the character of the young citizens in a wholesome manner. Students gain knowledge and imbibe values in universities. These dual pursuits constitute the founding purpose of a university, in fact its raison detre.

70. A unifocal approach promoting scholastic achievements, to the exclusion of character building, would undermine the founding principles of a university. A failure of character or deficit of values in students, may impel action against the delinquent student, but should also cause introspection in university authorities.

71. University education is not an arm's length transaction, between the teachers and the taught. Nor is university education an exact contractual relation, in the likeness of a consumer and a service provider.

I. *Discipline in Universities: Concept, Need & Challenges*

(i) Violence, intimidation and moral turpitude

"Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit"

~Rabindranath Tagore

72. Violence degrades human life. Intimidation stifles human thought. Moral turpitude is the low ebb of human conduct. These are the scourges and yet inescapable facts of human life. Our society faces these issues, and our varsities grapple with them.

73. Violence, intimidation, and acts of moral turpitude, are not conducive to the academic atmosphere of a varsity, and pose a mortal threat to the values of a university. They retard the growth of free thought and reasoned debate. These evils have no place in our universities. The universities can prosper only when such evils are got rid of.

(ii) *Communal disturbances in universities*

"Where the world has not been broken up into fragments by narrow domestic walls".

~Rabindranath Tagore

74. In Writ C No. 32955 of 2019, (Ajay Singh Vs. Union of India and Others), the petitioner is charged with disturbing the communal harmony in the university.

75. Stoking communal hatred not only disrupts peace and order in a university, but can roil the foundations of law and harmony in our society. The problem cannot be tackled as a "discipline" issue alone. A composite and a conceptual approach has to be adopted. The roots of communal hate have to be analyzed and addressed. Communal hatred is a narrative, which stands in direct opposition, to our civilizational ethos and constitutional

values. Communal hatred holds a threat, to the rule of law. Communal hatred cannot be countenanced in our universities, nor can be given any space in our society.

(iii) Discipline in universities

76. Discipline is the bedrock of any organization. In a university, discipline does not mean conformity of thought, or creation of a regimented class of people. In a varsity discipline is not the residue, after dissent is stifled and dissenters purged.

77. Discipline in a university is the consensus among all stakeholders, to live by the universal values which define the academic world. Discipline in a varsity is common allegiance and unshakable adherence, to values which nurture free thought, respect dissentient opinions, and create an environment of unimpeded academic pursuits. Hate and true debate cannot co-exist. Violence and true learning cannot cohabit.

78. Discipline has to be preserved at all costs, if the raison detre of the University is to be protected at all times. Indiscipline unchecked is indiscipline unleashed. However in our constitutional scheme, the means of ensuring discipline, is as important as the end of keeping discipline.

(iv) ***Statutory approach to maintaining discipline***

79. The universities have created legal frameworks, to deal with acts of indiscipline, and to maintain discipline and order.

80. The power to take disciplinary action, and impose punishment upon delinquent students, is vested in the competent authorities, by the statutes of the concerned university. The following statutes govern and regulate, the process of initiating disciplinary action against delinquent students, and imposition of penalty for misconduct.

BHU -The Banaras Hindu University Act No. XVI of 1915 {Section 60}

ii. Chapter VIII, Ordinances Governing Maintenance of Discipline and Grievances Procedure.

iii. Notification, New Delhi, 31st July, 2017, BHU

AMU- The Aligarh Muslim University (Act No. XL of 1920), [Amendment] Act, 1981 (62 of 1981)

ii. Section 35 (5) of the AMU

iii. The Statutes of the University (as adapted under Section 28 of the Act) amended upto December, 2012).

IIT BHU - i. The Institutes of Technology Act, 1961

ii. The Institutes of Technology Amendment Act, 2012.

iii. Section 17(2) of the Act, 1961 (already quoted)

(The relevant extracts of the statutes are appended as appendix 1 to the writ petition.)

J. ***Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality***

81. The statutes of all the three universities contemplate only penal action, to deal with all forms of indiscipline or deviant conduct. The penal action may lead to suspension, and can even extend to expulsion and debarment.

82. The punitive provisions of the Statutes of the respective universities,

manifest the deterrent intent of the law. A reformist approach to the problem is absent in the statutes. The makers of statutes have solely adopted a punitive or deterrent approach to the exclusion of other methods of dealing with issues of indiscipline or deviant conduct.

83. The aforesaid ordinances of the universities and the affidavits of the respondents have been perused. Submissions of the learned counsel for the universities have been considered. This Court finds that there is no structured, professionally designed reform, self development and rehabilitation programme, or therapeutic support system backed by a legal frame work, to deal with the delinquent students and like issues in the universities.

84. The statutory monopoly of a punitive approach, to deviant behaviour, and the exclusion of all other responses, often creates a lack of balance in the actions of the concerned University. In such cases, the punishment becomes disproportionate, not because the decision maker was incapable of measured action, but because the ordinances/statutes preclude a proportional response.

85. It is clarified, that the requirement of punitive provisions in the statutes is a given. The need to empower the authority, to take disciplinary action in law is undisputed. There is no infirmity in the statutory provisions. The inadequacy is in the reach of the statutory provisions.

86. The decision maker is constrained in his choices, by the absolute dominance of punitive provisions, and complete omission of reformative measures in the ordinances.

87. The impact of absence of reformative provisions and the presence of a statutory bias in favour of a punitive approach, on the fundamental rights of the petitioners, shall also be assessed in the next part of the judgment.

K. *Punishments and Article 21*

(i) *Right to human dignity*

88. A life without dignity is robbed of its meaning. Absent self worth, life is devoid of content.

89. Human dignity as a concept, was created by an international consensus, on universal human values. "Human dignity" and "self worth" are used, in close proxmity in international instruments, reflecting the affinity between the concepts.

90. The comity of nations, first pledged commitment to protecting the "dignity and worth" of the human person, in the charter of the United Nations. These eternal values were reiterated, in subsequent international instruments and conventions including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1951); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention on the Rights of the Child (1989); and the Convention on the Rights of Persons with Disabilities (2006).

91. Human dignity and self worth, were increasingly incorporated in the jurisprudence of all liberty loving nations in the post World War II era.

92. The complexity of the concept of human dignity, never diluted the usefulness of the theory of human dignity in enhancing the worth of the human

person. Human dignity made a decisive contribution in the development of the rights of life and liberty, in jurisprudential systems of free societies across the world.

93. However, the Court would do well to observe the caution, that a sweeping judicial definition of human dignity, would make an abstract theory, unintelligible. An unduly wide judicial construct of human dignity, would create unworkable judicial tests.

94. Likewise if the courts adopt too narrow a view of human dignity, a concept which has made stellar contribution to the advancement of human rights will be lost.

95. Keeping these pitfalls in mind, a balance has to be maintained, between attempting too much and recoiling from the task altogether.

96. The applicability of human dignity, would be determined in this case, by evolving a workable test or construct of human dignity and self worth applicable to these cases.

97. Human dignity is not inserted in the text of the fundamental rights under the Constitution of India. Human dignity occurs in the Preamble to the Constitution of India.

98. The Preamble to the Constitution, reflects the resolve of the People of India, to secure to all its citizens

"Justice social, economic and political;
Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity;
and to promote among them all and
Fraternity assuring the dignity of the individual and the unity of the Nation."

The Preamble to the Constitution is not analogous, to a preamble to any legislative enactment.

99. The unique place of the Preamble, in the Constitution came to be noticed very early, in ***Sajjan Singh v. State of Rajasthan,*** reported at ***AIR 1965 SC 845***. The Hon'ble Supreme Court found that the Preamble to our Constitution is "not of the common run". Further the Preamble bore the "stamp of deep deliberation" and precision.

100. This feature shines light on the special significance, attached to the Preamble by the framers of the Constitution. The Preamble was held to be a part of the Constitution, by the Hon'ble Supreme Court in ***Kesavananda Bharati v. State of Kerala,*** reported at ***(1973) 4 SCC 225***.

101. The words 'life, law and liberty' in Article 21 of the Constitution of India, were freed from the confines of narrow and literal interpretation by the Courts. (*See* ***Maneka Gandhi v. Union of India, (1978) 1 SCC 248***)

102. A defining moment came when the Hon'ble Supreme Court, liberated "life" from the fetters of mere physical existence. (see **Olga Tellis v. Bombay Municipal Corpn. Reported at (1985) 3 SCC 545**).

103. Over the years human dignity, has been read into the meaning of life and liberty, under Article 21 of the Constitution of India, by consistent pronouncements of the courts.

104. A broad overview of some of the leading pronouncements of the Hon'ble Supreme Court, elevating human dignity to the status of a fundamental right, are discussed in the succeeding paragraphs.

(ii) Supreme Court on human dignity

105. The concept of human dignity forming a part of Article 21, was introduced in ***Prem Shankar Shukla v. UT of Delhi***, reported at ***(1980) 3 SCC 526***. While construing the constitutional rights of prisoners, in ***Prem Shankar Shukla (supra)***, Krishna Iyer, J. speaking for a three-Judge Bench of the Hon'ble Supreme Court held:

"1. ... the guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21 spring into action when we realise that to manacle man is more than to mortify him; it is to dehumanise him and, therefore, to violate his very personhood, too often using the mask of "dangerousness" and security.

21. The Preamble sets the humane tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual."

106. Undermining the human dignity of a detenue, under the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 was not countenanced by the Hon'ble Supreme Court in ***Francis Coralie Mullin v. UT of Delhi,*** reported at ***(1981) 1 SCC 608*** by ruling thus:

"6. ... The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

7. ... the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival."

107. The right to live with human dignity flowing from Article 21, was employed by the Hon'ble Supreme Court to unlock the fetters of those living in bondage and setting them free in ***Bandhua Mukti Morcha v. Union of India***, reported at ***(1984) 3 SCC 161.*** The Hon'ble Supreme Court in ***Bandhua Mukti Morcha (supra)*** observed that:

"10. ...This right to live with human dignity enshrined in Article 21 derives its life breath from the directive principles of State policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State -- neither the Central Government nor any State Government -- has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

108. Dehumanizing treatment given to the arrested activists of an organization

by the police authorities was called out by the Hon'ble Supreme court, in ***Khedat Mazdoor Chetna Sangath v. State of M.P***., reported at ***(1994) 6 SCC 260***, wherein it was recognized:

"10. ... It is, therefore, absolutely essential in the interest of justice, human dignity and democracy that this Court must intervene; order an investigation, determine the correct facts and take strongest possible action against the respondents who are responsible for these atrocities."

109. The right of human dignity was also construed by the Hon'ble Supreme Court in ***M.Nagaraj v. Union of India***, reported at ***(2006) 8 SCC 212***. In that case the right was held to be intrinsic to and inseparable from human existence:

"26. ... The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. ...It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give(sic be given).It simply is. Every human being has dignity by virtue of his existence.

42. India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realised only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised."

110. The Hon'ble Supreme Court in **Shabnam v. Union of India**, reported at **(2015) 6 SCC 702** elaborated the following elements of the human dignity;

"14. This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being "as a human being". Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being."

(emphasis in original)

111. Aharon Barak (former Chief Justice of the Supreme Court of Israel), discussed the constitutional value of human dignity, in the following celebrated passage:

"The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the

scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right. "

112. The views of the Judge Aharon Barak, were approved and incorporated in the corpus of human dignity jurisprudence, in our country by the Hon'ble Supreme court in ***Jeeja Ghosh v. Union of India,*** reported at ***(2016) 7 SCC 761***.

113. The consequences of loss of human dignity in an individual's life, were noted by the Hon'ble Supreme Court in ***Mehmood Nayyar Azam v. State of Chhattisgarh***, reported at ***(2012) 8 SCC 1***.

114. Similar sentiments were expressed on human dignity, by the Hon'ble Supreme Court in ***National Legal Services Authority v. Union of India***, reported at ***(2014) 5 SCC 438.***

115. In ***Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal*** reported at ***(2010) 3 SCC 786***, the Hon'ble Supreme court upon consideration of good authority, reiterated the dignity of the individual as a core constitutional concept.

116. While in ***Selvi v. State of Karnataka*** reported at ***(2010) 7 SCC 263***, the Hon'ble Supreme Court ruled thus:

"244.....we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences."

117. Even prisoners have been found entitled to the fundamental rights while in custody by the Hon'ble Supreme Court (see ***Sunil Batra (II) Vs. Delhi Administration***, reported at ***1980 (3) SCC 488***).

118. The importance of therapeutic approach in dealing with the criminal tendencies of prisoners and the necessity for reform, was considered by the Hon'ble Supreme Court in ***T.K. Gopal v. State of Karnataka***, reported at ***(2000) 6 SCC 168***, by holding that:

"15. The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy."

119. In ***Asfaq v. State of Rajasthan and Others***, reported at ***(2017) 15 SCC 55***, the Hon'ble Supreme Court emphasizing the need for reform of a convict held that "redemption and rehabilitation of such prisoners for good of societies must receive

due wightage while they are undergoing sentence of imprisonment."

120. The judicial authorities can be multiplied, reiterating the above holdings. However, the same will add volume, but not value to the narrative.

121. Consistent and high authority have thus entrenched human dignity as fundamental to right to life, which flows from Article 21 of the Constitution of India.

122. The narrative would not be complete without reference to the most authoritative pronouncement, of the Hon'ble Supreme Court in the case of ***K.S. Puttaswamy v. Union of India*** reported at ***(2017) 10 SCC 1***

123. Dr. D. Y. Chandrachud, J. speaking for the Constitution Bench, firmly and irrevocably, reiterated that human dignity is a fundamental right under Article 21 of the Indian Constitution, with customary eloquence, in ***K.S. Puttaswamy (supra)***. Dr. D. Y. Chandrachud, J., upon consideration of the judicial precedents in point distilled the concept of human dignity and its place in part III of the Constitution:

"***Jurisprudence on dignity***

"108.Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

118. Life is precious intself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions. "Life" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfillment of life is as much within the protection of the guarantee of life.

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value

which the protection of life and liberty is intended to achieve."

(iii) Comparative International Jurisprudence

124. A survey of comparative international jurisprudence, on the point of human dignity and the rights flowing therefrom, shows convergence in the values of human dignity across the free world.

125. The foreign authorities can be cited to show that human dignity is an accepted universal value in the comity of nations.

126. In ***Rosenblatt v. P Baer,* reported at 1966 SCC OnLine US SC 22 : 383 US 75 (1966)**, the US Supreme Court found that "The essential dignity and worth of every human being" was at the root of any system of "ordered liberty".

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being- a concept at the root of any decent system of ordered liberty."

127. In the case of ***Armoniene v. Lithuania, reported at (2009) EMLR 7***, the European Court of Human Rights set its face against an act of disclosure of a person's state of health, causing "exclusion from social life", and found it violative of the right to privacy by holding thus:

"The Court takes particular note of the fact that the family lived not in a city but in a village, which increased the impact of the publication on the possibility that the husband's illness would be known by his neighbours and his immediate family, thereby causing public humiliation and exclusion from village social life."

128. The human dignity rights of prisoners included rehabilitation, in the opinion of the US Supreme Court in ***Procunier, Corrections Director, ET AL. Vs. Martinez ET AL.*** reported at ***416 U.S. 396 (1974)***:

"The Court today agrees that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation."

Balanced against the State's asserted interests are the values that are generally associated with freedom of speech in a free society - values which "do not turn to dross in an unfree one." Sostre v. McGinnis, supra, at 199. First Amendment guarantees protect the free and uninterrupted interchange of ideas upon which a democratic society thrives. Perhaps the most obvious victim of the indirect censorship effected by a policy of allowing prison authorities to read inmate mail is criticism of prison administration. The threat of identification and reprisal inherent in allowing correctional authorities to read prisoner mail is not lost on inmates who might otherwise criticize their jailors. The mails are one of the few vehicles prisoners have for informing the community about their existence and, in these days of strife in our correctional institutions, the plight of prisoners is a matter of urgent public concern. To sustain a policy which chills the communication necessary to inform the public on this issue is at odds with the most basic tenets of the guarantee of freedom of speech.

The First Amendment serves not only the needs of the polity but also those of the human spirit - a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.14Cf. Stanley v. Georgia, 394 U.S.[416 U.S. 396, 428]557 (1969). Such restraint may be "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." J. Milton, Aeropagitica 21 (Everyman's ed. 1927). When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit."

129. The validity of a punishment causing loss of nationality, for an act of desertion in military service, was in issue before the US Supreme Court, in ***Trop Vs. Dulles***, reported at ***356 US 86 (1958)***. The US Supreme Court in ***Trop (supra)*** reiterated the importance and role of rehabilitation in a penal system, while dealing with the validity of the punishment. The principle holding of the US Supreme Court on these points is as under:

"Expatriation, in this respect, constitutes anespecially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

The novelty of expatriation as punishment does not alone demonstrate its inefficiency. In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution. What then is the relationship of the punishment of expatriation to these ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights. Similarly, it must be questioned whether expatriationcan really achieve the other effects sought by society in punitive devices. Certainly it will not insulate society from the deserter, for unless coupled with banishment the sanction leaves the offender at large. And as a

deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation.However insidious and demoralizing may be the actual experience of statelessness, its contemplation in advance seems unlikely to invoke serious misgiving, for none of us yet knows its ramifications."

(iv) Constitutionality of punishments under the statutes

"Universities are made by love, love of beauty and learning."

~ Annie Besant

130. The engagement of human dignity and Article 21 will now be examined in the context of punishment, imposed on a delinquent student.

131. The statutory scheme of enforcing discipline by imposition of punishments and suspension has a salutary purpose, but it needs to be compliant with the requirements of fundamental rights.

132. Punishment has to be effective to serve its purpose; however, it cannot be purblind to human dignity, if it is to retain its constitutionality.

133. Severity of a punishment is not sufficient basis for holding it unconstitutional. The enquiry into the constitutionality of a punishment, will examine the relationship between the punishment and its purpose, and whether the penalty can achieve the purpose. The enquiry will also determine whether the punishment degrades the human person, and whether it devalues human dignity against established norms of decency, or has a dehumanizing effect.

134. Degree of injuries to self esteem, extent of degradation of human worth, depth of humiliation caused by the punishment, are facts to be probed in an enquiry into the validity of the punishment.

135. Experience teaches the fact of human fallibility, but knowledge holds the hope of human redemption. If error is part of human nature, reform is an element of human spirit. The capacity of human beings to introspect on erring ways and the power of human will to reform deviant conduct are building blocks of the concept of human dignity. "Every sinner has a future, many a saint had a past."

136. Punishment for deviant conduct, cannot be so severe as to degrade human life. Every form of punishment should protect the essential sanctity of human life and comport with fundamental norms of decency evolved by a civilized society. Any act which dehumanizes life cannot be countenanced by societies and courts which value life and liberty. The degrading or dehumanizing elements of the punishment have to be eliminated to bring it in conformity with requirement of human dignity, contemplated by Article 21 of the Constitution of India.

137. Failure to consider susceptibility to reform, while denying the right to access privileges and activities of the university, negates the possibility of rehabilitation. Absence of an environment of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation. Termination of dialogue with the delinquent student, without offering an opportunity to reform,

makes him an outcaste. The individual is permanently discarded by the institution, and loss of human self worth is total. This system of punishment is destructive of fundamental elements of human dignity, and violative of Article 21 of the Constitution of India.

138. Another aspect of the punishment which needs consideration, is the consequence exclusion from higher education.

139. Education is a most credible and effective mode of restoring self esteem and enhancing self worth. By denying opportunities of education to a delinquent student, without looking at the possibility of reform, the power to redeem one's errors and enhance self worth is taken away from an individual. In these cases, closure of avenues of education, extinguishes the hope for a better tomorrow. Loss of hope and its sequitor perpetual condemnation are fatal blows to the human spirit and self esteem.

140. Acts of deviant conduct, violence or intimidation, do not cease the need for social engagement or knowledge. Such needs are more acutely felt and require satisfaction in these cases.

141. Order may be enforced by punishments. Causes of deviant conduct can be addressed only by engagement. Punishments deal with the offence, reform deals with the offender.

142. Public interest however demands that the claim for further education, and engagement with delinquent students, should be guided and controlled by the authorities.

143. Statutory regimes in universities, dealing with delinquent behaviour and university environments, which are bereft of therapeutic and reform based support systems, are incompatible with the constitutional mandate to uphold human dignity. The violations of human dignity, in such cases, are summed up hereinunder:

144. Dignity violations occur when a punishment meted out to a student, does not consider his susceptibility to reform, and degrades his person by exclusion to the point where his diminished self worth cannot be reinstated due to systemic inadequacies or institutional shortcomings.

145. By denying further education, and neglecting to create an institutional system of reform, self development and rehabilitation, the university in effect tells the delinquent student, that it does not recognize the student's need to re-establish his self esteem. In other words, the student is not only impervious to reform, but incapable of enhancing his self esteem.

146. Dignity of an individual/student is injured, when it is found that the punishment precludes reform by rehabilitative measures, and prevents self enhancement by further education.

147. The punitive consequences of the action, cannot go beyond the requirements of the case. In this case they do.

An institutional reform, self development and rehabilitation programme, will enable a delinquent student to introspect on errors, express remorse and correct course.

148. Neglect by the universities to create an institutional reform, self development and rehabilitation programme thus places substantial obstacles in the

enjoyment of the fundamental right of human dignity under Article 21.

149. The result of the preceding narrative is as follows:-

(i) The impugned action taken by the university, against the petitioner is violative of the fundamental right of human dignity of the petitioner, guaranteed under Article 21 of the Constitution of India, as it fails to consider his susceptibility to reform, and does not enable the petitioner to undergo a reform and self development process to redeem himself.

(ii) The statutory omission of reform measures, is an inadequacy which renders the university incapable of rectifying the violation made by it. The systemic fault-line is contrary to the mandate of Article 21 of the Constitution of India.

(v) Systemic responses : Responsibilities of the State and universities

150. Exercise of judicial power is the prerogative of the courts; but upholding the Constitution is not the monopoly of the courts.

151. To realize the fundamental rights guaranteed under the Constitution and to achieve the goals contemplated under the Preamble, all stakeholders have to play their part and all organs of governance have to perform their obligations. Constitutional ideals will become meaningful only if constitutional values animate the functioning of all institutions of governance. Universities have a special role to play.

152. The State and in this case the universities too, have the obligation to create an ***enabling environment***, *(emphasis supplied)* where life and life enhancing attributes under Article 21 of the Constitution of India flourish and where constitutional ideals become a reality.

153. The importance of "therapeutic approach" in solving social dysfunctions, the growth in role of the State to give away public recognition in the way they treat their citizens, the evolution of law on the subject, and the contribution of universities were analyzed by **Francis Fukuyama** in his book **"Identity"**. Some of the instructive passages are extracted below:

"The therapeutic turn in the popular culture of advanced liberal democracies such as the United States was inevitably reflected in its politics, and in an evolving understanding of the role of the state. In the classical liberalism of the nineteenth century, the state was held responsible for protecting basic rights such as freedom speech and association, for upholding a rule of law, and for providing essential public services such as police, roads, and education. The government "recognized" its citizens by granting them individual rights, but the state was not seen as responsible for making each individual feel better about himself or herself."

"Under the therapeutic method, however, an individual's happiness depends on his or her self-esteem, and self-esteem is a by-product of public recognition. Governments are readily able to give away public recognition in the way that they talk about and treat their citizens, so modern liberal societies naturally and perhaps inevitably began to take on the responsibility for raising the self-esteem of each and every one of their citizens".

"Therapeutic services came to be deeply embedded in social policy, not just in California but throughout the United States and in other liberal democracies. States began to offer psychological counseling and other mental health services, and schools began to incorporate therapeutic insights into the way that they taught children."

"In the early twentieth century, social dysfunctions such as delinquency or teen pregnancy were seen as deviant behaviour that needed to be dealt with punitively, often through the criminal justice system".

"But with the rise of therapeutic approaches by mid century, they were increasingly seen as social pathologies that needed to be treated through counseling and psychiatric intervention".

"The 1956 amendments to the Social Security Act allowed for federal reimbursements of a range of therapeutic services to strengthen family life and self-support."

"The therapeutic state metastasized across a wide number of institutions, including a large non-profit sector that by the 1990s had become the delivery vehicle for state-funded social services".

"Universities found themselves at the forefront of the therapeutic revolution." *(emphasis supplied)*

154. These special needs of citizens have to be addressed by State action, and also through judicial interventions in a nuanced manner, and in a larger perspective. Exclusive reliance on coercive powers of the law, shall be inadequate and an unsatisfactory way of dealing with the problem. The therapeutic jurisprudence draws heavily from concept of human dignity and self worth for its philosophical underpinning.

155. Disciplinary action should also be supported by reformative philosophy. Reformative philosophy does not undermine the deterrent approach.

156. The statutory regime imposes punishment for delinquent acts. The reform programme will address the cause of delinquency itself. Framing the approach to discipline as a choice between punishment or reform is misleading. A just corrective system needs both. Both approaches complement each other and can be pursued simultaneously. Deterrent aspect may also be reinforced, by making grant of the degree contingent upon successful completion of the reform programme.

157. The ordinances providing for punishments for deviant conduct need to be duly supported by a legal framework for structured reform, self development and rehabilitation programmes. This environment will accord social recognition to the need for reform of delinquent students. The degrading effect of punishment will be ameliorated. Dialogue will end isolation, reform will reinstate self worth and education will enhance self esteem.

158. Structured reform, self development and rehabilitation programmes and therapeutic support, within a legal framework, will create an ***enabling environment*** *(emphasis supplied)* in the universities, to realize the fundamental right of human dignity, flowing from Article 21 of the Constitution of India.

L. ***Reform, Self Development & Rehabilitation***

(i) *Role of universities in achieving behavioral change*

"You must be the change you wish to see in the world"

~Mahatma Gandhi

159. Non violence as a philosophy of thought, and a creed of conduct, was developed in India on a scale wider than elsewhere. From the Buddha to Ashoka and the Mahatma, behavioral change in adopting non violence as a way of life, at the national scale was greatly accomplished in India.

160. The response of the Indian civilization, to the challenges of communal hatred and communal otherness, was profound and without parallel. The unique response of the Indian society was fashioned by the universal philosophy of the Indian civilization; of affirming the unity of the human race, of embracing diversity, of respecting dissent, and creating a harmonious dialogue of faiths. The lives and teachings of saints and thinkers like Guru Nanak, Kabir, Vivekananda, Tagore and Mahatma Gandhi, bear testimony to this composite culture.

161. For each generation to produce such individuals of excellence is an exorbitant demand. Today behavioral change is achieved in a different manner, albeit more incrementally and less dramatically. Institutions like universities have a critical role to play. Universities have an obligation to the society and the individual. The universities have an irrevocable compact, and an organic connect with the society.

162. University is a paternal institution. By the act of suspension or debarment of a delinquent student, the university abandons its ward. The university has solved its problem, but the society has one at its hands. The downstream effects of the punishments, have not been considered by the respondents. Clearly there are direct costs to the society as well. There are no other institutions of equal standing, to engage with the youth, deal with the discontent or aberration, and channelize youthful energies.

163. The role of the University does not end in punishing perpetrators of violence. It begins with the identification of the causes of violence, communal hatred, and other forms of deviant conduct. Thereafter the responsibility to achieve behavioral change commences. The fruit of knowledge imparted by the universities lies in the manifestation of human values in the human personality and expression of humanity in human conduct. Knowledge which does not change human behaviour in this manner is futile.

(ii) Imbibing Constitutional values and purging communal hatred

164. The Indian civilizational ethos and the Indian constitutional values are congruent. The Supreme Court distilled the essence of Indian values, when it emphasised "our tradition teaches tolerance, our philosophy preaches tolerance and our Constitution practises tolerance; let us not dilute it" while upholding the religious rights of Jehovah's witnesses in ***Bijoe Emmanuel and others vs. State of Kerala and others,*** reported at ***(1986) 3 SCC 615.***

165. Universities have to protect the space for open dialogue, respectful

engagement and reasoned debate. Universities need to ensure that the space for constitutional values, is not encroached by communal hatred.

166. The universities have the responsibility, to preserve this heritage, and the obligation to nurture these constitutional values. University experience has to inculcate these values in the students.

167. The universities may consider holding seminars, workshops, heritage festivals, cultural festivals, literature festivals, and encourage other activities to achieve this end. This has to be a part of the larger programme of value creation and self development.

(iii) Present discontents of students and solutions

168. The preceding discussion shows how a reform, self development and rehabilitation programme, will create an enabling environment, for realization of the fundamental rights of the individual under Article 21. How such programme, will yield tangible benefits for the society, will now be examined.

169. The paradox of the digital age is a plethora of devices and a dilution of dialogue, the substitution of conversation by chatter. There is the ever present danger of growth of knowledge and diminution of thought. The young are empowered by technology, but made restless by the void in values, and lack of direction.

170. The dilemmas of the digital age were acutely summed up by Yuval Noah Harari in his profound and acclaimed work "Homo Deus":

"Today our knowledge is increasing at breakneck speed, and theoretically we should understand the world better and better. But the very opposite is happening. Our new-found knowledge leads to faster economic, social and political changes; in an attempt to understand what is happening, we accelerate the accumulation of knowledge, which leads only to faster and greater upheavals. Consequently we are less and less able to make sense of the present or forecast the future."

171. In this situation lack of avenues of engagement, absence of a structured reform, self development and therapeutic support system, leaves the students with little options. The choices available in the society, to satisfy their need for belonging, to recover self esteem, and to channelize youthful energies are not very encouraging.

172. Re-establishing meaningful dialogue, recreating an environment of fruitful conversation, and making empathetic engagement are some of the present challenges. The responsibility of reaching out and engaging with the students, and increasing quality interface with them, lies with the universities and the teachers.

173. These obligations can be accomplished by a meticulously created reform/self development programme and high quality of academic leadership within a comprehensive legal framework.

174. Universities are a microcosm of the society. They are laboratories of social change, and also agents of social transformation.

175. The manner in which the universities deal, with aberrations of violence other forms of deviant conduct, and deficit of values in students, has repercussions for the society at large. The divergent pulls of primordial instincts of hate and violence, against a citizen's duties in a nation ruled by law can best be managed by universities.

176. The universities are uniquely placed to deal with these issues. The universities have the intellectual capital, institutional framework and moral leadership, which puts them in the front rank of institutions to effect such change. The environment in the University should encourage and engender reflective actions instead of automatic choices.

177. The reform, self development and rehabilitation programme, will give an individual student correct direction in life, and prevent one from drifting away. The student will be anchored in constitutional values, and will not be led astray by social evils. The support and aid by the university will give one a sense of ownership and belonging. No harvest is richer for a nation, than citizens empowered by a constitutional value system.

178. The high pedestal at which teachers are placed in Indian traditions and thoughts, was recalled to explain the current role of teachers in Indian society, by the Hon'ble Supreme Court in the case of **Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others,** reported at **(1997) 2 SCC 534**. The relevant extracts were succinctly summed up by a Division Bench of this Court, in the case of **Devarsh Nath Gupta Vs. State of U.P. and Others,** reported at **2019(6) ADJ 296 (DB):**

"22. Special status of teacher has been reminded by Court inAvinash Nagra vs. Navodaya Vidyalaya Samiti and others(1997) 2 SCC 534. Quoting Father of the Nation, Court said that a teacher cannot be without character. If he lacks it, he will be like salt without its savour. A teacher must touch the hearts of his students. Boys imbibe more from the teacher's own life than they do from books. If teachers impart all the knowledge in the world to their students but do not inculcate truth and purity amongst them, they will have betrayed them. Quoting Shri Aurobindo, Court said that it is the teacher's province to hold aloft the torch, to insist at all times and at all places that this nation of ours was founded on idealism and that whatever may be the prevailing tendencies of the times, our children shall learn to live among the sun-lit peaks. Court also referred Dr. S. Radhakrishanan saying that we, in our country, look upon teacher as gurus or, as acharyas. An Acharya is one whose achar or conduct is exemplary. He must be an example of Sadachar or good conduct. He must inspire the pupils who are entrusted to his care with love of virtue and goodness. The ideal of a true teacher is "andhakaraniridhata gurur itya bhidhiyate" (Andhakar is not merely intellectual ignorance, but is also spiritual blindness). He, who is able to remove that kind of spiritual blindness, is called a 'guru'. Swami Vivekananda was also quoted saying that student should live from his very boyhood with one whose character is a blazing fire and should have before him a living example of the highest teaching. In our country, the imparting of knowledge has always been through men of renunciation. The charge of imparting knowledge should again fall upon the shoulder of Tyagis."

179. In ***Avinash Nagra (supra)***, the obligations of teachers to transform students into responsible citizens, and inculcate the value system of the Indian Constitution, was stated thus:

"...The State has taken care of service conditions of the teacher and he owed dual fundamental duties to himself and to the society. As a member of the noble teaching profession and a citizen of India he should always be willing, self-disciplined, dedicated with integrity to remain ever a learner of knowledge, intelligently to articulate and communicate and imbibe in his students, as social duty, to impart education, to bring them up with discipline, inculcate to abjure violence and to develop scientific temper with a spirit of enquiry and reform constantly to rise to higher levels in any walk of life nurturing Constitutional ideals enshrined inArticle 51Aso as to make the students responsible citizens of the country. Thus the teacher either individually or collectively as a community of teachers, should regenerate this dedication with a bent of spiritualism in broader perspective of the Constitutionalism with secular ideologies enshrined in the Constitution as an arm of the State to establish egalitarian social order under the rule of law. Therefore, when the society has given such a pedestal, the conduct, character, ability and disposition of a teacher should be to transform the student into a disciplined citizen, inquisitive to learn, intellectual to pursue in any walk of life with dedication, discipline and devotion with an inquiring mind but not with blind customary beliefs....."

180. The students entering universities embark on a new phase in their lives. Many are often removed from their comfort zone, and the secure environment of their homes, to face the challenges of independent life. At times these new challenges can be intimidating, and the uncertainties can create apprehensions, in the minds of the young adults.

181. Some students are unmoored in this trying phase of life and change of circumstances. Ragging of juniors in institutions of higher learning and other evils make the situations worse for freshers. Such students especially girls students in our country, need full institutional support to face these challenges.

182. It is the responsibility of the universities and the institutions of higher learning to create requisite environment of sensitizing the senior students and supporting the freshers in every possible manner.

183. A programme for self development implemented in a proactive manner shall foster constitutional values among students. Students need to realize the value of dissent in a democracy, but also have to understand the manner of dissent in a society ruled by law.

184. This process also requires initiation of engagement with the students and improving the quality of interface between the teachers and the taught. Educating the educators in this regard has to be a part of any such programme. Workshops have to be held and other methods have to be explored, to cultivate constitutional values in students and achieve behavioral change.

185. These are the preventive measures to address the issues of indiscipline, deficit in values and deviant

behaviour in all institutions of higher learning.

186. The preventive measures preclude the occurrence of deviant behaviour. The post facto rehabilitation measures prevent recurrence of deviant behaviour. Both have to be integrated into one conjoint system of value creation, in the universities and institutions of higher learning.

187. Structured reform/self development programmes run by universities, can be catalysts for inducing behavioral change, and inculcating a constitutional value system in students. A successful reform, self development &rehabilitation programme, can convert a possible danger into a real asset for the society.

(iv) Creation of reform, self development & rehabilitation programmes

188. Many branches of knowledge in modern times are devoted to the study of human psychology, social behaviour and behavioural change. Psychology, Psychiatry, Sociology, Anthropology and Behavioral Economics, are some fields dedicated to gaining insights into human behaviour and inducing behavioural change.

189. Works of the Nobel prize winning economist Richard Thaler deserve special mention. The methodology of "nudges", in creating behavioral change has been gaining acceptability. The organization "Nudge" in Lebanon, has done noteworthy work with refugee children, and on environmental protection.

190. The Behavioral Insights Teams sometimes called "Nudge Units", are also existing in many nations including Australia, Canada, Germany, Qatar, the United Arab Emirates, Japan, the United States, and the United Kingdom. The Economic Survey released by India's Finance Ministry in July, 2019 has concluded with the clear recommendations that "the proposal to set up a behavioral economics unit in the NITI Ayog must be immediately activated". The report further noticed that the unit should work with State Governments, helping them to make their programme more effective, and informing them of the potential value of Behavioural Insights.

191. Ancient branches of knowledge and wellness like yoga, meditation, vipassana and so on may prove to be rich resources to benefit from.

192. Many scientific researches have confirmed the efficacy of these ancient systems of human wellness. These branches of knowledge have to be approached with a scientific and an open academic mindset. Personal beliefs have to be respected at all times. There can be no imposition of any system, which is resisted on grounds of faith or beliefs; in which cases other options may be given.

193. Socially useful work like planting and taking care of trees, and flora may be a part of the programme. Sports and sporting activities also go a long way in creating integrating social values, and enhancing emotional intelligence. Teaching needy children, serving the sick, and other forms of service to the society are options which may be explored. Counselling sessions with experts and psychologists could prove useful.

194. Therapeutic solutions to social problems, are being increasingly

recognized by social scientists, medical experts, psychologists, and jurists alike.

195. Creation of course content of the reform or self development programme, and manner of its implementation has to be decided by the respondents. This requires wide consultations, deliberations and workshops with academia, varsities, institutions of research, student counsellors, psychologists, psychiatrists, students and other stakeholders.

196. The UGC is a statutory body, and cannot abdicate its responsibilities in this scenario. The functions of the UGC are enumerated in the University Grants Commission Act, 1956. The UGC will play an important role, in the creation and standardization of the course, for reformation and self development, and aid its implementation on an institutional basis.

197. The Government of India in particular, the Ministry of Human Resource Development, also has a contribution to make in the process. The Ministry of Human Resource Development, Government of India, New Delhi, has to provide the necessary support to the University as may be required under law to create and implement the reform, self development and rehabilitation programme. This support would include the creation of necessary infrastructure for implementing the programmes.

198. Both the University Grants Commission and the Ministry of Human Resource Development, Government of India, are required to support the universities in their endeavours to create and implement the programmes of reform, self development and rehabilitation.

199. Law enforcement agencies the world over are engaging with the youth, to draw them away from the appeal of extreme ideologies.

200. The prestige enjoyed by universities and the teachers in society, will make the programme credible to concerned individuals, and acceptable to the student community. The key to the efficacy of any structured reform programme, is empathetic engagement and a supportive environment.

201. An impersonal approach and institutional prejudice, can make the programme a non starter. Due sensitization of all stakeholders is required, before implementing the programme.

202. The founding purpose of universities to supply intellectual and moral leadership to the society, and to be at the vanguard of social transformation, will be eminently achieved by effective reformation/therapeutic/self development programmes.

(v) Concerns of universities regarding discipline & restraints during the reformation, self development & rehabilitation programme:

203. The Court is cognizant of concerns of the universities, that a reform programme should not derail university administration, nor should it have a detrimental effect on discipline and good order in the campus. A reform and rehabilitation programme, is not intended to allow a wrongdoer to escape justice.

204. Apprehensions of the universities need to be addressed. The reform programme has to be created and structured and implemented in a manner that it does not adversely impact the good

order and discipline in the university campus.

205. The start of reform programme does not inevitably mean a free access to, or unconditional reinstatement of a delinquent student into the university campus. In cases of indiscipline where presence of individuals poses a threat of breakdown of order in the university campus, a decision can be made only by the university. Even when such students undergo a reform programme, and the students are pursuing their academic studies, the university may impose restraints it deems fit.

206. To obviate possibilities of disruption in the academic atmosphere, various measures of graduated restrictions may be imposed on a case to case basis. These restraints may include minute monitoring of movements in campus, restricting movements and contact, an employee escort till the student is in the campus, alteration of class schedules and timings. Such lighter restrictions could continue, while undergoing reform programmes along with the academic course.

207. More stringent measures in aggravated cases, may include a campus ban, with on-line classes and home schooling. Transfer to constituent colleges or other universities from a pool of universities, or setting up separate premises are among the options. In these cases entry to the specific university campus may be barred, even as the reform programme is underway, and the student is prosecuting his academic course.

208. These are some illustrative instances, of restraints which may be imposed by the universities.

M. Proportionality & Punishment

209. The controversy has to be seen from another critical legal perspective. The doctrine of proportionality is an established ground of judicial review in the Indian Constitutional jurisprudence.

210. Aharon Barak, former President of Supreme Court of Israel in his book "Proportionality" thus defines the rules of the doctrine of proportionality, "According to the four components of proportionality a limitation of constitutional right will be permissible if, (1) It is designated for a proper purpose, (2) The measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose, (3) The measures undertaken are necessary and in that there are alternative measures that may similarly achieve that same purpose with a lesser degree of limitation and finally; (4) Their needs to be a proper relation "proportionality strict senso and balance" between the importance of achieving the proper purpose and social importance of preventing the limitation on the constitutional right."

211. The concept of proportionality essentially visualizes, a graduated response to the nature of the misconduct by a delinquent student. The purpose of the institution, its role in the society and its obligations to the nation, provide the setting for adjudication of the issue of proportionality.

212. Proportionality first came to be applied in the context of punishments imposed for misconduct in service jurisprudence. The necessity of proportional punishment, in cases of

misconduct by students is more strongly needed. Hence action of the respondent-University, is liable to be tested on the anvil of disproportionality.

213. The "doctrine of proportionality" was introduced, and embedded in the administrative law of our country, by the Hon'ble Supreme Court in the case of ***Ranjit Thakur Versus Union of India***, reported at ***(1987) 4 SCC 611***. The Hon'ble Supreme Court in Ranjit Thakur held thus:

"Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. "

214. The essence of proportionality is that, the competent authority while imposing a punishment upon a delinquent student, has to co-relate and balance the imperatives of institutional discipline with the demands of individual rights. Too light a punishment will not be conducive to institutional discipline. Too harsh a punishment will not be consistent with norms of justice.

215. The enquiry into the four components of proportionality, as elucidated by Justice Aharon Barak in his book "Proportionality" has been made in the preceding part of the judgment. The purpose and obligations of universities, have also received consideration, in the earlier part of the narrative.

216. The measures undertaken against the petitioner, are not rationally connected to the fulfillment of the purpose sought to be achieved. The proper and designated purpose of a punishment in a university, has to include reform of the student, not mere imposition of penalty. Clearly there are alternative reformative measures, that can achieve the same purpose, with a lesser degree of curtailment of the students rights.

217. The impugned action fails the test of proportionality. The action taken against the petitioner, does not achieve the purpose, and social importance of the reform and rehabilitation of the delinquent student. The impugned order is liable to be set aside on this ground as well.

N. Conclusions & Reliefs

218. The impugned order of suspension dated 27.12.2017 and the consequential order dated 03.07.2019 do not record any past instances of violence or deviant conduct on the part of the petitioner. The petitioner has tendered a contrite apology, to the Court through his counsel, (this is without prejudice to the defence to the petitioner in criminal case), and seeks an opportunity to evolve into a law abiding and responsible citizen of the country.

219. The acts of violence if proved, may warrant disciplinary action to maintain discipline in the campus. But the facts of the case, also require reformative measures to protect the future of the petitioner. However, the suspension of the petitioner cannot continue indefinitely. A regular departmental enquiry against the students has not been concluded till date. The petitioner cannot be deprived of higher education indefinitely.

220. In the wake of the preceding discussion, this Court finds that the order dated 27.12.2017 passed by the respondent no. 4, Assistant Registrar (ACAD), Banaras Hindu University, Varanasi is arbitrary and illegal and of no effect. The order dated 27.12.2017 passed by the respondent no. 4, Assistant Registrar (ACAD), Banaras Hindu University, Varanasi is quashed.

221. The consequential order dated 03.07.2019 passed by the respondent no. 5, Deputy Registrar (Academic), Banaras Hindu University, Varanasi, is quashed.

222. The quashment of the impugned order, does not in any manner exonerate the petitioner of his guilt. Nor does it preempt the regular enquiry into the misconduct. The law shall take its course, unhindered by any observation made in this judgement.

223. In the facts of the instant case and the material in the record, the admission of the petitioner in the M.A. course, shall happen in the manner and the time frame provided in the final directions.

224. The issue relating to creation of reform, self development and rehabilitation programmes in the University was heard as a common issue in various writ petitions. The Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, were also parties in the leading two writ petitions namely Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others) and Writ C No. 26755 of 2019 (Mohammad Ghayas Vs. State of U.P. and Others). All connected writ petitions were heard together.

225. The directions issued to the Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, in the leading two writ petitions; Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others) and Writ C No. 26755 of 2019 (Mohammad Ghayas Vs. State of U.P. and Others) being of a general nature, shall be part of all connected writ petitions including the instant writ petition.

The matter is remitted to the respondents.

226. A writ in the nature of mandamus is issued commanding the respective respondents to execute the following directions in the light of this judgment:

I. The University shall create a reform, self development and rehabilitation programme, for students accused of misconduct and against whom disciplinary action or any action to deny facilities of the university is proposed or taken;

II. The reform, self development and rehabilitation programme should be created after wide consultations and workshops with institutions of higher learning and research, universities, experts, student counsellors/psychologists,

psychiatrists, students and other stakeholders;

III. University Grants Commission will aid the above process by providing the necessary support to the University to create, standardize and effectuate the reform, self development and rehabilitation programme in the university;

IV. The Secretary, Ministry of Human Resource Development, Government of India, New Delhi, shall also provide the necessary support to create infrastructure in the University to effectuate the reform, self development and rehabilitation programme in the University, in light of this judgment and as per law;

V. The reform, self development and rehabilitation programmes shall be processed as per law, and integrated into the existing legal/statutory framework, of the University dealing with deviant conduct and punishments;

VI. The case of petitioner for admission to M.A. course shall be considered after the creation of the reform, self development and rehabilitation programme;

VII. In case the petitioner is found eligible for admission to M.A. course, he shall be permitted to pursue the M.A. course along with the reform, self development and rehabilitation programme in the University;

VIII. It shall be open to the BHU to impose necessary restraints, as it deems fit, upon the petitioner even as he pursues his academic course along with the reform, self development and rehabilitation programme;

IX. The exercise shall be completed, preferably, within six months, but not later than 12 months. At all times the respondents keeping in mind the best interests of the students and the society, shall make all efforts to expedite the compliance of the directions;

X. It shall be open to the respondents to create a scheme for reform, self development and rehabilitation for convicts in criminal cases who wish to pursue further higher studies in the respondent University;

XI. The counsels for the respondents shall provide certified copy of this judgment along with copy of the judgment of this Court rendered in Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others), to the Vice Chancellor, Banaras Hindu University, Varanasi; the Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, for necessary compliances.

227. The writ petition is allowed to the extent and manner indicated above.

(2020)03-05ILR A1875
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE SARAL SRIVASTAVA, J.

WRIT-C No. 30320 of 2019
&
WRIT- C No. 30681 of 2019

M/s Husain Stone Crusher & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Satyendra Narayan Singh, Sri Subhash Chandra Pandey

Counsel for the Respondents:
C.S.C., Sri Habib Ahmad

A.Civil Law- The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 – Section 14 – Functions of District Magistrate on the issue of taking Possession – Two distinct jobs have to be performed by the District Magistrate – The first is to pass a suitable order for the purpose of taking possession of the secured assets; and second is to take possession of such assets and the documents and to forward them to the secured creditor which job can be authorized by him to be performed by any officer subordinate to him also – The job of passing the order for the purpose of possession has to be performed by the District Magistrate himself whereas the job of taking possession can be delegated by him to any subordinate officer. (Para 10 and 11)

B. Interpretation of Statute – Delegatus Non Potest Delegair – Meaning – Application to the Enactment – Delegate has no power to delegate i.e. a distinction conferred by Statute on any authority is intended to be exercised by that authority only and not by any other unless the contrary intention is expressed in the Statute itself – District Magistrate is persona designeta, that is a person as an individual upon whom the power to pass an order of possession of the secured assets has been conferred exclusively – In the absence of any intention conferring any authority upon the District Magistrate to delegate the aforesaid power to any other person, officer or authority, the power to pass an order of possession the Act has to be exercised by the District Magistrate and none else. (Para 13, 14 and 15)

C. Criminal Law-S.R.F.A.E.S.I. Act, 2002 – Section 14 – Criminal Procedure Code – Section 20 – Power of Additional District Magistrate – Since Additional District Magistrate is empowered to exercise the powers of the District Magistrate under the Code or any other law in force, the order passed by him under Section 14 of the Securitization Act is not without jurisdiction – The application moved under Section 14 can be considered even by the Additional District Magistrate provided he is directed by the State Government to perform the said powers under the Securitization Act in accordance with Section 20(2) of the Code. (Para 32 and 39)

Writ Petition dismissed (E-1)

Cases relied on :-

1. Irshad Husain Vs. D.M., Moradabad & ors., (2009) 3 ADJ 81 (DB)

2. Brahm Singh & ors.Vs. Board of Revenue & ors., AIR (2008) Allahabad 144

3. Rich Field Industries Pvt. Ltd. Vs. S.B.I. & 3 ors., (2016) 10 ADJ 192

4. S.K. Akbar Ali Vs. St. of W.B. & ors., (2012) AIR Calcutta 10

5. M/s Lakshya Concosts Pvt. Ltd. Vs. B.O.B. (Allahabad) (DB), 2017 AIR (Allahabad) 172

6. Ajaib Singh Vs. State of Punjab, 1965 (2) SCR 845

7. Hari Chand Aggarwal Vs. Batala Engineering Co., AIR (1969) SC 483

8. Nainital Bank Ltd. Vs. M/s Naveen Kisan Rice Mill & ors., AIR (2019)Uttaranchal 44

9. The Authorised Officer, Indian Bank Vs. D. Visalakshi & anr., AIR (2019) SC 4619

(Delivered by Hon'ble Pankaj Mithal, J.
&
Hon'ble Saral Srivastava, J.)

1. Under challenge in this writ petition is the order dated 26.08.2019 passed by the Additional District Magistrate (Finance and Revenue), District Rampur.

2. The aforesaid order has been passed by him in exercise of powers under Section 14 of the The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 *(hereinafter referred to as "Securitisation Act") directing Up Zila*

Magistrate (Sadar) and the Circle Officer to take possession of the secured assets of the petitioners.

3. The principle argument of Sri Prateek Kumar, learned counsel for the petitioners is that the aforesaid order is without jurisdiction and as such a nullity. The Additional District Magistrate has no authority in law to pass any order under Section 14 of the Securitisation Act. The power to pass an order under the aforesaid provisions is vested solely in the District Magistrate or the Chief Metropolitan Magistrate. The aforesaid power is a *quasi-judicial* power and it cannot be delegated to any other person, officer or authority. The Additional District Magistrate would not be included in the definition of the District Magistrate for the purposes of the Securitisation Act.

4. In defence of the above order, learned Standing Counsel and Sri Habib Ahmad, learned counsel appearing for Allahabad Bank submits that the powers exercised by the District Magistrate under Section 14 of the Act are not adjudicatory in nature rather administrative and same can be delegated, if necessary, to any other person, officer or authority by the District Magistrate. In fact, in view of the provisions of Section 20 and 23 of the Criminal Procedure Code *(hereinafter referred to as "Code")*, the Additional District Magistrate have all the powers of a District Magistrate and is entitle to exercise all his powers in his absence.

5. In view of the respective submissions of counsel for the parties, we are seized with the following three questions :-

(i) Whether the power exercisable under Section 14 of the Act are in the nature of ***persona designeta*** *and can be exercised only by the District Magistrate/Chief Metropolitan Magistrate and not by any other officer much less the Additional District Magistrate; and*

(ii) Whether the Additional District Magistrate is a District Magistrate for the purposes of exercising the said power; and

(iii) Whether the District Magistrate/ Chief Metropolitan Magistrate can delegate the power to pass an order under Section 14 of the Securitisation Act to any subordinate authority/officer such as Additional District Magistrate.

6. In context with all the above issues, it is pertinent to refer to Section 14 of the Securitisation Act. The aforesaid provision stipulates that where any secured creditor is desirous of taking possession of the secured assets, he may move an application in writing to the Chief Metropolitan Magistrate or the District Magistrate *(for our purpose only "District Magistrate" hereinafter)* of the area concerned for taking its possession and the application has to be accompanied by an affidavit declaring as many as 9 things as enumerated in the provision whereupon the District Magistrate on being satisfied as to the contents of the affidavit, order for the possession of the secured assets.

7. The aforesaid provision further lays down that the District Magistrate after passing of such an order may authorize any officer subordinate to him to take possession of such assets and documents relating thereto and forward them to the secured creditor.

8. The aforesaid Section 14 in its entirety as it stands today is reproduced hereinbelow for the purposes of convenience-:

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of

secured asset. *- (1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him-:*

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor.

[Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that-

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above.

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secl1red assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets [within a period of thirty days from the date of application]:-

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]

[Provided further that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.]

[(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,-

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.]

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any Court or before any authority.

9. The aforesaid provision contemplates the following steps -:

(i) Moving of an application accompanied by an affidavit containing certain essentials by the secured creditor before the District Magistrate for the purpose of obtaining possession of the secured assets ;

(ii) Passing of a suitable order by the District Magistrate on satisfaction of the contents of the affidavit for taking possession of the secured assets;

(iii) Authorization by the District Magistrate to any subordinate officer to take possession of assets and documents and to forward them to the secured creditor.

10. In view of the above provision, two distinct jobs have to be performed by the District Magistrate under Section 14 of the Act. The first is to pass a suitable order for the purpose of taking possession of the secured assets; and second is to take possession of such assets and the documents and to forward them to the secured creditor which job can be authorized by him to be performed by any officer subordinate to him also.

11. Thus, in a way, the job of passing the order for the purpose of possession has to .be performed by the District Magistrate himself whereas the job of taking possession can be delegated by him to any subordinate officer.

12. In other words, the actual order for possession has to be passed by the District Magistrate and by no other authority whereas the possession can be taken thereafter by any other officer or authority as may be authorized by the District Magistrate. The Parliament has separated the functions of passing an order on an application made by the secured creditor and the consequential act of taking possession of secured assets and documents thereof for forwarding them to the secured creditor. The consequential act following the order of possession has been permitted to be delegated by the District Magistrate to any officer subordinate to him but not the power to pass the order itself whether it happens to be an administrative order or a quasi-judicial order with no adjudication of any lis between the parties.

13. It is a well recognized legal maxim ***"Delegatus Non Potest Delegair"***

meaning that delegate has no power to delegate i.e. a distinction conferred by Statute on any authority is intended to be exercised by that authority only and not by any other unless the contrary intention is expressed in the Statute itself.

14. In the present enactment, the District Magistrate is *persona designeta*, that is a person as an individual upon whom the power to pass an order of possession of the secured assets has been conferred exclusively and it is not intended to be delegated either expressly or impliedly.

15. In the absence of any intention conferring any authority upon the District Magistrate to delegate the aforesaid power to any other person, officer or authority, the power to pass an order of possession under Section 14 (1) of the Securitisation Act has to be exercised by the District Magistrate and none else.

16. Now coming to the other aspect of the matter, whether the District Magistrate includes Additional District Magistrate, a reference may be had to Section 20 of the Code which is quoted hereinbelow-:

20. Executive Magistrates. *- (1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.*

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have [such] of the powers of a District Magistrate under this Code or under any other law for the time being in force, [as may be directed by the State Government].

(3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive administration of the district, such officer shall, pending the orders of the State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

(4) The State Government may place an Executive Magistrate in charge of a sub-division and may relieve him of the charge as occasion requires; and the Magistrate so placed in charge of a sub-division shall be called the Sub-Divisional Magistrate.

[(4-A) The State Government may, by general or special order and subject to such control and directions as it may deem fit to impose, delegate its powers under sub-section (4) to the District Magistrate.]

(5) Nothing in this section shall preclude the State Government from conferring, under any law for the time being in force, on a Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area.

17. The aforesaid provision relates to Executive Magistrates and provides that the State Government may appoint as many persons as it thinks fit to be Executive Magistrates for every district and shall appoint one of them to be the District Magistrate.

18. It further lays down that the State Government may appoint any Executive Magistrate to be the Additional District Magistrate who shall have such powers of the District Magistrate under the Code or any other law for the time being in force as may be directed by the State Government.

19. In the absence of the District Magistrate, any officer who succeeds him temporarily is entitle to exercise his powers and perform all duties conferred and imposed under the Code upon the District Magistrate.

20. In other words, State Government is entitle to appoint several Executive Magistrate for every district and one of them to be the District Magistrate. The Executive Magistrate can also be appointed as an Additional District Magistrate and can be conferred with the powers of the District Magistrate under the Code or any other law for the time being in force and is also entitle to perform the functions and duties of the District Magistrate as conferred upon him under the Code.

21. In view of the above, the District Magistrate and Additional District Magistrate are both executive magistrates and the Additional District Magistrate possesses such of the powers of the District Magistrate under the Code or any other law in force as may be directed by the State. In the absence of the District Magistrate, his functions and duties may also be performed by the Additional District Magistrate but that performance is confined to the Code only.

22. Section 35 and 37 of the Securitisation Act provides that the Securitisation Act is a special enactment and its provisions shall have effect notwithstanding anything inconsistent therewith contained in any law for the time being in force and that the provisions of the Securitisation Act shall be in addition to, and not in derogation of the certain Acts mentioned therein or any other law for the time being in force. The aforesaid provisions read as under :-

*"**35. The provisions of this Act to override other laws.** - The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*

***37. Application of other laws not barred.** - The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."*

23. In **Irshad Husain**1, a Division Bench of this Court was seized with a similar controversy as to whether Additional District Magistrate/ Additional Collector (Finance and Revenue) has the authority to pass an order under Section 14 of the Securitisation Act. The Court simply by referring to provisions of Section 14 of the Securitisation Act and Section 14-A of the Revenue Act held that as the powers of the Additional Collector are similar to those of the Collector, the order passed by Additional Collector is not without jurisdiction.

24. The aforesaid decision has been rendered on the basis of Section 14-A of the U.P. Land Revenue Act, 1901 *(hereinafter referred to as "Revenue Act")* wherein appointments and powers of the Additional Collectors have been laid down. The powers of the Collectors or the Additional Collectors are for the purposes of collection of revenue and not for exercising magisterial powers of administration.

25. Section 14-A of the Revenue Act is reproduced below for the sake of convenience :-

[14-A. Appointment, powers and duties of Additional Collectors.] *- (1) The [State Government] may appoint an Additional Collector in a district or in two or more districts combined.*

(2) An Additional Collector shall hold his office during the pleasure of the [State Government].

[(3) An Additional Collector shall exercise such powers and discharge such duties of a Collector in such case or classes of cases as the Collector concerned may direct.]

(4) This Act and every other law for the time being applicable to a Collector shall apply to every Additional Collector, when exercising any powers or discharging any duties under sub-section (3), as if he were the Collector of the district.

26. According to the aforesaid provision, Additional Collector has been authorized to exercise powers of the Collector and to discharge his duties, as may be directed. It also provides that law applicable to a Collector shall also be applied to every Additional Collector while exercising powers or discharging duties as a Collector. It thus entrusts him with the powers and functions of the Collector. However, the position of the Collector or the Additional Collector is totally different from that of the District Magistrate/ Additional District Magistrate whose appointment, powers and duties are not governed by the provisions of the Revenue Act but by the Code. Both these officers exercise distinct powers and functions. One acts as a revenue officer of the district whereas the other as the executive magistrate or administrative officer of the district. Therefore, the powers conferred upon Collector/ Additional Collector or the nature of their duties cannot be equated with that of the District Magistrate/Additional District Magistrate. Accordingly, the decision in **Irshad Husain** *(supra)* and some other decisions rendered on its basis are not relevant and conclusive insofar as the powers of the Additional District Magistrate *viz-a-viz* the District Magistrate under Section 14 of the Securitisation Act are concerned as they are not the same as that of Collector/Additional Collector.

27. The aforesaid decision in **Irshad Husain** *(supra)* does not refer to any other provision of law and fails to take into account the *ex-facie* distinction between the duties of the Collector and the District Magistrate. The provisions relating to Collector/Additional Collector and those relating to District Magistrate/Additional District Magistrate are distinct and operate in altogether a different field and as such the aforesaid decision cannot be treated to be a good precedent for the purposes of resolving the controversy as to whether Additional District Magistrate and District Magistrate are one of the same authority who have been conferred with the same powers for the purposes of passing an order under Section 14 of the Securitisation Act.

28. The Full Bench decision in **Brahm Singh**2 is also in context with the powers of the Collector and the Additional Collector. In the said case, the short controversy under consideration was whether the powers and functions of the Collector can be exercised by the Additional Collector under Section 198 (4) of U.P. Z.A. and L.R. Act. It was in context with the said controversy that the Court held that in view of Section 14-A of the

Revenue Act, the Additional Collector acts and discharges duties and functions or exercises such powers of the Collector that would be deemed to have been exercised by him under the Act and as such the powers under Section 198(4) of the said Act are exercisable by him also.

29. The aforesaid decision also does not extend any help to us for deciding the controversy at hand viz-a-viz the powers, duties and functions of District Magistrate/Additional District Magistrate in reference to Section 14 of the Securitisation Act.

30. In **Rich Field**3, one another Division Bench of this Court was again seized of the matter regarding the powers of the District Magistrate to pass orders under Section 14 of the Securitisation Act. The Court after referring to **Irshad Husain** (supra) disagreed with the decision of the Calcutta High Court in **S.K. Akbar Ali**4 which laid down that an Additional District Magistrate even if conferred with the powers of the District Magistrate does not become District Magistrate and remains to be an officer below the District Magistrate and accordingly held that Additional District Magistrate is competent to decide the application filed under Section 14 of the Securitisation Act.

31. One more Division Bench of this Court in **M/s Lakshya Concosts**5 while dealing with an identical controversy relying upon **Irshad Husain** and **Rich Field Industries** *(supra)* opined that the Additional District Magistrate had not acted illegally or without jurisdiction in deciding the application under Section 14 of the Securitisation Act.

32. The said Division Bench further referred to Section 20 of the Code and came to the conclusion that the District Magistrate and Additional District Magistrate are Executive Magistrates and since Additional District Magistrate is empowered to exercise the powers of the District Magistrate under the Code or any other law in force, the order passed by him under Section 14 of the Securitisation Act is not without jurisdiction.

33. The respondents, on the other hand, relied upon the following three decisions-:

(i) **Ajaib Singh**6
(ii) **Hari Chand Aggarwal**7
(iii) **Nainital Bank Limited**8

34. In **Ajaib Singh**, it has been observed that unless a person is appointed under the Code as a District Magistrate, he cannot be called a District Magistrate and that an Additional District Magistrate is an officer below the rank of the District Magistrate.

35. The Three Judges' Bench of the Apex Court in **Hari Chand Aggarwal** held that Additional District Magistrate and District Magistrate are two different authorities and that Additional District Magistrate is not competent to requisition the property simply because he has been vested with all powers of the District Magistrate under the Code. The Hon'ble Supreme Court therein observed that the object of appointing an Additional District Magistrate is to relieve the District Magistrate of some of his duties and that he is subordinate to the District Magistrate to a limited extent only.

36. In **Nainital Bank Limited** where an identical controversy was under consideration as to whether Additional District Magistrate is empowered to pass order under Section 14 of the Securitisation Act, the Court held that the provisions of the Code or the Revenue Act can not be pressed into motion to contend the District Magistrate referred to under Section 14 of the Securitisation Act, would also include an Additional District Magistrate. Notwithstanding that District Magistrate and Additional District Magistrate are two different and distinct authorities and Additional District Magistrate is subordinate to District Magistrate and cannot be called as District Magistrate. Nonetheless, as both are Executive Magistrates and the Additional District Magistrate is entitle to perform functions and duties of the District Magistrate or to exercise his powers in his absence as conferred upon him under the Code or any other law in force, the Additional District Magistrate to some extent virtually acts as a District Magistrate. The use of the phrase "any other law for the time being in force" as used in Section 20 of the Code and Sections 35 and 37 of the Securitisation Act has very wide amplitude to cover the powers of the District Magistrate conferred upon him under the Act which can be exercised by Additional District Magistrate in case of necessity and if so directed. It would not be proper rather unnecessary to narrow down the scope of the above phrase by excluding the Act from it as has been done by the Uttarakhand High Court in the above case. The provisions of none of the above enactments permit such limited use of the above phrase to confine it in relation to the law relating to securities markets only.

37. In view of the above, we find it difficult to agree and follow the above decision of the Uttarakhand High Court more particularly when there is a good precedent of our own High Court in the shape of **M/s Lakshya Concosts Private Limited** (supra).

38. In The **Authorised Officer, Indian Bank**9, the issue that cropped up before the Apex Court was whether the Chief Judicial Magistrate (C.J.M.) is competent to process the request of the secured creditor for taking possession of secured assets under Section 14 of the Securitisation Act as the aforesaid provision mentions only Chief Metropolitan Magistrate (C.M.M.). The Apex Court after in depth consideration of the entire controversy held that substitution of the functionaries (C.M.M. as C.J.M.) qua the administrative and executive or so to say the non-judicial functions discharged by them in the light of Code, would not be inconsistent with Section 14 of the Securitisation Act. It would be meaningful, purposive and contextual construction of Section 14 of the Securitisation Act to include C.J.M. as competent to assist the secured creditor to take possession of the secured assets. It was thus held that C.J.M. is equally competent to deal with the application moved by the secured creditor under Section 14 of the Securitisation Act.

39. Similarly, in the light of the provisions of the Code, it would be meaningful to include Additional District Magistrate as District Magistrate and to hold that the application moved under Section 14 of the Securitisation Act can be considered even by the Additional District

Magistrate provided he is directed by the State Government to perform the said powers under the Securitisation Act in accordance with sub-section 2 of Section 20 of the Code or if he succeeds District Magistrate temporarily for discharge of the executive, administration of the District Magistrate in accordance with sub-section 3 of Section 20 of the Code.

40. In view of the above, we find no force in the challenge made to the impugned order and in the argument raised on behalf of the petitioners.

41. The writ petition is accordingly **dismissed** with no order as to costs.

(2020)03-05ILR A1885
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE PIYUSH AGRAWAL, J.

WRIT-C No. 40523 of 2019

Paras Nath Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan, Sri Javed Hussain Khan, Sri Gulrez Khan

Counsel for the Respondents:
C.S.C., Sri Vinod Kumar Chandel

A. Civil Law-U.P. Kshettra Panchayat and Zila Panchayat Act, 1961 – Contractual amount – Recovery as arrear of land revenue – Legality – There is no provision in the Act, which empower the Zila Panchayat to recover the contractual amount as arrears of land revenue – Contractual amount cannot be recovered as arrears of land revenue in the absence of any provisions – The action taken by the respondents by way of issuing the recovery citation held legally not justified. (Para 15 and 21)

Writ Petition allowed (E-1)

Cases relied on :-

1. Writ C No. 12575 of 2013; Subhas Tiwari Vs. St. of U.P. decided on 17.10.2014

2. Subhash Chand Vs. Collector, Etawah & ors., (1999) 1 AWC, 582

3. Titu Singh Mathura Vs. D.M./Collector, Mathura & ors., (2003) 5 AWC 3479

4. Iliyas Vs. St. of U.P. & ors., 2007 (2) ADJ, 143 (D.B.)

5. Mohd. Umar Vs. Collector / D.M. Moradabad & ors., 2006 (9) ADJ 66 (All) (DB)

6. Sanjay Kumar Gupta Vs. St. of U.P. & ors., 2013 (5) ADJ 506 (DB)

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Heard Sri W.H. Khan, learned Senior Advocate assisted by Sri Javed Hasain Khan, for the petitioner, learned Standing Counsel for State-respondents and Sri Vinod Kumar Chandel, for respondent nos. 2 and 3.

2. By means of the present writ petition, the petitioner is challenging the recovery certificate dated 24.8.2019 issued by Upper Mukha Adhikari, Zila Panchayat, Sonebhadra as well as recovery citation dated 0.1.2019 issued by Tehsildar Chunar, District Mirzapur, on the ground that there is no provision under UP Kshetra Samiti and Zila Panchayat Adhiniyam, 1961, to recover the contractual amount as arrears of land revenue.

3. Brief facts of the case is that in pursuance of the Advertisement dated 4.7.2015 issued by Adhyaksh and Upper

Mukhya Adhikari, Zila Panchayat Sonebhadra and published in daily "Aaj' dated 7.7.2015 for awarding contract of realizing *Parivahan Shulk* for the year 2015-16, the petitioner submitted his tender and was a successful bidder of the price of Rs. 8 crores. In pursuance thereof an agreement was executed on 20.7.2015 between the petitioner and Zila Panchayat, Sonebhadra.

4. It has been averred that neither at the time of advertisement dated 4.7.2015/7.7.2015 nor at the time of entering into the contract dated 20.7.2015, the respondents informed the petitioner that validity of the by-laws of Zila Panchayat, Sonebhadra was under challenged by several persons whereby the realization of *Pariwahan Shulka* was stayed. In view of the pendency of litigation at various stages i.e. before this Court as well as before the Apex Court, the company as well as the firms did not pay the prescribed *Pariwahan Shulka* to the petitioner and therefore, the petitioner could not realize the same.

5. It is further averred that somehow, the petitioner deposited the first instalment of Rs. 01 crore and security deposit of Rs. 25 lakh, which was to be adjusted in the last instalment. Thereafter another two instalments, firstly on 30.9.2015, the petitioner deposited Rs. 3.50 crore along with tax of Rs. 7 lakhs and additional tax of Rs. 14,000/- and the other on 31.12.2015, deposited Rs. 3.25 crores along with tax of Rs. 07 lakhs and additional tax of Rs. 14,000/-.

6. Learned counsel for the petitioner submitted that on 26.12.2015, Upper Mukhaya Adhikari wrote a letter to the petitioner for deposit of remaining amount of *Parivahan Shulk* within three days and in case of default the loss caused to the Zila Panchayat would be realized from the petitioner. In response thereto, the petitioner sent a reply dated 5.1.2016 to the Upper Mukha Adhikari in which it has been submitted that the petitioner was not informed by Zila Panchayat about the pending litigation, therefore, different companies are neither paying the tax nor cooperating with the petitioner as such the petitioner could not collect the prescribed fee.

7. He further submitted that when the coercive action was taken against the petitioner by terminating the agreement by order dated 18.1.2016, a Writ Petition No. 3954 of 2016 was filed before this Court in which the pleadings have been exchanged but the same is still pending. In the meantime, the impugned recovery notice has been issued for realization of Rs. 3,26,21,116/- including 10 % collection charges as arrears of land revenue.

8. The counsel for the petitioner submitted that admittedly in pursuance of advertisement dated 7.7.2015 published in daily "Aaj' , the petitioner applied for contract of *Pariwahan Shulk* for the period 2015-16 and the petitioner was successful bidder, thus the contract was executed in favour of the petitioner on 20.7.2015. But neither at the time of advertisement nor at the time of execution of contract, Zila Parishad had intimated the petitioner that litigation in respect of validity of by-laws of Zila Parishad is pending as such the *Parivahan Shulk* cannot be realized. It is further submitted that in view of pending litigation, the *Parivahan Shulk* could not be realized and the same was duly intimated to the respondents but instead of co-operating with the petitioner, the respondents choose to terminate the contract of the petitioner

and also issued impugned recovery certificate to recover the contractual amount as the arrears of land revenue.

9. He further submitted that under UP Kshetra Samiti and Zila Panchayat Adhiniyam, 1961, there is no provision for recovery of contractual amount as an arrears of land revenue.

10. In support of his contention, learned counsel for the petitioner has relied upon the judgement and order passed by this Court in **Writ C No. 12575 of 2013 (Subhas Tiwari Vs. State of UP)** decided on 17.10.2014; relevant part of the judgement is extracted below :-

"Sri W.H. Khan, learned Senior Counsel appearing for the petitioner has contended before us that the amount which are claimed under the recovery certificate are the sums which the Zila Panchayat alleges to be payable under the contract aforementioned and which cannot be recovered as arrears of land revenue in the light of various Division Bench judgments of this Court. In support of his submission Sri Khan has placed reliance on the judgment rendered by this Court in **Mohd. Umar Vs. Collector / District Magistrate, Moradabad and others 2006 (3) AWC 2412; Sanjay Kumar Gupta Vs. State of U.P. and others 2013 (5) ADJ 506; Abrar Hussain Vs. District Magistrate / Collector and others** in Writ Petition No. 40319 of 2006 decided on 26.11.2013. The counsel for the Zila Panchayat does not dispute the legal proposition and principles laid down in the aforementioned judgements and is also not able to dispute the position in law as noticed and declared in the aforesaid judgments.

For the view taken by the Division Benches of this Court, we find it just and proper to conclude that the impugned recovery certificate, seeking to enforce the recovery as arrears of land revenue, cannot be sustained."

11. The counsel for the petitioner further contended that in the absence of any provision under UP Kshetra Samiti and Zila Panchayat Adhiniyam, 1961, no recovery of contractual amount can be made as arrears of land revenue and in view of the judgement passed by this Court in case of **Subhash Tiwari *(supra)***, the impugned recovery citation is liable to be set aside.

12. Learned counsel for the respondents did not dispute the aforesaid contention made by the learned counsel for the petitioner.

13. We have considered the arguments of the learned counsel for the parties and perused the material on record.

14. There is no factual dispute in the matter. The only contention raised by the counsel for the petitioner for consideration of this Court is that the contractual amount cannot be recovered as arrears of land revenue as U.P. Kshetra Samiti and Zila Panchayat Adhiniyam, 1961 does not empower the respondents to do so, therefore the impugned recovery certificate is liable to be set aside.

15. The respondents could not place any material before this Court to show any provision which empowers the Zila Panchayat to recover the contractual amount as arrears of land revenue.

16. This Court in the case of **Subhash Chand Vs. Collector, Etawah and others, 1999 (1) AWC, 582** held as follows:

22. In our view the Theka money due is on account of Tehbazari fee payable

to the Zila Parishad. The Zila Parishad in order to managing itself realisation of the Tehbazari fee has given it on Theka of the petitioner. It has passed its headache or burden to the Thekedar. The loss and profits are his responsibility. The Theka money flows from Tehbazari fee therefore how could it be taken away from the scope and ambit of the Act. In our view it has a direct nexus with the Tehbazari fee. We have to consider the substance and not the form while interpreting the document.

23. The Legislature has used the phraseology "any sum due" in Section 161 of U. P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961. Similarly, the Legislature has used the phraseology "any sum due" in Section 159 also of the said Act. Thus, a combined reading of both these statutory provisions, i.e. Sections 159 and 161 of the said Act makes it crystal clear that the phraseology "any sum due" has been used by the Legislature in such a comprehensive sense that it covers in its widest amplitude any sum due under the Act or under any rule/bye-law framed thereunder and therefore, any such sura would be recoverable as arrears of land revenue, i.e. in the manner as provided under Chapter VIII of the said Act. Accordingly we are of the considered view that the term 'any sum due' in the facts and circumstances of present case, would Include the Theka money, i.e. the amount due from the Thekedar towards the Tehbazari fee or licence fee. This is the harmonious construction of the two provisions. The Legislature has used the term 'mutatis mutandis' in Section 161 of the Act which means in the given context that the provisions of Chapter VIII would apply to deal the recovery of taxes and certain other claims. The Legislature has purposely used the terms 'certain other claims' which includes any sum due. The mode of recovery provided by the Legislature is to recover as arrears of land revenue is a speedy and expeditious mode of recovery and we cannot question the wisdom of the Legislature in providing such a speedy and effective mode of recovery. It is very interesting aspect of the matter to note in the instant case. that the recovery certificate issued by the Atirikt Mukhya Adhikari, the respondent No. 3 to Collector Etawah attached as Annexure-1 to the writ petition has been challenged by means of this writ petition. A bare perusal of Annexure-1 shows that the amount of Rs. 2,75,000 which was sought to be recovered was shown as the amount due to the Zila Parishad. The relevant portion of Annexure-1 reads as under :

'महोदय, श्री सुभाष चन्द्र पुत्र श्री नत्थू सिंह निवासी संवारपुर परगवा इटावा जिसके संबंध में यह विश्वाश किया जाता है कि यह आपके जिले में स्थान संवारपुर परगना इटावा में निवास करता है उसकी सम्पति ग्राम संवारपुर परगना इटावा में आपके जिले में है.....तहबाजारी वेदपुरा वर्ष 86–87 के बकाये मददे 2,75,000.00 (दो लाख पचहत्तर हजार रू. मात्र) की धनराशि शेष है।

रेवेन्यू रिकवरी एक्ट –1989 के उपबंधों के अधीन रहते हुये धनराशि आपके जिले में प्रतिभूति हुई माल गुजारी बकाये के रूप में आप द्वारा वसूल की जा सकने वाली है और आपसे अनुरोध किया जाता है कि आप उसे वसूल करवाने का कष्ट करें तथा जिला परिषद इटावा को जिला निधि, जिला–परिषद एकाउन्ट में जमा कराने का कष्ट करें । इस बकाया की वसूली हेतु जिलाधिकारी/अध्यक्ष ने वहैसियत परिषद स्वीकृति प्रदान कर दी है ।

भवदीय,

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अतिरिक्त मुख्य अधिकारी

24. After hearing the learned counsel for the parties we are of the view that the amount in question can be recovered as arrears of land revenue and it is unfortunate that public money is not

being paid by the petitioner. We are also of the view that the submissions raised by Mr. Agarwal that it cannot be recovered as arrears of land revenue are of no substance and we are also of the view that the petitioner introduced some pleas of the writ petition filed by one Sri Ali Hasan which is of no relevance in this petition as the land was different and the scope of that writ petition was different. It was regarding validity of fee.

25. We have considered the aforementioned judgments referred by the learned counsel for the petitioner first in *Surendra Kumar Rai (supra)*--the question of Section 161 was never discussed in this case. Similarly in *Raj Bahadur Singh (supra)*--it deals with U. P. Town Area Act. Bhagwati Prasad (supra)--it also deals with U. P. Town Area Act (Sections 20 and 21} Angad Pandey (supra)--it also deals with U. P. Town Area Committee and money dues which cannot be recovered as arrears of land revenue and it was held that any amount due to the Thekedar in view of the contractual term cannot be recovered as arrears of tax. Similarly in Umesh Chandra (supra)--it was observed that amount of Rs. 5,500 can be recovered under Section 158 of the Act as it is due to a Contractor and cannot be recovered under U. P. Moneys Recoveries of Dues Act as it is not tax or rent.

26. In other words the consistent view was that it is a contractual amount between the Contractor and Zila Panchayat and has no link with the fee. On the aforesaid facts we do not accept the ration as Section 161 did not fall for consideration in those judgments.

27. We are of the considered view that the plea raised by the petitioner that the money due cannot be recovered as arrears of land revenue and should not be ordinarily entertained in writ proceedings. We refuse to exercise, in the facts and circumstances, our discretion under Article 226 of the Constitution of India.

17. Similar view has been taken by this Court in the case of **Titu Singh Mathura Vs. District Magistrate/Collector, Mathura and others, 2003 (5) AWC 3479**. Relevant part of the judgement is extracted below:-

6. From perusal of the aforesaid provisions of the Municipalities Act and Town Area Act, it is clear that the contention of the learned Counsel for the petitioner is well founded. Under Section 173-A of the Municipalities Act, it is provided that any sum due on account of tax, other thanoctroi or toll or any similar tax payable upon immediate demand, from a person to a board, the board may, recover as arrears of land revenue. In the instance case the amount in question became due from the petitioner as a result of default in payment of Theka money between the parties. Similarly Section 21 of the Town Areas Act provides that arrears of any tax imposed under this Act may be recovered and no other amount. Therefore, the provisions of Section 173-A of the Municipalities Act, and Section 21 of the Town Areas Act are not attracted. The amount in question is not a tax imposed under the aforesaid two Act and as such the amount due from the petitioner could not be recovered as arrears of land revenue. Besides the aforesaid decisions, there are two recent decisions also in Bisheshwar Singh @ Kalloo v. District Magistrate/Collector. Shahjahanpur and Ors. MANU/UP/0433/2001 and Rakesh Shukla v. District Magistrate/Sub-Divisional Magistrate, Phoolpur, Allahabad and Anr. MANU/UP/0554/2002. In these decisions also, the Division Bench found

that the Theka money could not be recovered as arrears of land revenue. However, the Bench did not interfere on the ground that the equity was not in favour of the petitioner.

7. Therefore, in view of the decisions of the Division Benches, clearly holding that only taxes imposed under the Municipalities Act, and Town Area Act can be recovered as arrears of land revenue, we are of the opinion that the amount in question cannot be recovered as arrears of land revenue and the recovery certificate as well as the citation are liable to be quashed.

18. In the case of **Iliyas Vs. State of UP and others, 2007 (2) ADJ, 143 (D.B.)** this Court has held as follows:

4. In view of the aforesaid provisions the learned counsel for the petitioner submits that it is clear that only taxes, which are due to the municipalities can be recovered as arrears of land revenue and no other sum can be recovered as arrears of land revenue.

5. The petitioner has placed reliance upon a Division Bench judgment of this Court reported in 2006(3) UPLBEC, 2643 Mohammad Umar Vs. Collector/District Magistrate, Moradabad and others and reliance has been placed upon paras 10, 12 to 14 and paras 15 and 17 of the said judgment and has submitted that the Division Bench of this Court has held that amount due towards the contract for realization of Tehbazari cannot be recovered as arrears of land revenue and there is no provision under the Municipalities Act or U.P. Town Area Act authorizing the respondents to realize theka money as arrears of land revenue, as such, the said amount cannot be recovered in the said manner and has held that in view of the aforesaid fact, the respondents have no authority to recover the amount due to the petitioner as arrears of land revenue.

6. We have considered the submission made on behalf of the petitioner and the respondents. We are in full agreement with the judgment relied upon by the counsel for the petitioner. As there is no factual dispute in the present writ petition, the only question was to be decided whether the amount due against the petitioner can be recovered as arrears of land revenue or not. As in view of the Division Bench judgment of this Court, which is fully applicable to the present case, the Tehbazari amount due against the petitioner cannot be recovered as arrears of land revenue, as such, without inviting the counter affidavit, with the consent of the parties, the writ petition is being disposed of.

7. In view of the aforesaid fact, the recovery certificate dated 10.5.2004 (Annexure 5 to the writ petition issued by the respondents is hereby quashed. The writ petition is allowed. It is, however, open to the respondents to recover the amount from the petitioner in accordance with law.

19. This Court in the case of **Mohd. Umar Vs. Collector / D.M. Moradabad and others, 2006 (9) ADJ 66 (All) (DB)** has held herein below:

65. The first question which poses consideration is whether in the absence of execution of agreement an enforceable contract between the parties came into existence. The petitioners participated in the public auction for the collection of Tehbazari dues and were highest bidders. In a public auction the bidders offer their bids and the moment of fall of hammer on highest bid, that highest bid is taken to be accepted. In a public auction the fall of hammer concludes the

contract. The auction proceedings, the list of bidders is the only evidence of the contract indicating that out of various offers the highest bid was accepted. Section 97 of the U.P. Municipalities Act relates to the execution of the contracts and provides that every contract made by or on behalf of a Municipality whereof the value or the amount exceeding to Rs.250/- shall be in writing provided that unless the contract has been duly executed in writing, no work including collection of materials in connection with the said contract shall be commenced or undertaken. Every such contract shall be signed by the President or the Vice President or by Executive Officer or Secretary or by any person or persons empowered under sub section (2) of sub-section (3) of previous section to sanction the contract if further and in the like manner empowered in this behalf by the Municipality. The auctions of Tehbazari contract were held in which the petitioners offered highest bids and made part payment of auction money. The petitioners having accepted the conditions of auction sale and having made payment in part performance of the contract a binding contract came into existence between the petitioners and the respondents. In a public auction on the acceptance of the highest bid of the tenderer a concluded contract between the parties enforceable at law came into existence. The highest bids of the petitioners at various auctions were in the nature of an offer which were accepted by the petitioners who were highest bidders and the petitioners deposited the amount in part a performance of the conditions of auction sales, therefore, a valid and legally enforceable contract came into being. Reliance in this regard may be placed on the decision in B.C. Mohendra Versus Municipal Board, Saharanpur AIR 1970 SC 729. Section 10 of the Indian Contract Act provides that all agreements are contracts if they are made by free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void. In all these cases the petitioners participated in an auction sale and being highest bidder made part payment under the terms and conditions of auction sales and carried out the work of collection of Tehbazari dues. The petitioners cannot wriggle out of the contract on the ground of non-execution of agreements. A concluded contract at auction sales came into being between the parties on the fall of hammer and acceptance of higher bid.

….

69. The decisions in the cases of Mahesh Chand (supra) and Surendra Kumar Rai (supra) have been distinguished and held to be per incuriam in the case of Subhash Chand Versus Collector Etawah and others 1999 (1) AWC 582 as the provisions of section 161 of the Adhiniyam 1961 did not fall for consideration in those judgments. Section 161 of the Adhiniyam 1961 provides that any sum due to Kshetra Panchayat under this Act or under any rule or under any bye-law made therein and declared by this Act or such rule or bye-law to be recovered in the manner provided by this Chapter shall mutatis mutandis be recoverable as provided in this Chapter. Section 161 deals with the recovery of dues of Kshettra Panchayat which is a distinct and separate body from a Zila Panchayat. The provisions exclusively relating to Kshettra Panchayat are not applicable to Zila Panchayats. Moreover, for the applicability of the provisions of section 161 any sum must be due to a Kshettra Panchayat and it must have been declared to be recoverable in the manner provided in Chapter VIII. In these writ petitions the Theka money is not due to Kshettra

Panchayat under this Act or under any rule or any bye-laws made thereunder. The auction money is due to Zila Panchayats which are distinct and separate body. The amount being due to Zila Panchayats, the facts of the case of Subhash Chandra (supra) are distinguishable. In view of these facts, the unpaid amount of auction sale held by the Zila Panchayat cannot be recovered as arrears of land revenue.

20. Similar view has been taken by this Court in the case of **Sanjay Kumar Gupta Vs. State of UP and others, 2013 (5) ADJ 506 (DB).** Relevant part of the judgement is extracted below :-

9. Admittedly, the contract between the petitioner and Nagar Palika Parishad, Mawana was for realisation of entry fees/parking fees from the vehicles which enter the territory of Nagar Palika Parishad, Mawana, Meerut. It is thus in the nature of 'toll' and not 'tax'. Under Section 173(A) of the Municipalities Act, 1916, the Municipal Board can only recover a sum due on account of tax as arrears of land revenue. The section itself carves out an exception, by laying down that the Board will have no power to recover arrears of octroi or toll as arrears of land revenue. Interpreting the aforesaid provision of law, a Division Bench of this Court in Titu Singh v. District Magistrate/Collector, Mathura, 2003 (5) AWC 3479, has held that the arrears of theka money (parking fees) cannot be realised as arrears of land revenue. The said decision has been followed in [Iliyas v. State of U.P. and others,].

10. We are in respectful agreement with the view taken in the aforesaid decisions. Accordingly, it is held that the impugned citation for recovery of balance theka money, as arrears of land revenue is without jurisdiction.

11. Before parting, it may be stated that the contention of the respondents that since it is public money and therefore, the petitioner may be directed to pay the said amount, does not desist us from granting aforesaid relief to the petitioner as even in case it is public money, it has to be recovered only in accordance with the procedure prescribed by law.

12. The Apex Court in its judgment in Iqbal Naseer Usmani v. Central Bank of India and others, 2006 (2) SCC 241, repelled similar contention and held as under:

According to the High Court "the money of the Bank and financial institutions is public money, which should be in circulation, otherwise the Bank and depositors will suffer." We are afraid that while this may be very good sentiment, it cannot apply in the face of Section 3 of the Act for the reason that Section 3 does not envisage the provisions of the Act being utilised for recovery of every loan taken. Section 3(1)(b) permits this to be done only in respect of loans taken under a "State-sponsored scheme", which expression has been defined in Section 2(g) of the Act. Since it is admitted that the loan taken by the appellant was not under or in relation to a "State-sponsored Scheme" within the meaning of Section 2(g), whatever else it may be, it would not be recoverable by recourse to the machinery under Section 3 of the Act.

13. Following the law laid down by the Apex Court, we have no hesitation in granting the relief prayed for. Accordingly, the impugned citation dated 1.12.2009 issued by the Tehsildar, Mawana, District Meerut is hereby quashed.

21. In view of the legal proposition enumerative above as well as the principles laid down by this Court in the aforesaid judgements, it is very clear that contractual amount cannot be recovered as arrears of land revenue, in the absence of any provisions contained under UP Kshetra

Samiti and Zila Panchayat Adhiniyam, 1961. Therefore, the action taken by the respondents by way of issuing the recovery citation is not legally justified.

22. The counsel for the respondents also could not bring any material or law contrary to the aforesaid judgements, before this Court, therefore, the action taken by the respondents in issuing recovery citation for recovery of the contractual amount as arrears of land revenue, is illegal.

23. In the facts of the case, we find just and proper to conclude that the impugned recovery certificate dated 24.8.2019 issued by Upper Mukhya Adhikari, Zila Panchayat, Sonebhadra and recovery citation dated 1.11.2019 issued by Tehsildar Chunar, Distt. Mirzapur, seeking to enforce the recovery of contractual amount as arrears of land revenue, cannot be sustained and are hereby quashed.

24. The writ petition is **allowed**. No order as to costs.

(2020)03-05ILR A1893
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SIDDHARTHA VARMA, J.

WRIT-C No. 41708 of 2001

Baboo Ram & Anr. ...Petitioners
Versus
The Commissioner, Basti Division, Basti & Ors. ...Respondents

Counsel for the Petitioners:
Sri P.P. Chaudhary, Sri A.K. Singh

Counsel for the Respondents:
C.S.C., Sri Dharm Raj Chaudhary, Sri P.N. Pandey, Sri Rama Nand Pandey

A. Civil Law-U.P. Zamindari Abolition and Land Reform Act, 1950 – Section 122-B (5-F) and 132 – Pasture Land – Significance – Preservation of Environment – Village Economy – The Pasture Land in a Village area is lifeline of the village people as they need a ground for grazing by their cattles. Every agricultural activity in the village is dependent upon the Cattles which are used for ploughing the fields and other related activities by the agriculturist – The Village economy is largely dependent upon the agricultural activities and even for Vegetarian urban population, agricultural produces are coming from the Villages – Over the period of years, with the increase in population, public spaces are being compromised which has resulted in ecological disasters. We cannot be oblivious of the imminent need to preserve our environment by restoring and maintaining public spaces both in rural and urban areas. (Para 15 and 26)

B. Civil law-U.P.Z.A.&L.R. Act, 1950 – Section 132 – Public Utility Land – Claim of Bhumidhari rights – Scope – In rural areas, public spaces such as ponds, pasture lands, lands in river bed and the lands used for casual or occasional cultivation described under Section 132 have to be preserved and protected by the Revenue Authorities who have been conferred with the ample powers to undo the wrong – No Bhumidhari rights could be granted in the Public Utility land kept aside for 'Charagah' (Pasture Land) – It cannot be settled in favour of an agricultural labour even belonging to Scheduled Caste or Scheduled Tribes by taking recourse to the proceedings under Section 122-B (4-F) of the Act. (Para 24, 26 and 31)

C. Public Utility Land – Illegal Encroachment – Duty of State and Revenue authorities – It is the duty of the State and the appropriate Local authority to take necessary measures at the grassroot level. The Revenue Authorities are required to keep a strict vigil in the area of their jurisdiction so as to ensure that the public spaces are not illegally occupied or encroached by the Villagers or outsiders – Appropriate

timely action is the need of the hour. In each case of such illegal encroachment coming before the Revenue Authorities, action in accordance with the statutory provisions has to be taken. (Para 27)

D. Civil Law-U.P.Z.A.&L.R. Act, 1950 – Section 333 – Supervisory Power – Objects and Scope – The Board or the Commissioner can make an enquiry into an order passed by the Subordinate Court by summoning the record of the suit or proceedings conducted by it, either on its own motion, i.e. suo motu or an application moved by any person bringing the said fact to its knowledge – The enquiry is limited to the question of failure in exercise of jurisdiction vested in the court concerned, or exercise of the jurisdiction not vested in or if it has acted in exercise of its jurisdiction illegally or with material irregularity – The supervisory powers given to the Board or the Commissioner is in order to keep the Subordinate revenue authorities or the Courts within their bounds. (Para 19 and 20)

E. Court proceeding – Playing of fraud – Consequence – Fraud vitiates every solemn act – A judgment or decree obtained by playing fraud on the Court is a nullity and nonest in the eye of law – Such a judgement and decree passed either by the Court of first instance or by the highest Court has to be treated as a nullity by every Court, whether superior or inferior – It can be challenged in any Court even in a collateral proceedings. (Para 21)

F. Constitution of India – Article 226 – Principle of Natural Justice – Scope of Interference – The observance of principles of natural justice cannot be put in a strait jacket formula. Wherever a plea is taken regarding violation of natural justice, the person pleading it has to establish that prejudice has been caused to him by such action – On demonstration of the said fact, interference under Article 226 of the Constitution of India can be made to remedy the situation – High court would be right in refusing to invoke its extraordinary discretionary power under Article 226 of the Constitution to quash an order which would result in restoration of an illegal order. (Para 29)

Writ Petition disposed off (E-1)

Cases relied on :-

1. S.P. Chengal Varaya Naidu Vs. Jagannath & ors., (1994) 1 SCC 1

2. Raj Kumar Vs. Ashok Kumar Chaurasia, (2016) 2 ADJ 672

3. Ramesh Chaturvedi Vs. St. of U.P. through Collector Faizabad & ors.,

(2019) 2 ALJ 292

4. Hinch lal Tiwari Vs. Kamala Devi & ors., (2001) 6 SCC 496

5. Jagpal Singh & ors. Vs. St. of Punjab & ors., (2011) 11 SCC 396

5. S. L. Kapoor Vs. Jagmohan & ors., (1980) 4 SCC 379

6. Aligarh Muslim University Vs. Mansoor Ali Khan, (2000) 7 SCC 529

7. Gadde Venkateswara Rao Vs. Govt. of A.P & ors., AIR (1966) SC 828

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. &
Hon'ble Siddhartha Varma, J.)

1. This Special Bench has been constituted by Hon'ble The Chief Justice on a reference made by learned Single Judge vide judgment and order dated 8.3.2017 in the present petition.

2. We have heard learned counsel for the parties and perused the record.

3. The petitioners before the learned Single Judge placed reliance on the judgment and order dated 12.7.2011 in Writ Petition no.5820 of 2002 (Kanhaiya and others) wherein the order dated 13.9.2001 passed by the Additional Commissioner in revision expunging the names of the petitioners therein had been

set aside on the ground that it was passed without issuing notice to them. The counsel for the petitioners herein insisted that the petitioners being similarly situated persons challenging the common order dated 13.9.2001 are entitled for the same relief. The observations made in the referral order in this regard are relevant to be noted hereunder:-

"Another supplementary affidavit has been filed by the petitioners on 20.01.2012, in which the petitioners have said that their writ petition was similar to Writ Petition No. 5820/2002 filed by Kanhaiya and others and said writ petition was allowed by order of Coordinate Bench of this Court dated 12.07.2011, copy of the said order has been filed as annexure 1 to the supplementary affidavit and a prayer has been made for grant of similar relief.

The judgement and order dated 12.07.2011 shows that the same contention was raised before this Court in Writ Petition No. 5820 of 2002, that the private respondent had filed an application on the basis of which the Additional Commissioner treated the same to be a revision and without issuing notice to the petitioners had passed the order dated 13.09.2001 expunging their names and directing for recording of plot no.46 as 'charagah'.The Hon'ble Court thereafter has recorded that the party, who could have been affected had not been given an opportunity or notice in the matter. In such circumstances, the order impugned passed by the Additional Commissioner dated 13.09.2001, was quashed and the matter was remanded back to respondent no. 1 i.e. Additional Commissioner for taking appropriate decision, after issuance of notice to the petitioners and after inviting objections.

While passing the order dated 12.07.2011 the Hon'ble Court also observed thus:

"While passing any order, respondent no.1 will also take into consideration whether in the facts and circumstances as it has been informed that the consolidation proceeding is going on, he will have a jurisdiction to pass such order or not. All these objections have to be taken into consideration by the respondent no.1."

Since this writ petition is by similarly situated petitioners as those of Writ Petition No. 5820 of 2001, which has been allowed by Coordinate Bench of this Court, which order is ordinarily binding upon this Court also, I can not take any contrary view unless I refer the matter to the Chief Justice for constitution of a Division Bench to hear and decide the following questions of law:-"

4. It appears that having different opinion, facing with the previous directions in a similar matter, the learned Single Judge deemed it fit and proper to make a reference while framing the following Questions of law to be answered by the larger Bench:-

"A. Whether the Additional Commissioner was empowered to treat an application bringing to his notice the fraud committed by the revenue authorities, as a revision and take necessary action because under U.P.Z.A & L.R. Act, the powers of revision are vested under Section 333 of the U.P.Z.A & L.R. Act and include the power to correct an error where the subordinate revenue authority has acted in the exercise of jurisdiction illegally or with material irregularity and the Revisional Authority may pass such order in the case as he thinks fit?

B. Whether an order passed by the Sub Divisional Officer in case filed under Section 229 B U.P.Z.A. & L.R Act, which was passed without reference to the

issues involved in the "lis" and without formal adjudication of points for determination could be said to be a decree in the eyes of law when admittedly it was against the statutory provisions of the very same Act, under which the said jurisdiction was exercised?

C. Whether there is any requirement of opportunity of hearing in a case where from the records in question and the reports submitted by the Revenue Authorities, it is apparent that an illegality has been committed and a fraud has been played. In terms of the law laid down by the Hon'ble Supreme Court in Aligarh Muslim University Vs Mansoor Ali Khan 2000(7) SCC 529? Whether such an exercise would be an exercise in futility and following of principles of natural justice an empty formality?

D. Whether this Court would exercise its extraordinary writ jurisdiction to set aside an order which would amount to restoration of an illegal order?

E. Whether in view of the law laid down by the Hon'ble Supreme Court in the case of ***A.M. Allison Vs. B.L. Sen****, AIR 1956 SC 227 and* ***Mohammad Swaleh Vs. III Additional District Judge,*** *1998 (1) SCC 40, this Court should set aside the order passed by the Additional Commissioner, looking into the necessity to preserve public utility lands and ponds emphasized by the Hon'ble Supreme Court in the case of* ***Hinch Lal Tiwari Vs. Kamla Devi,*** *2001 (6) SC 496 and* ***Jagpal Vs. State of Punjab and others,*** *2011 (11) SCC 396?"*

5. Having carefully read the referral order, we find that answer to the questions referred can be given only while dealing with the merits of the case of the parties herein. The reason being the legal position on the questions of law referred to us is not unsettled and no authoritative pronouncement of the larger Bench is needed. It has to be seen whether the questions referred would arise in the controversy at hands in the facts and circumstances of the case.

6. Further, having carefully perused the order dated 12.7.2011 passed by the learned Single Judge in the previous Writ Petition no.5820 of 2002, we note that all questions were left open to be examined by the Additional Commissioner while relegating the matter. On the merits of the claim of the petitioners therein only this much was noted that no notice was issued to the petitioners before passing the order dated 13.9.2001 expunging their names and directing for recording of plot no.46 as 'Charagah'. We further find that there was no expression of opinion of the learned Single Judge while passing the judgment and order dated 12.7.2011 on any of the issue before us under the referral order. The conflict of opinion appears to be only on the merits of the case, though in the referral order the learned Single Judge has not expressed any definite opinion on any of the issues before her.

7. The facts in brief relevant to decide the controversy at hands are that the present petition has been filed for quashing of the order dated 13.9.2001 passed by the Additional Commissioner, Basti in Revision no.29 of 2001. The said revision was registered on an application dated 10.8.2001 filed by one Vishram, resident of Village-Saraini, Tehsil-Bhanpur, District-Basti.

8. The averments in the said application was that Arazi No.46 area 2-0-0 situated in Mauja Saraini, Tappa Kothila, Pargana Basti, Tehsil-Bhanpur, District-

Basti was kept aside for 'Charagah' (Pasture Land) during the last consolidation proceedings. In the middle of the land in dispute, there exist a pokhar (pond) where Village cattles used to drink water. In the land in question a Village fair was also being held. However, in order to grab the land in question illegally, certain Scheduled Caste persons of the Village got settlement of the said land in their names and got entry in the proceeding under Section 122-B (4-F) of U.P.Z.A & L.R Act (hereinafter referred as the 'Act) Kanhaiya, Siya Ram, Bundele, Gulai and Hari Ram all sons of Ram Lal got their names recorded in Category -3 in an area of 16-0-0 (pukhta) of plot no.46 taking benefit of Section 122-B (4-F) of the Act. Two persons namely Nokhairam and Ramkewal sons of Ram Surat constructed their houses over the land in question. On the restoration/recall application filed by a member of Land Management Committee, the then Sub-Divisional Officer had stayed the operation of the order passed under Section 122-B (4-F) of the Act. The revision filed by Kanhaiya and others was also rejected by the Commissioner, Gorakhpur on the ground of maintainability. It was averred therein that the Village was under consolidation and taking benefit of the same the opposite parties were making efforts to get their names recorded in the public utility land, which was kept aside for 'Charagah' (Pasture Land). The prayer in the application was to evict the unauthorised occupants and restore the public utility land in its original position.

9. On the presentation of the said application, it appears that the Commissioner, Basti Division, Basti had summoned the report of the lekhpal as also the Original basic year khatauni from 1397-1404 fasli. The lekhpal in his report dated 6.9.2001 produced original records namely Gausvara dated 6.9.2001 and extract of khatauni for 1399-1404 fasli. The said report of lekhpal has been extracted in the order impugned. It is recorded in the order impugned that in the Basic year Khatauni (1399 to 1404 fasli), Arazi 46, (Area 17-0-0) has been entered in Khata no.198. In the same document, in Khata no.65- Arazi 46/2 (Area 1-10-0) was entered in the name of Bundele s/o Ram Lal in Category-1; Arazi no.46/3 Area 1-10-0 in Khata no.66 in Category-1 was recorded in the name of Babu Ram s/o Puddan; in Khata No.198, Arazi no.46 (Area 3-0-0) names of Babu Ram s/o Puddan, Bundele, Hariram sons of Ramlal were entered in Category-3 and Arazi no.46M (Area 3-0-0) was entered in the names of Kanhaiya, Gulai, Siyaram sons of Ram lal as Asami in Category-3. Name of Guru Prasad s/o Kanhaiya was recorded as Non-transferable Bhumidhar in Arazi no.46 M in an Area 3-10-0; Arazi no.46, Area 1-0-0, Khata no.198 in category-4 was entered in the name of Lakshram s/o Sewak. As result of it, out of total Area of 20-0-0 of Arazi no.46, entered in the Basic year Khatauni, only an area of 17-0-0 remained in Khata No.198. It was directed that the revenue record keeper shall explain after making an enquiry as to how the aforesaid entries were made and when and under whose order? It was further observed that the public utility land kept aside for 'Charagah' under Section 132 of U.P.Z.A & L.R Act could not have been settled in favour of private persons. Direction was, therefore, given to find out the guilty officials and initiate appropriate proceedings against them. Simultaneously, it was ordered that no right whether Asami or Bhumidhari (transferable or non-transferable) could be conferred in the public utility land within the meaning of Section 132 of U.P.Z.A & L.R Act. The

entries made in the name of the private persons noted hereinabove were directed to be expunged being illegal and void ab initio. Entries of 'Charagah' in Arazi no.46, Area 20-0-0 was directed to be restored in Khata of 'Charagah' (Pasture Land). It was further directed that the copy of the order be also sent to the Settlement Officer (Consolidation), Basti for information.

10. Challenging this order, the petitioners herein (two in number) averred in the writ petition that they belong to Scheduled Caste category and each of them has been in possession of the land in dispute since prior to 30.6.1975. Over an area of 1-10-0 of Arazi no.46, their names were initially recorded in Category (Class)-4 in the revenue records. But later, both the petitioners filed two separate suits under Section 229-B of U.P.Z.A & L.R Act seeking declaration of Bhumidhar rights in the said land. The said suits were registered as Suit no.25 and 26, respectively, and decreed by two separate judgments and orders of the same date, i.e. 20.1.1989. After expunging the entries of the names of the petitioners in Category-4, the land in question was directed to be recorded in their names in Category-1. Both the aforesaid orders have been appended as Annexures-'1' and '2' to the writ petition and to contend that the petitioners, thereafter, have installed their tubewells and are using the land in question for agricultural purposes. The complainant/respondent no.2 is a member of higher class and the complaint is motivated. The Commissioner, however, being swayed away by the statement of the respondent had directed for deletion of names of the petitioners from the revenue record, without even issuing notice to them. As no notice or opportunity of hearing had been granted to the petitioners herein, the order impugned is liable to be quashed.

11. Sole ground to press the prayer for quashing the order impugned is non-compliance of principles of natural justice.

12. At the outset, we may note that we have not been able to gather anything from the order impugned which would demonstrate that notice was issued to the petitioners herein after registration of the application moved by the respondent no.2 as Revision under Section 333 of U.P.Z.A & L.R Act.

13. First question (A) in the referral order, therefore, arises for consideration before us as to whether the Commissioner had jurisdiction for expunging the entries in the revision noticing that fraud had been committed by the Revenue Authorities in manipulating the records as also in view of the error apparent on the face of record in making the revenue entries in the name of private persons of the public utility land.

14. We may also note that the petitioners are claiming right in the Public Utility Land on the basis of an order passed by the Sub-Divisional Officer in proceedings under Section 122-B (4-F) of the Act, operation of which was stayed on a recall application filed by a member of Gram Sabha. We do not have any record pertaining to the proceedings under Section 122-B (4-F) nor anything has been disclosed in the writ petition. Only the copies of the decree passed in the declaratory suits under Section 229-B of U.P.Z.A & L.R Act suit nos.25 of 26 have been filed with the writ petition. As per the stand of the complainant and the findings

recorded in the order impugned, the land in question i.e. Arazi No.46, area 20-0-0 was kept aside during the course of consolidation as land for 'Charagah' under Section 132 of U.P.Z.A & L.R Act. We may, at this stage, note the relevant provisions of Section 122-B (4-F), 132 and 333 of the U.P.Z.A & L.R Act to answer the issue before us:-

"122B. Powers of the Land Management Committee and the Collector. -

[(4-F) Notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in Section 132) having occupied it from before [May 13, 2007] and the land so occupied together with land, if any, held by him from before the said date as bhumidhar, sirdar or asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and [he shall be admitted as bhumidhar with non-transferable rights of that land under Section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as bhumidhar with non-transferable rights in that land.]]

Explanation. - The expression "agricultural labourer" shall have the meaning assigned to it in Section 198.

"132. Land in which [bhumidhari] rights shall not accrue. - *Notwithstanding anything contained in Section 131, but without prejudice to the provisions of Section 19, [bhumidhari] rights shall not accrue in-*

(a) pasture lands or lands covered by water and used for the purpose of growing singhara or other produce or land in the bed of a river and used for casual or occasional cultivation;

(b) such tracts of shifting or unstable cultivation as the State Government may specify by notification in the Gazette; and

[(c) lands declared by the Slate Government by notification in the Official Gazette, to be intended or set apart for taungya plantation or grove lands of a [Gaon Sabha] or a Local Authority or land acquired or held for a public purpose and in particular and without prejudice to the generality of this clause-

(i) lands set apart for military encamping grounds;

(ii) lands included within railway or canal boundaries;

(iii) lands situate within the limits of any cantonment;

(iv) lands included in sullage farms or trenching grounds belonging as such to a local authority;

(v) lands acquired by a town improvement trust in accordance with a scheme sanctioned under Section 42 of the U.P. Town Improvement Act, 1919 (U.P. Act V11 of 1919) or by a municipality for a purpose mentioned in Clause (a) or Clause (c) of Section 8 of the U.P. Municipalities Act, 1916 (U.P. Act VII of 1916); and

(vi) lands set apart for public purposes under the U.P. Consolidation of Holdings Act, 1953 .]"

*"**[333. Power to call for cases. -** (1) The Board or the Commissioner or the Additional Commissioner may call for the record of any suit or proceeding [other than proceeding under sub-section (4-A) of Section 198] decided by any court subordinate to him in which appeal lies or where an appeal lies but has not been preferred, for the purpose of satisfying himself as to the legality or propriety of*

any order passed in such suit or proceeding and if such subordinate court appears to have;

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested, or

(c) acted in the exercise of jurisdiction illegally or with material irregularity;

the Board or the Commissioner or the Additional Commissioner, as the case may be, may pass such order in the case as he thinks fit.

(2) If an application under this section has been moved by any person either to the Board or to the Commissioner or to the Additional Commissioner, no further application by the same person shall be entertained by any other of them.]"

15. From a conjoint reading of the said provisions, we may note that under the Scheme of the Zamindari Abolition Act, no Bhumidhari rights could accrue in a 'Pasture Land' or public utility land covered by the Clauses (a) to (c) (i)-(vi) of Section 132 of U.P.Z.A & L.R Act. Section 122-B (4-F) categorically states that any land vested in Gaon sabha under Section 117, (not being land mentioned in Section 132), if in occupation of any agricultural labourer belonging to Scheduled Caste and Scheduled Tribes can be settled in the manner as provided therein. It is, thus, clear that no private person can be conferred Bhumidhari Rights, either transferable or non-transferable, in a land which has been declared as public utility land under any of the Category of Section 132 of the Zamindari Abolition Act. In view of the clear language of Section 122-B (4-F) read with Section 132, we have no doubts that the land kept aside as 'Pasture Land' (Charagah)' in the village could not have been settled in favour of the petitioners by taking aid of the provisions of Section 122-B (4-F), or by declaring them Bhumidhar either with non-transferable or transferable rights under Section 229B of the Act. It appears that the orders of settlement of land in favour of the petitioners and declaration of Bhumidhari rights in their names under the Act have been obtained by playing fraud upon the process of law.

16. It may not be out of place to note here that the Land Management Committee and the Collector are empowered under Section 122-B for eviction of unauthorised occupants of the land belonging to Gram Sabha and they can also realise compensation for damage, misappropriation or wrongful occupation of such land, which can be recovered as arrears of land revenue.

17. We may also note that the proceeding for eviction of an unauthorised occupant can be undertaken as per the provisions in Section 122-B of the Act, which requires that the Assistant Collector has to issue notice calling upon the person in unauthorised occupation to explain his conduct and also to show cause as to why he may not be held liable to pay compensation.

18. Further remedy available to the aggrieved person to assail the order passed by the Assistant Collector under Sub-section-(3) or sub-Section-(4) by filing revision before the Collector on the ground mentioned in clauses (a) to (c) of Section 333. Finality has been attached to the order passed by the Collector in revision and a person aggrieved can only file a suit in the Court of competent jurisdiction to establish the rights claimed by him in such land property.

19. Section 333, on the other hand, confers supervisory powers upon the Board or the Commissioner or the Additional Commissioner, as the case may be, to call for the record of any suit or proceeding, decided by the Court subordinate to it, for the purpose of satisfying itself as to the legality or propriety of any order passed in such suit or proceeding, where no appeal lies or though an appeal lies but has not been preferred. The said enquiry is limited to the question of failure in exercise of jurisdiction vested in the court concerned, or exercise of the jurisdiction not vested in or if it has acted in exercise of its jurisdiction illegally or with material irregularity.

20. The plain and simple reading of the provisions of Section 333(1) of the Zamindari Abolition Act makes it clear that the Board or the Commissioner can make an enquiry into an order passed by the Subordinate Court by summoning the record of the suit or proceedings conducted by it, either on its own motion, i.e. suo motu or an application moved by any person bringing the said fact to its knowledge. The supervisory powers given to the Board or the Commissioner, in our opinion, is in order to keep the Subordinate revenue authorities or the Courts within their bounds. The application moved by a person bringing the said fact to the knowledge of the supervisory or revisional authority would be only an intimation or information of the illegality committed by such Authority or the Court. The complainant, however, has no say in the enquiry, if any, initiated by the Revisional Authority by invoking its power under Section 333 of U.P.Z.A & L.R Act, on his application.

21. Moreover, it is settled proposition in law that fraud vitiates every solemn act. A judgment or decree obtained by playing fraud on the Court is a nullity and nonest in the eye of law. Such a judgement and decree passed either by the Court of first instance or by the highest Court has to be treated as a nullity by every Court, whether superior or inferior. It can be challenged in any Court even in a collateral proceedings. As a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. A litigant who approaches the Court must come with clean hands. A person whose case is based on falsehood has no right to get any relief from the Court. He can be summarily thrown out at any stage of the litigation. If he withholds a vital document in order to gain advantage on the other side or produces a document as a basis of his claim which is forged or fabricated document, then he would be guilty of playing fraud on the Court as well as on the Opposite side. Reference may be made to decision of the Apex Court in ***S.P. Chengal Varaya Naidu vs Jagannath and others*** reported in ***(1994) 1 SCC 1*** in support of the above view.

22. In light of the above discussion, the action of the Commissioner in treating the application filed by the respondent no.2 as a revision under Section 333 to U.P.Z.A & L.R Act would be suo motu exercise of power conferred on him, on receipt of intimation of fraud played in the revenue records. The question no.1 of the reference is, thus, answered in affirmative.

23. The decisions relied by the learned counsel for the petitioners in ***Raj Kumar vs Ashok Kumar Chaurasia*** reported in ***(2016) 2 ADJ 672*** and ***Ramesh Chaturvedi vs State of U.P through Collector Faizabad and others*** reported in ***(2019) 2 ALJ 292*** are distinguishable on the facts and the circumstances of the present case.

24. As far as the second question (B) is concerned, we do not find it necessary to deliberate on the said issue as we are not examining the merits of the order passed by the sub-divisional Officer in the suit under Section 229-B of U.P.Z.A & L.R Act, passed in favour of the petitioners, inasmuch as, we are of the definite opinion no Bhumidhari rights could be granted in favour of the petitioners herein in the Public Utility land kept aside for 'Charagah' (Pasture Land) under Section 132 of U.P.Z.A & L.R Act.

25. In so far as the fifth question (E) is concerned, we may note at this stage itself that there cannot be any two opinion or doubt about the directions issued by the Apex Court in ***Hinch lal Tiwari vs Kamala Devi and Ors*** reported in ***(2001) 6 SCC 496 and Jagpal Singh and others vs State of Punjab and others*** reported in ***(2011) 11 SCC 396*** that the material resources of the Community like forests, tanks, ponds, hillock, mountain etc; being nature's bounty need to be protected for a proper and healthy environment as they maintain delicate ecological balance and enable people to enjoy a quality life which is essence of the guaranteed right under Article 21 of the Constitution. The Government including Revenue Authorities have been mandated to take appropriate steps under the relevant statutory provisions to prevent damage, misappropriation of the Village land which is vested in the Gaon Sabha being Public-Utility land under Section 132 of the Act.

26. The Pasture Land in a Village area is lifeline of the village people as they need a ground for grazing by their cattles. Every agricultural activity in the village is dependent upon the Cattles which are used for ploughing the fields and other related activities by the agriculturist. The Village economy is largely dependent upon the agricultural activities and even for Vegetarian urban population, agricultural produces are coming from the Villages. Over the period of years, with the increase in population, public spaces are being compromised which has resulted in ecological disasters. We cannot be oblivious of the imminent need to preserve our environment by restoring and maintaining public spaces both in rural and urban areas. In rural areas, public spaces such as ponds, pasture lands, lands in river bed and the lands used for casual or occasional cultivation described under Section 132 of the Zamindari Abolition Act have to be preserved and protected by the Revenue Authorities who have been conferred with the ample powers to undo the wrong. Apathy or lack of immediate action at the ends of Revenue Authorities has resulted in illegal encroachment of the Public Utility Lands in the rural area.

27. This Court and the Apex Court has repeatedly expressed its concern over the said issue but it is the duty of the State and the appropriate Local authority to take necessary measures at the grassroot level. The Revenue Authorities are required to keep a strict vigil in the area of their jurisdiction so as to ensure that the public spaces are not illegally occupied or encroached by the Villagers or outsiders.

Appropriate timely action is the need of the hour. In each case of such illegal encroachment coming before the Revenue Authorities, action in accordance with the statutory provisions has to be taken. Adequate checks and balances have been provided under the Act to remedy an illegal or overzealous attempt of a Revenue Authority in any such situation. We are, therefore, of the considered opinion that no exception can be taken to the action taken by the Commissioner for restoration of the public utility land in Arazi no.46 area 20-0-0 after summoning the original records, when the fact of illegal or forged revenue entries was brought before it by way of an application moved by the respondent no.2. The fifth and last question no.'E' of the reference is, thus, answered in affirmative.

28. Now we are left with two more question nos.'C' & 'D' of the reference. Question no.'C' is about the need of observance of principles of natural justice and question no.'D' is about exercise of extraordinary discretionary writ jurisdiction in the instant case in the light of the facts brought before us. Both the questions can be answered together as answer to one would be dependent on answer to another.

29. As to question no.'C' and 'D', no debate or deliberation is required as it is settled that the observance of principles of natural justice cannot be put in a strait jacket formula. Wherever a plea is taken regarding violation of natural justice, the person pleading it has to establish that prejudice has been caused to him by such action. On demonstration of the said fact, interference under Article 226 of the Constitution of India can be made to remedy the situation. In a case where on consistent and indisputable facts only one conclusion is possible, then in such a case, it would not be possible to hold that breach of natural justice was itself in prejudice. ***(Reference S. L. Kapoor vs Jagmohan and others reported in (1980) 4 SCC 379).*** It is, thus, a settled proposition of law that if no other conclusion is possible on admitted or indisputable fact, it is not necessary to quash the order which is shown to have been passed in violation of natural justice. However, it is observed in ***Aligarh Muslim University vs Mansoor Ali Khan reported in (2000) 7 SCC 529*** that the above principles is in the nature of exception and great care must be taken by the Court in applying this exception. Similarly, it is settled position of law that the High court would be right in refusing to invoke its extraordinary discretionary power under Article 226 of the Constitution to quash an order which would result in restoration of an illegal order. The refusal by the High Court to exercise of its extraordinary discretionary jurisdiction in such circumstance of a case would be justified. [Reference- **Gadde Venkateswara Rao vs Government of A.P and others**, *AIR 1966 SC 828].* Both the question nos. 'C' and 'D' of the reference are, thus, answered in the above terms.

30. Reverting to the facts of the instant case, we find that only ground urged by the petitioners to seek quashing of the order dated 13.9.2001 passed by the Commissioner is that the names of the petitioners were expunged from the Revenue records without affording them any opportunity of hearing. The basis of the claim of the petitioners to seek Bhumidhari rights in the disputed property is the declaration granted by the Sub-divisional officer in the suits filed under Section 229-B. In the order impugned, categorical finding of fact has been recorded by the Commissioner after perusal of the original

records that the land in question namely Arazi no.46 area 20-0-0 was reserved for 'charagah' (Pasture Land) during the course of the consolidation proceedings. The merits of the said finding has, however, not been challenged before us. We, therefore, cannot take exception to the findings of fact recorded by the Commissioner as there is nothing before us which would justify interference in the aforesaid findings in exercise of our extraordinary discretionary jurisdiction.

31. At the cost of repetition we may note here that in view of the findings returned by the Additional Commissioner regarding the nature of the land in dispute being public utility land, declaratory decree obtained by the petitioners in Suit nos.25 and 26 of 1987 under Section 229-B of U.P.Z.A & L.R Act appear to be nullity. The order of the Revenue Authority is nonest in the eye of law. We may also note that the public utility land under Section 132 of U.P Act can not be settled in favour of an agricultural labour even belonging to Scheduled Caste or Scheduled Tribes by taking recourse to the proceedings under Section 122-B (4-F) of the Act. Any such attempt by a Revenue Authority would be illegal exercise of jurisdiction vested in it and has to be viewed seriously. The petitioners, therefore, cannot derive any benefit from the settlement, if any, made in their favour under Section 122-B (4 F) of the Act. They cannot take benefit of the declaratory decree which in itself is a nullity or nonest in the eye of law.

32. Nonethless, the order impugned passed by the Commissioner does not show that any notice was issued to the petitioners herein who claimed to be in occupation of the land-in-dispute for a long time. Eviction of even an unauthorised occupants from the Gram Sabha land can be made by undertaking appropriate proceedings under Section 122-B of the Act. Further, an enquiry into the plea of fraud put forward before the Commissioner was required and in the event of notice the aggrieved person against whom allegations of fraud are made may come up with the plea that he is innocent. The notice is all the more necessary as on eviction of an unauthorised occupant from the Gram Sabha land in a proceeding either on suo motu motion or at the instance of any person, including Gram Sabha, compensation for damages, misappropriation or wrongful occupation can be levied which can be recovered from such person as arrears of land revenue. As any action against unauthorised occupant for eviction and realization of compensation or damages entails serious civil consequences, we find it expedient in the interest of justice, that the notice to the unauthorised occupant or the petitioners herein whose names have been recorded in the revenue record was necessary before expunging entries of their names from the revenue record and further for taking physical possession of the land belonging to the Gram Sabha.

33. In light of the aforesaid, though we do not find any justifiable ground to quash the order passed by the Additional Commissioner by invoking extraordinary jurisdiction vested in us under Article 226 of the Constitution of India, but in order to meet the ends of justice, it is provided that the petitioners herein was required to put to notice by the Commissioner to show cause as to why action be not taken against them for illegal occupation of the public utility land (Pasture Land) reserved under Section 132 of U.P.Z.A & L.R Act. While taking their defence, it would be open for the petitioners to raise all issues available in

law and also to challenge the findings recorded by the Commissioner in the order impugned regarding the nature of the land in question being public utility land. We, thus, make it clear that all issues are kept open to be assailed by the petitioners before the Commissioner who shall examine them being the supervisory revisional authority within the scope of Section 333 of the U.P.Z.A & L.R Act. We also make it clear that we are keeping intact the order impugned in the present petition so far as the petitioners herein are concerned and only making it subject to the fresh order to be passed by the Commissioner or the concerned revisional authority. We, therefore, disposed of the present petition with the directions as follows:-

(i) The petitioners shall file an application in reply to the findings returned by the Assistant Commissioner in the order impugned alongwith the certified copy of this order, before the Commissioner or the competent revisional authority within a period of four weeks from the date of this order. The said reply shall be treated as a reply to the notice to show cause had it been earlier issued to the petitioner.

(ii) On presentation of such an application, the competent revisional authority shall be under obligation to pass a fresh reasoned and speaking order in accordance with law by intimating the date fixed before it to the petitioners, within a further period of two months.

(iii) The petitioners herein shall be under obligation to cooperate in the above proceedings. In any case, no unnecessary adjournment shall be granted to any of the petitioners herein so that they may not linger on the proceedings.

(iv) The status quo as to the nature and possession of the land as on date, shall be maintained in so far as the petitioners herein are concerned till the passing of the fresh order by the revisional authority.

34. After taking fresh decision as directed above, necessary action for restoring the nature and possession of the land in question shall be taken by the competent authority which shall be brought to its logical ends in accordance with law, as expeditiously as possible. In other words, all necessary actions to undo the wrong done, if any, shall be taken and proceedings in this regard be brought to their logical ends.

35. In case of non compliance or dereliction of the petitioners in cooperating in the proceedings before the Revenue authorities, the guilty person(s) would expose him/them in the contempt proceedings for deliberate violation of the directions issued hereinabove.

36. Subject to the above, the present petition is **disposed of.**

(2020)03-05ILR A1905
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2020

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

WRIT-C No. 56388 of 2016

Shanti Devi Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shashi Bhushan Mishra

Counsel for the Respondents:

C.S.C., Sri Ratnesh Kumar Pandey, Sri Ritvik Upadhya

A. Civil Law-Industrial Dispute Act, 1947 – Section 4K – Reference – Limitation – Although it is clear that there is no limitation prescribed for seeking reference of a dispute to Labour Court, but it is also a sine qua non for referring any dispute to Labour Court that on the date of reference, industrial dispute should be in existence – The workman by maintaining complete silence for 28 years had unequivocally given up his alleged claim, if any. (Para 8)

B. Labour dispute – Proceedings before the Conciliation Officer – Nature – The proceedings before the Conciliation Officer are administrative in nature and are not judicial proceedings – He only has the power to facilitate reconciliation between the parties. He does not possess adjudicatory powers – The State Government is not bound by the recommendation made by the Conciliation Officer. It is competent to take its own independent view as to whether on basis of material brought before it, there exists any dispute in praesenti, worthy of reference to the Labour Court and if it comes to the conclusion that there is no such material, it is fully competent in declining to make reference, as in the instant case. (Para 9)

Writ Petition dismissed (E-1)

Cases relied on :-

1. Sapan Kumar Pandit vs. U.P. Electricity Board, (2001) 6 SCC 222

2. Prabhakar vs. Joint Director, Sericulture Department & anr., (2015) 15 SCC 1

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. The petitioner has called in question an order dated 16.9.2009 in C.P. Case No. 14 of 2004, and another dated 15.10.2016 contained in Letter No. 4966/PiP-I.R./16 by Deputy Labour Commissioner, Mirzapur Division, Pipri, Sonebhadra. He has also prayed for a mandamus commanding the Deputy Labour Commissioner to refer the dispute between the parties for adjudication by Labour Court.

2. The background facts leading to the instant petition are that Ramjag Tripathi, late husband of the petitioner (hereinafter referred to as the 'workman'), was a Clerk on probation in Primary Section of Hindalco Primary School, Renukoot. The said Institution is run by a separate Management, distinct from Hindalco Industries Limited, which is a company incorporated under the Indian Companies Act. By order dated 15.9.1975, the Management of the Institution informed him that his services were no more required since after 20th September, 1975. On 4.1.2003, after a gap of 28 years, the workman made an application to the President, Hindalco, alleging that he had made repeated representations to the authorities regarding illegal retrenchment of his service, but no heed was paid. In the meantime, he had attained the age of superannuation, i.e. 60 years and consequently, he should be deemed to have retired. It was also claimed that since his retrenchment was illegal, therefore, all his dues be paid, treating him to have retired on the date of superannuation. The workman thereafter filed Writ Petition No. 2035 of 2003 before this Court, which was dismissed by order dated 1.5.2003, holding that he had alternative remedy of approaching the Labour Court. The workman thereafter filed an application dated 31.5.2003, alleging illegal retrenchment at the hand of the Management. It was admitted in the application that the retrenchment was made on 15.9.1975 and there was delay of 27 years 18 days in approaching the authorities under the U.P. Industrial

Disputes Act 1947 (hereinafter referred to as the 'the Act'), but the said delay was sought to be explained by alleging that in the meantime he had been making repeated written and oral representations to the Employer to reinstate him in service and they also kept assuring him of the same. However, when he could not get any relief from the Management, he had approached the authorities. It seems that upon filing of the said application, a case was registered before the Conciliation Officer, bearing C.P. Case No. 14 of 2004. The respondent company filed objection contending that the claim made by the workman in his application was totally false, fabricated and devoid of correct facts. He had approached the authorities after 28 years of his alleged retrenchment. After lapse of such long time, the Management was not retaining any record or evidence. The delay was fatal and accordingly the matter be consigned to record. In other words, the objection was that there was no live dispute in existence in the year 2003 about alleged illegal retrenchment done in the year 1975.

3. On 3.7.2004, the Conciliation Officer passed order to the effect that the delay in approaching the authorities under the Act is condoned and fixed 17.7.2004 for producing evidence by the parties. The Company sought to challenge the said order by filing an appeal before Labour Commissioner, Kanpur, contending that the order dated 3.7.2004 condoning delay was wholly illegal, as there was no live dispute in existence. It is noteworthy that the appeal filed by the Management was more in the shape of representation to higher authority as under law, no appeal against such order is contemplated. Thereafter, it seems that the matter remained pending before the Conciliation Officer and ultimately on 16.9.2009 the Assistant Labour Commissioner (Conciliation Officer) vide letter dated 16.9.2009 (impugned herein) held that there is no evidence before him to explain such long delay of 28 years and in his opinion, the matter should be consigned to record. The State Government accepted the recommendation made by the Conciliation Officer and passed an order on 8th October 2009, declining to make reference of the alleged dispute to the Labour Court. The reason disclosed in the order is gross delay of 27 years on the part of the workman in raising the dispute. The petitioner, who is widow of the deceased workman, filed an application dated 23.9.2016, once again making request for reference of the dispute to the Labour Court. The Deputy Labour Commissioner, Mirzapur Region, Pipri, Sonebhadra vide impugned letter dated 15.10.2016 informed the petitioner that C.P. Case No. 14 of 2004 had been consigned to record and the request for reference of dispute was declined long back and the same was also duly communicated vide letter dated 8.10.2019 through the Deputy Labour Commissioner. Consequently, it was not possible to accept the request contained in the application dated 23.9.2016.

4. Learned counsel for the petitioner submitted that the stand taken by the authorities in declining to make reference to the Labour Court is not sustainable in law, inasmuch as there is no limitation prescribed under the Act for raising the dispute. It is submitted that expression "at any time" employed in Section 4K of the Act is conclusive of the legislative intent. In support of his submission, he has placed reliance on a judgment of Supreme Court in **Sapan Kumar Pandit vs. Uttar Pradesh Electricity Board, (2001) 6 SCC 222.** He further submitted that initially the

Conciliation Officer passed a specific order condoning the delay and therefore, after holding the conciliation proceedings for number of years, it was not open to the Conciliation Officer to make recommendation against the workman. It is also submitted that the State Government erred in acting upon the recommendation made by the Conciliation Officer in declining to make reference.

5. On the other hand, learned counsel for respondent no. 6 submitted that the Institution, nor the Committee of Management of the Institution was made party to the conciliation proceedings, nor even before this Court and on this ground alone, the claim now sought to be agitated ought to be rejected. He further submitted that there was gross delay on part of the workman in approaching the authorities under the Act. In between, there was never any representation from the workman, nor any such evidence was filed before the authorities. It is submitted that the only written representation received by the Management was dated 4.1.2003, which the workman made after hhe attained the age of 60 years, praying for release of his dues. It is further submitted that in the aforesaid background, the Institution did not retain record of a workman who was engaged on probationary basis and whose service was later dispensed with within a short period. This is an additional ground for rightly not accepting the claim of the workman for reference of dispute to the Labour Court at such distance of time. He has placed reliance on judgment of Supreme Court in **Prabhakar vs. Joint Director, Sericulture Department and another, (2015) 15 SCC 1** and various judgments of this Court.

6. The facts are not much in dispute. The workman was working as a Clerk in Primary Section of Hindalco Primary School, Renukoot. He was informed by letter dated 15.9.1975 that his services were no more required since after 20th September, 1975. Although it is the case of the workman that he made several representations, as well as oral requests to the Management for his reinstatement, but not a single written representation, as allegedly made by him, has been brought on record. The only representation is dated 4.1.2003, which he made to the President, Hindalco, alleging that he was wrongly retrenched from service in the year 1975 and now since he had attained the age of superannuation, his dues be paid. It was followed by filing of Writ Petition No. 2035 of 2003, resulting in dismissal on 1.5.2003. The workman thereafter moved application dated 31.5.2003 before the Assistant Labour Commissioner, raising the dispute, on basis of which C.P. Case No. 14 of 2004 was registered. It is evidently clear that the matter was agitated by the workman by approaching the Management and then this Hon'ble Court by way of a writ petition, followed by application before Deputy Labour Commissioner, resulting in registration of C.P. Case No. 14 of 2004 for the first time in the year 2003. During this long 28 years which passed in between, there is no explanation worth accepting so as to hold that the workman had been continuously agitating against his alleged retrenchment. Moreover, there is also no evidence to show that during this period, the Management ever gave any assurance to him for his reinstatement in service. Learned counsel for the respondent rightly pointed out that the workman filed application dated 4.1.2003 after he attained 60 years of age as he was only interested in wages and not in working in the Institution. It seems that for such reason, he maintained complete silence until he attained the age of superannuation and then started agitating the matter. It is also nowhere asserted that during this period he remained idle or was not gainfully employed.

7. In **Prabhakar**, the Supreme Court after considering various previous decisions, summarized the legal position in paragraph-42 of the Law Report as under: -

"42. On the basis of aforesaid discussion, we summarise the legal position as under:

42.1 An industrial dispute has to be referred by the appropriate Government for adjudication and the workman cannot approach the Labour Court or Industrial Tribunal directly, except in those cases which are covered by Section 2A of the Act. Reference is made Under Section 10 of the Act in those cases where the appropriate Government forms an opinion that 'any industrial dispute exists or is apprehended'. The words 'industrial dispute exists' are of paramount importance unless there is an existence of an industrial dispute (or the dispute is apprehended or it is apprehended such a dispute may arise in near future), no reference is to be made. Thus, existence or apprehension of an industrial dispute is asine qua nonfor making the reference. No doubt, at the time of taking a decision whether a reference is to be made or not, the appropriate Government is not to go into the merits of the dispute. Making of reference is only an administrative function. At the same time, on the basis of material on record, satisfaction of the existence of the industrial dispute or the apprehension of an industrial dispute is necessary. Such existence/apprehension of industrial dispute, thus, becomes a condition precedent, though it will be only subjective satisfaction based on material on record. Since, we are not concerned with the satisfaction dealing with cases where there is apprehended industrial dispute, discussion that follows would confine to existence of an industrial dispute.

42.2 Dispute or difference arises when one party make a demand and other party rejects the same. It is held by this Court in number of cases that before raising the industrial dispute making of demand is a necessary pre-condition. In such a scenario, if the services of a workman are terminated and he does not make the demand and/or raise the issue alleging wrongful termination immediately thereafter or within reasonable time and raises the same after considerable lapse of period, whether it can be said that industrial dispute still exist.

42.3 Since there is no period of limitation, it gives right to the workman to raise the dispute even belatedly. However, if the dispute is raised after a long period, it has to be seen as to whether such a dispute still exists? Thus, notwithstanding the fact that law of limitation does not apply, it is to be shown by the workman that there is a disputein praesenti. For this purpose, he has to demonstrate that even if considerable period has lapsed and there are laches and delays, such delay has not resulted into making the industrial dispute seized to exist. Therefore, if the workman is able to give satisfactory explanation for these laches and delays and demonstrate that the circumstances discloses that issue is still alive, delay would not come in his way because of the reason that law of limitation has no application. On the other hand, if because of such delay dispute no longer remains alive and is to be treated as "dead", then it would be non-existent dispute which cannot be referred.

42.4 Take, for example, a case where the workman issues notice after his termination, questioning the termination and demanding reinstatement. He is able to show that there were discussions from time to time and the parties were trying to sort out the matter amicably. Or he is able to

show that there were assurances by the Management to the effect that he would be taken back in service and because of these reasons, he did not immediately raise the dispute by approaching the labour authorities seeking reference or did not invoke the remedy Under Section 2A of the Act. In such a scenario, it can be treated that the dispute was live and existing as the workman never abandoned his right. However, in this very example, even if the notice of demand was sent but it did not evoke any positive response or there was specific rejection by the Management of his demand contained in the notice and thereafter he sleeps over the matter for number of years, it can be treated that he accepted the factum of his termination and rejection thereof by the Management and acquiesced into the said rejection.

42.5 Take another example. A workman approaches the Civil Court by filing a suit against his termination which was pending for number of years and was ultimately dismissed on the ground that Civil Court did not have jurisdiction to enforce the contract of personal service and does not grant any reinstatement. At that stage, when the suit is dismissed or he withdraws that suit and then involves the machinery under the Act, it can lead to the conclusion that dispute is still alive as the workman had not accepted the termination but was agitating the same; albeit in a wrong forum.

42.6 In contrast, in those cases where there was no agitation by the workman against his termination and the dispute is raised belatedly and the delay or laches remain unexplained, it would be presumed that he had waived his right or acquiesced into the act of termination and, therefore, at the time when the dispute is raised it had become stale and was not an 'existing dispute'. In such circumstances, the appropriate Government can refuse to make reference. In the alternative, the Labour Court/Industrial Court can also hold that there is no "industrial dispute" within the meaning of Section 2(k) of the Act and, therefore, no relief can be granted."

8. Although it is clear that there is no limitation prescribed for seeking reference of a dispute to Labour Court, but it is also a sine qua non for referring any dispute to Labour Court that on the date of reference, industrial dispute should be in existence. The workman by maintaining complete silence for 28 years had unequivocally given up his alleged claim, if any. The Management was also right in taking a stand that serious prejudice would be caused to it in case reference is made at this distance of time, inasmuch as it had not been in possession of any record of an employee who remained in service on probationary basis for a short period and who never agitated the issue after dispensation of his services. Even before this Court, as noted above, no material has been placed to show that there was any representation in writing by the workman to the Management, complaining about his alleged illegal retrenchment. The alleged dispute therefore ceased to exist and the claim sought to be raised by the workman in the year 2003 was a dead claim, a stale one, not worthy of reference to the Labour Court and this Court finds no illegality in the stand taken by the respondent authorities in declining to refer the matter to the Labour Court.

9. The proceedings before the Conciliation Officer are administrative in nature and are not judicial proceedings. He only has the power to facilitate reconciliation between the parties. He does not possess adjudicatory powers. The initial

order passed by the Conciliation Officer on the application of the workman that delay is condoned and thereafter notice is issued, calling upon the parties to file their evidence, was not an order which could operate as res judicata, so as to prevent the Conciliation Officer, after the parties had led evidence, to arrive at the conclusion that the dispute is not a live one, worthy of being referred to the Labour Court. Thus, this Court finds no force in the submission of learned counsel for the petitioner that once the Conciliation Officer at initial stage condoned the delay in approaching him, he could not have made an adverse recommendation to the State Government for not referring the dispute to Labour Court on ground of delay. Even otherwise, the State Government is not bound by the recommendation made by the Conciliation Officer. It is competent to take its own independent view as to whether on basis of material brought before it, there exists any dispute in praesenti, worthy of reference to the Labour Court and if it comes to the conclusion that there is no such material, it is fully competent in declining to make reference, as in the instant case. Consequently, this Courts finds no illegality in the impugned orders to warrant interference in exercise of writ jurisdiction under Article 226 of the Constitution.

10. The petition lacks merit and is dismissed.

(2020)03-05ILR A1911
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

WRIT-C No. 70208 of 2009

M/s Shipra Hotels Ltd. ...Petitioner
Versus
Ghaziabad Development Authority, Ghaziabad ...Respondent

Counsel for the Petitioner:
Sri Anurag Khanna, Sri Abhishek Misra, Sri H.R. Misra, Sri Tarun Agrawal

Counsel for the Respondent:
Sri V.B. Mishra, Sri Ashwani Kumar Mishra, Sri M.N. Singh, S.C.

A. Civil Law-U.P. Urban Planning and Development Act, 1973 – Proviso to Sub-Section (4) of Section 18 – Lease to develop amusement park over the leased land – Determination – Right to the lessor of re-entry – Sufficient Reason – The import of the *proviso* is putting a caveat to the main provision in favour of a lease holder – Sub Section 4 of Section 18 shows that legislative intent of giving right to the lessor of re-entry upon failure of the lessee to make constructions as provided and contemplated under the lease agreement – But that too is when found without sufficient reason, meaning thereby for not undertaking any action or performing as per land use under the lease agreement, one must ensure that it was not for any 'sufficient reason' to record. (Para 17)

Writ Petition allowed (E-1)

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

1. Heard Sri Anurag Khanna, learned Senior Advocate assisted by Sri Tarun Agrawal, learned counsel for the petitioner and Sri M.C. Chaturvedi, learned Senior Advocate and Additional Advocate General assisted by Sri M.N.Singh, learned counsel for the respondent/ Development Authority.

2. By means of present writ petition under Article 226 of the Constitution of

India, the petitioner has come up with prayer for a writ of certiorari for quashing of the order dated 26.5.2009 whereby Ghaziabad Development Authority (for short "Authority") has determined the lease of the petitioner for the reason that petitioner did not abide by the terms and conditions of the lease as the land use for which lease was granted, was not performed.

3. Briefly stated facts of the case are that respondent authority executed the lease deed on 29.12.1999 in respect of the land earmarked as "green belt", in favour of the petitioner to develop the amusement park over the leased land. However, when the petitioner did not perform as per terms of the lease, the authority came to determine the same under the order impugned.

4. Assailing the order impugned, learned Senior Advocate, Sri Khanna has argued that order having been passed in violation of the provision contained under Section 18(4) of the U.P. Urban Planning and Development Act, 1973 (for short "Act No. 11 of 1973"), the order impugned is liable to be rendered unsustainable and deserves to be quashed.

5. Relying upon the *proviso* to sub section 4 of Section 18 of the Act No. 11 of 1973, it has been argued that authority before passing any order determining the lease under sub-section 4 of Section 18 whereby lessor is meant to re-enter the land forfeiting the lease, it is mandatory to issue a show cause notice of such a proposed action. However, in the present case, as he submits, it is quite reflective from various documents that have been brought on record in the form of notice alongwith counter affidavit issued to the petitioner on 12th March, 2005, 20th May, 2005, 6.10.2005 and 23rd March, 2007, that all are referable to a proposed action under Section 27 of the Act No. 11 of 1973 and cannot be construed as a notice contemplated under the *proviso* prior to the exercise of power under sub section 4 of Section 18 of the Act No. 11 of 1973.

6. Sri Khanna submits that these notices only question the construction/development activity as an unauthorized one without sanction of approval by the authority and are meant for the proposed demolition exercise, whereas under the *proviso* to sub section 4 of Section 18 of Act No. 11 of 1973, show cause notice will be in respect of the proposed action of determination of lease and cancellation thereof.

7. Sri Khanna has further drawn our attention to the contents of paragraphs 14 and 15 of the counter affidavit to demonstrate that ultimate action in question has been taken only on the basis of these notices as the petitioner had failed to reply the same. He, therefore, submits that the averments as have come to be made amount to complete admission on the part of the respondent authority that they never issued any notice under the *proviso* to sub section 4 of Section 18 of Act No. 11 of 1973.

8. Learned Senior Advocate has argued that the order passed cancelling the lease and entire proceeding preceding the order of cancellation undertaken by the respondent authority, where *de hors* the procedure prescribed and so the said order is liable to be held bad and unsustainable.

9. *Per contra*, learned Senior Advocate Sri M.C. Chaturvedi appearing for contesting respondent, Development

Authority has sought to justify the order for the reasons assigned therein. However, alternatively, he has argued that if non issuance of the notice is the only reason that makes the order liable to go, this plea being technical, the matter can be remitted to the authority and the order impugned can be taken to be notice as contemplated under the *proviso* to sub section 4 of section 18 of Act No. 11 of 1973. He has sought to urge that no pleadings even raised regarding merit of the order nor, any averment has come up to demonstrate that petitioners complied with terms and condition of the lease as stipulated thereunder and thus, he submits that the matter can be revisited before the authority and decision afresh can be directed to be taken.

10. Having heard learned counsel for the parties and their respective arguments raised across the bar and having perused the record, we are needed to test the order impugned in the light of the provision contained under sub section 4 of Section 18 of the Act, 1973, as we find that in the counter affidavit, respondents have authority has admitted that notices were the same notices as have been appended, to have preceded the order impugned. We proceed to examine the notice filed as CA-1,2 and 3 in the first instance to find as to whether these notices can be termed as the ones contemplated under the *proviso* to sub section 4 of section 18 of the Act No. 11 of 1973.

11. A bare perusal of the notice as per contents, undoubtedly notices revealed it to be in respect of the some development activity as alleged to have been undertaken by the petitioner without there being any sanction for the same of the authority and so notices are meant for an explanation to be submitted by the petitioner of the proposed action under Section 27 read with section 28 of Act No. 11 of 1973. For better appreciation, Sections 27 and 28 of the Act, 1973 are reproduced as under:

*27. "**Order of demolition of building - (1) where any development has been commenced or is being carried on or has been completed in contravention of the master plan or zonal development plan or without the permission, approval or sanction referred to in Section 14 or in contravention of any conditions subject to which such permission, approval or sanction has been granted in relation to the development area, then without prejudice to the provisions of Section 26 (the Vice Chairman or any officer of the authority empowered by him In that behalf may make an order directing that such development shall be removed by demolition, felling or otherwise by the owner thereof or by the person at whose instance the development has been commenced** or is being carried out or has been completed, within such period not being less than fifteen days and more than forty days from the date on which a copy of the order of removal, with a brief statement of the reasons therefore, has been delivered to the owner or that person as may be specified in the order and on his failure to comply with the order, (the Vice Chairman or such officer) may remove or cause to be removed the development and the expenses of such removal as certified by (the Vice Chairman or such officer) shall be recoverable from the owner or the person at whose instance the development was commended or was being carried out or was completed as arrears of land revenue and no suit shall lie in the Civil Court for recovery of such expenses.*

Provided that no such order shall be made unless the owner or the person

concerned has been given a reasonable opportunity to show cause why the order should not be made.

(2) Any person aggrieved by an order under Sub-section (1) may appeal to the 4(Chairman) against that order within thirty days from the date thereof and the 5[Chairman) may after hearing the parties to the appeal either allow or dismiss the appeal or may reverse or vary any part of the order.

(3)The 6[Chairman) may stay the execution of an order against which an appeal has been filed before it under Sub-section(2).

The decision of the 7(Chairman) on the appeal and, subject only to such decision, the order under Sub-section (1), shall be final and shall not be questioned in any Court.

The provisions of this section shall be in addition to, and not in or derogation of, any other provision relating to demolition of buildings of contained in any other law for the time being In force.

28. Power to stop development-(I) Where any development in a development area has been commenced or continued in contravention of the Master Plan or Zonal Development Plan or without the permission, approval or sanction referred to in Section 14 or In contravention of any conditions subject to which such permission, approval or sanction has been granted, then, without prejudice to the provisions of Sections 26 and 27, the Vice Chairman of the Authority or any officer of the Authority empowered by him in that behalf may make an order requiring the development to be discontinued on and from the date of the service of the order, and such order shall be complied with accordingly.

Where such development is not discontinued in pursuance of the order under Sub-section (1), the Vice-Chairman or the said officer of the Authority may require any police officer to remove the person by whom the development has been commenced and all his assistants and workmen from the place of development within such time as may be specified in the requisition, and such police officer shall comply with the requisition accordingly.

After the requisition under Sub-section (2) has been complied with the Vice-Chairman of the Authority may depute by a written order a police officer or an officer or employee of the Authority to watch the place in order to ensure that the development is not continued.

Any person failing to comply with an order under Sub-section (1) shall be punishable with fine which may extend to two hundred rupees, for every day during which the non-compliance continues after the service of the order.

No compensation shall be claimable by any person for any damage which he may sustain in consequence of the removal of any development under Section 27 or the discontinuance of the development under this section.

The provisions of this section shall be in addition to and not in derogation of, any other provision relating to stoppage of building operations contained in any other law for the time being in force. ***(Emphasis added)***

12. From a bare reading of the aforesaid provisions, the legislative intents is quite apparent that a person is to undertake every development activity in an area within the territorial limits of the Authority with the prior approval of such authority or else shall face the action of demolition. The development activity therefore, always has to be in tune with the development plan and, therefore, illegal

development activity and constructions to that extent are meant to be arrested at the earliest and we find that such a proceeding has nothing to do with the right of a person to the property.

13. Now Development of land has to take place in accord with the develop scheme as per zonal development plan as may be developed and prescribed by the Development Authority and a consequential Master Plan with the approval of the State Government *(vide sections 8,910, 11 and 12 of the Act No. 11 of 1973).* Section 14 that has an effect of consequential action in case of violation of the plan, under Section 27 of the Act, is reproduced hereunder:

14. Development of land In the developed area.-

(1) After the declaration of any area as development area under Section 3, no development of -land shall be undertaken or carried out or continued in that area by any person or body (including a department of Government)- unless permission for such development has been obtained in writing from the [Vice-Chairman) in accordance with the provision of this Act.

(2) After the coming into operation of any of the plans in any development area no development shall be undertaken or carried out or continued in that area unless such- development is also in accordance, with such plans.

(3) Notwithstanding anything contained In Sub-sections (1) and (2), the following provisions shall apply in relation-to development of land by any department of any State Government or the Central Government or any local authority-

when any such department or local authority intends to carry out any development of land it shall inform the (Vice Chairman] in writing of its intention to do so -giving full, particulars thereof, including any plans and documents, at least 30 days before undertaking such development;

in the case of a department of any State Government or the Central Government, if the (Vice-Chairman) has no objections it should inform such department of the same within three weeks from the date of receipt by it under Clause (a) of the department's intention, and if the Vice-Chairman does'not make any objection within the said period the department shall be free to carry out the proposed development;

where the C 4[Vice-Chairman) raises any objection to the proposed development on the ground that the development is not conformity with any Master Plan or Zonal Development Plan prepared or intended to be prepared by it, or on any other ground, such department or the local authority, as the case be, shall-

(i)either make necessary modifications in the proposal development to meet the objections raised by the 5[Vice-Chairman] or

(ii) submit the proposals for development together with the objections raised by the[Vice-Chairman] to the State Government for decision under Clause (d)

the State Government, on receipt of proposals for development together with the objections of the 2[Vice-Chairman) may either approve the proposals with or without modifications or direct the department or the local authority, as the case may be, to make such modification as proposed by the Government and the decision of the State Government shall he final:

the development of any land begun by any such department or subject to

the provisions of Section 59 by any such local authority before the declaration referred to in Sub-section (1) may be completed by that department or local authority with compliance with the requirement of Sub-sections (1) and (2).

(Emphasis added)

14. So the scheme of Act No. 11 of 1973 in the light of the above provision is that development of an area has to take place as per zonal and Master Plan floated with the approval of the State Government and any constructions thereof invites action under Sections 27 and 28 of the Act No. 11 of 1973.

15. Now Section 17 of the Act, provides for compulsory acquisition of land by the Authority and its disposal as per the plan. Section 18 that deals with the disposal of the acquired land under the Act, is reproduced hereunder in its entirety:

18. Disposal of land by the Authority or the local Authority concerned.-

(1) Subject to any directions given by the State Government in this behalf, the Authority or, as the case may be, the local Authority concerned may dispose of

any land acquired by the State Government and transferred to it, without undertaking or carrying out any development thereon; or

any such land after undertaking or carrying out such development as it thinks fit.

to such persons, in such manner and subject to such terms and conditions as it considers expedient for securing the development of the development area according to plan.

(2) Nothing in this Act shall be construed as enabling the Authority or the local Authority concerned to dispose of land by way of gift,(***) but subject thereto, references in this Act, to the disposal of land shall be construed as references to the disposal thereof in any manner, whether by way of sale, exchange or lease or by the creation of any easement, right or privilege or otherwise.

2(3) Notwithstanding, anything contained in Sub-section (2), the Authority or the local Authority concerned may create a mortgage or charge over such land (including any building thereon) in favour of the Life Insurance Corporation of India. the Housing and Urban Development Corporation, or a banking company as defined in the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 or any other financial institution approved by general or special order in this behalf by the State Government.

1[(4) Where vacant land has been disposed of under this section by way of lease for making constructions within the time with right of forfeiture of the lease and re-entry upon failure to make constructions within such time, and the lessee fails without sufficient reason, to make the constructions or a substantial portion thereof, within the stipulated time or such extended time as the lessor may grant, the 2[lessor may subject to the provisions of Sub-section (4-A) forfeit] the lease and re-enter upon the land:

Provided that no forfeiture and re-entry shall be made unless the lessee has been allowed reasonable opportunity to show cause against the proposed action.

3[(4-A) Where a lessee fails to make construction within the stipulated time, and the extended time, if any, under Sub-section (4) so that the total period from the date of lease exceeds five years, a

charge at the rate of two per cent of the prevailing market value of the concerned land shall be realised every year from him by the lessor and if from the date of imposition of the said charge a further period of five years elapses the lease shall stand forfeited and the lessor shallre-enter upon the land :)

4[Provided that where the period of five years has expired before the commencement of the Uttar Pradesh Urban Planning and Development (Amendment) Act, 1997, or where the period of five years expires within one year after such commencement, the charge shall be realizable after a period of one year from the date of such commencement.]

(5) Upon such forfeiture and re-entry, the premium paid by the lessee for such land shall be refunded without any interest, after deducting-

(a) the amount, if any, due to the lessor under that lease, and

(b) a sum equivalent to 5 per cent of the premium, for administrative expenses.

(6)Any person aggrieved by an order under Sub-section (4) may, within 30 days from the date of knowledge thereof, prefer an appeal to the District Judge whose decision shall be final.

(7)The land so re-entered upon after forfeiture of lease may be disposed of in accordance with the provisions of Sub-sections (1) and (2)].

(Emphasis added)

16. Sub Section 1 thus provides for transfer of land on such terms and conditions as the Authority may consider expediant for securing development under the development area but of course, according to the plan Sub Section (2) provides for various modes of transfer/disposal of land and lease is one such mode prescribed for. And Sub Section (4) empowers forfeiture of lease and re-entry for violation of terms of lease.

17. The import of the *proviso* is putting a caveat to the main provision in favour of a lease holder. Sub Section 4 of Section 18, from its bare reading, shows that legislative intent of giving right to the lessor of re-entry upon failure of the lessee to make constructions as provided and contemplated under the lease agreement but that too is when found without sufficient reason, meaning thereby for not undertaking any action or performing as per land use under the lease agreement, one must ensure that it was not for any *'sufficient reason'* to record. Here comes the element of adjudication because authority has to evaluate the explanation of the lessee *qua* the charges of violation of the lease and then adjudicate the issue regarding right to re-entry. The natural corollary is unless a show cause notice is given of the proposed action for the forfeiture of the lease deed and re-entry of the lessor, offering a 'reasonable opportunity' to explain no action can be undertaken by the authority forfeiting the lease and making re-entry.

18. So in the entire regime of the Act two different actions/ coercive measures are contemplated to meet two different contingencies and the consequential effect of the respective actions are also different and there is no overlapping of procedures to make one notice as substitution of the other merely because the authority is one and the same. The contents of the order impugned since clearly indicate that impugned action has been undertaken for not developing the amusement park to house sport activities like

recreational one: swimming, golf course, joyride etc, it clearly speaks of an action as contemplated under sub section 4 of Section 18 and, therefore, in our ultimate conclusion that we arrive is that notices appended as C.A. 1,2 and 3 cannot be read and held to be notices under the *proviso* to sub section 4 of Section 18 of the Act No. 11 of 1973 to justify the consequential order.

19. Applying the above legal principle to case in hand and in view of the facts discussed above, we find that there is no such notice and, therefore, we find merit in the argument of learned Senior Advocate that the order impugned cannot be sustained in law as it being a result of exercise power *de hors* the procedure prescribed.

20. It is also sought to be urged by learned Senior Advocate Sri M.C. Chaturvedi, appearing for the respondent that the petitioner has the opportunity to explain his position and meet the charges on merits here itself in this petition. He argues that endeavour of the Court while exercising power under Article 226 should be aimed at achieving substantial justice. He submits that since the pleadings are absolutely silent *qua* the grounds/charges for violation of terms of the lease, it is writ large on the face of it that petitioner does not have any reasonable explanation to offer to sustain the lease rights.

21. Meeting this above argument, suffice it to say that determination of lease for violation of its terms entail a detail fact finding enquiring and at times personal opportunity of hearing may even become necessary. Such matters cannot be decided on mere affidavits. The element of adjudication as we have already referred to above being involved in the exercise of power under Section 18(4), it is always proper to let the competent authority decide the same. Once can argue that appeal involves a question of law so the said remedy may be bypassed in a certain case but task of primary authority cannot be bypassed, more so, in case where for lack of notice, a litigant had neither any opportunity to offer explanation nor, had offered any explanation.

22. However, since the lease has come to be determined for violation of the terms and conditions thereof and grounds have been clearly spelt out in the order, we take it that the petitioner now has requisite notice and so what is required at his end is to submit reply. So we find merit in the argument of learned Senior Advocate Sri M.C. Chaturvedi to the extent that matter may be remitted to the authority concerned to revisit the entire issue and decide afresh in accordance with law and that too without being influenced by any finding returned in the order impugned.

23. In view of the above the order impugned 26.05.2009 (Annexure No. 1 to the writ petition) to the extent it determines the lease and cancels the same and findings are returned in support thereof, is hereby quashed, however, contents thereof and reasons assigned therein are directed to be treated as a notice to the petitioner to submit his reply and offer explanation to the alleged violation of terms and

conditions of the lease and non performance of the land use for which land in question was leased out to the petitioner.

24. Accordingly, the petitioner is directed to submit reply/explanation within period of four weeks from today and authority shall consider the reply of the petitioner and thereafter shall proceed to pass order afresh. The authority shall conclude the proceedings as directed hereinabove within a further period of eight weeks from the date of submission of reply of the petitioner.

25. We may, however, hasten to add and clarify that if any proceeding has been initiated by the authority under Section 27 of the Act No. 11 of 1973, that will be a separate one and it will be open for the authority to bring that to a logical end in the light of provisions prescribed for in that regards under the Act No. 11 of 1973.

26. The writ petition is allowed to the extent indicated hereinabove and subject to the aforesaid observations and directions but, with no order as to cost.

(2020)03-05ILR A1919
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Crl. Misc. Ist Bail Application No. 38764 of 2017

Dinesh Kumar ...Applicant (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Kamal Kaushal Upadhyay, Sri Ankit Saran, Sri Jai Narayan, Sri Rohan Gupta
Counsel for the Opposite Party:
A.G.A.

A. Criminal Law- Dowry Prohibition Act, 1961-Sections 498-A, 304-B-Section ¾ - Indian Penal Code, 1860 - application-adjournment-Counsel for applicant did not appear to argue-the applicant is in jail for 3 years-counsel did not show any interest to argue the matter.(Para 2)

The matter is adjourned. (E-6)

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

1. A request has been made by Sri Rohan Gupta, Advocate holding brief of Sri Ankit Saran, learned counsel for applicant to adjourn this matter today.

2. This bail application is pending since 2017 and applicant is in jail since 20.10.2016. It appears that learned counsel for last more than three years did not make any attempt to argue the case but allowed detention of his client in jail. Even today, he did not show any interest by arguing the matter. He does not want to give a chance to his client to celebrate Holi at his residence.

3. Under these circumstances, I have no option but to adjourn this matter for today.

4. List in the next cause list.

(2020)03-05ILR A1920
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.05.2020

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE ALI ZAMIN, J.

Criminal Appeal No. 328 of 2001

Diwari Lal & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Ashwini Kumar Awasthi, Sri Ajay Vikram Yadav, Sri Manish Tiwari, Sri Vimlendu Tripathi

Counsel for the Opposite Party:
A.G.A., Sri Rajesh Yadav, Sri Vipin Kumar Yadav

Criminal Law-Indian Penal Code-1860-Section 307/149 & 302/149 - Appeal against conviction. Binding Precedent – The fact of the present case are different to facts of the case laws cited by the counsel for the parties. Therefore the ratio of the judgments cited is not applicable.

Criminal Appeal rejected. (E-2)

List of cases cited:-

1. Pala Singh and others Vs St. of Pun., (1972) 2 SCC 640

2. Criminal Appeal no. 2525 of 1978, Chhotey Lal and others Vs St. of U.P. reported in 1990 (2) Crimes (HC) 531

3. Bhajan Singh Alias Harbhajan Singh Vs St. of Har., (2011) 7 SCC 421

4. 1998 SCC (Crl) 1055, Shiekh Ayub Vs St.of Maha
5. Waman and others Vs St. of Maha., (2011) CrLJ 4287 (SC)

6. Gangabhavani v. Rayapati Venkat Reddy, AIR 2013 SC 3681

7. Yogendra Morarji Vs St. of Guj., (1980) 2 SCC 218

8. Moti Singh Vs St. of Maha., (2002) 9 SCC 494

9. Vajrapu Sambayya Naidu and others Vs St. of A.P. and Others, (2004) 10 SCC 152

10. (2014) 5 SCC 744, St. of Raj. Vs Manoj Kumar

11. Kashi Ram and others Vs St. of M.P., (2002) 1 SCC 71

12. Bhawar Singh and Ors Vs St. of M.P., (2008) 16 SCC 657

13. Munshi Ram Vs Delhi Administration, AIR (1968) SC 702

14. Rajinder and others Vs St. of Har., (1995) 5 SCC 187

15. Abid Vs St. of U.P., 2009 (66) ACC 737 (SC)

16. Avtar Singh Vs St.of Har., 2012 (79) ACC 699

17. Asraf Ali Vs St. of Assam, (2008) 16 SCC 328

18. Shardul Singh Vs. St. of Har. (2002) 8 SCC 372

19. Ravindra Kumar Vs. St. of Punj., (2001) 7 SCC 690,

20. St. of U.P. Vs. Baburam (2000) 4 SCC 515

21. Thaman Kumar Vs. St. of UT of Chandigarh, (2003) 6 SCC 380,

22. Yunis alias Kariya Vs. St. of M.P. (2003) 1 SCC 425,

23. (1973) 3 SCC 219 (Shivaji Genu Mohite Vs. St. of Maha.)

24. (2017) 11 SCC 120 (Rajagopal Vs. Muthupandi alias Thavakkalai and Others)

25. St. of U.P. Vs M.K. Anthony, (1985) 1 SCC 505,

26. Gangabhavani v. Rayapati Venkat Reddy, AIR 2013 SC 3681

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. Heard Shri Vimlendu Tripathi, learned counsel for the appellants and the learned A.G.A. for the State.

2. The present criminal appeal has been filed against the judgement and order dated 24.1.2001 passed by the Special Judge (D.A.A. Act), Etawah in S.T No. 503 of 1993 connected with S. T. No. 546 of 1993 whereby the appellant have been convicted under section 148 I.P.C. and sentenced to 3 years R.I., under section 307/149 I.P.C. and sentenced to 7 years R.I. and under section 302/149 I.P.C. to life imprisonment. All the sentences were directed to run concurrently.

3. Briefly stated the facts of the case are that on 14.11.1991 a written report Ext. Ka-1 was submitted by one Akhilesh Kumar scribed by Rajveer Singh at police station Bharthana, Etawah, which was registered as case crime no. 294 of 1991 under sections 147, 148, 149, 307 and 302 I.P.C. wherein it was stated that on 14.11.1991 at about 6 a.m. the informant Akhilesh Kumar alongwith Prahlad Singh, Govind Singh, Sovaran Singh, Malkhan Singh, Ajmer Singh, Manoj Kumar and Babloo were ploughing his filed which he had purchased from Uma Shanker resident of Kunjpura Etawah and with regard to this agricultural plot he had old enmity with Nathu Ram and regarding which a court decision had been made in favour of his (Akhilesh's) father as a result of which Nathu Ram and his sons bore enmity towards Akhilesh. It is alleged that seeing Akhilesh and his companions ploughing the said plot, Nathu Ram (died during trial) alongwith Diwari Lal, Dinesh Chandra, Viresh Chandra, Shiv Singh, Sarvesh Chandra (died during trial), Nihal Singh and Kusum Singh armed with *Lathi*, Stick, Spear, Pharsa, Country Made Pistol, and handbombs came to the plot and surrounded the complainant after which Nath Ram exhorted his companions to kill the complainant and other persons whereupon the accused persons, namely, Nathu Ram and Sarvesh Chandra fired upon the complainant and others and also attacked them with *Lathi*, Danda, Pharsa Spear, and country made pistols, as a result of which the complainant's brother Ramesh Chandra died on the spot whereas Prahlad Singh, Kripal Singh, Govind Singh and Manoj Kumar sustained bullet injuries and injuries from Danda, Spear, *Lathi* and Pharsa. The complainant and the other injured started shouting upon which Subhash Chandra, Jaiveer and other villagers rushed to the spot and on their challenge the accused persons ran away. On the basis of this written report F.I.R. was registered by the police on 14.11.1991 at 10.35 a.m. (Ext. Ka. 2). Ext. Ka- 14 dated 14.11.1991 is a search report in respect of the accused persons which mentions that all the accused persons had ran away from their houses. Ext. Ka-8 is the recovery memo which shows recovery of four empty cartridges, one cartridge is of 12 bore, pieces of used bombs, half burn strings and three cartridges were recovered from the field of Nirbal. Ext. Ka-7 is the recovery memo of plain and blood stained earth from the place where the deceased Ramesh Chandra had fallen.

4. The inquest report is Ext. Ka-6 which shows the time of the F.I.R. as 10.35 a.m. dated 14.11.1991 and the time of commencement of inquest is mentioned as 11 a.m. dated 14.11.1991 and the time of completion of the inquest is mentioned as 2.00 p.m. dated 14.11.1991.

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5. The dead body of the deceased Ramesh Chandra was sent for post mortem examination and postmortem was conducted on 15.11.1991 at 3 p.m. by Dr. H.N. Singh (P.W.-5) who has

noted the following ante mortem injuries on the person of the deceased:-

"(1) Blast Injury 8cmx8cm x skull cavity deep lying on part of forehead including nasal bone, causing multiple fracture of frontal bone & nasal bone. Injury is surrounded by blackening in are of 15cmx 14cm.

(2) Incised wound 24cm x 2cm x skull cavity deep causing multiple fractures of both parietal and occipital bone. Wound is lying transversely on the occipital and both parietals, on right Side 1 cm about right Ear and on left side 6cm above the left. Brain matter drained out.

(3) Incised wound 12 cm x 3 cm x skull cavity deep on back of head transversely situated above the neck at level of mid of both ears causing fracture of underlying occipital bone.

(4) Abrasion 2cm x 1 cm on outer aspect of left upper arm 13 cm below top of shoulder.

(5) Incised wound 4cm x 1cm x muscle deep, 8 cm below rest of neck on right Side back."

6. The doctor has also opined on the basis of the injuries that the death of the deceased is possible to have been caused at 7:00 am on 14.11.1991. He has also opined that the injuries are capable of being caused by a hand grenade and that the blast injury has been caused within a distance of 3 ft. In the opinion of the doctor the death of the deceased has been caused due to shock and excess bleeding.

7. The injured Akhilesh, the informant was examined by P.W.-6 Dr. K.K. Sharma, who has prepared the report (Ext.Ka.5) and has noted the following injuries:-

"(1) A lacerated wound of size 3.5 x0.5 cm, muscle deep, irregular margins, over right Side of the head, 7.5 cm above the right Pinna of ear.

(2) A traumatic swelling of size 8cm X 5 cm over posterio lateral side of the left elbow joint."

8. In the opinion of the doctor the injuries are simple and caused by blunt object. Duration fresh.

9. The injured Manoj Kumar S/o Prahlad Singh was examined by Dr. B.S. Bisaria (P.W.-8) who has noted the following injuries:-

"(1) Multiple semi-circular wound in an area 12cm x 11 cm on the right side of face and ear measuring about 0.2 x 0.5 cm in diameter x skin deep.

(2) Multiple semi-circular would in an area of 15cm x 14 cm on the front of right shoulder measuring about 0.2 x 0.5 cm in diameter x skin deep."

10. In the opinion of the doctor, all the injuries are simple and fresh and caused by any firearm weapon. The doctor has also advised for X-Ray.

11. Injuries suffered by injured Govind (who has not been examined during trial) as noted by Dr. V.S. Bisaria (P.W.-8) are as under:-

"(1) Lacerated wound 5cm x 0.7 cm x muscle deep on the right side of skull 11 cm above of right ear.

(2) Abrasion 0.2 cm x 0.3 cm on the tip of right nose."

12. In the opinon of the doctor, all the injuries are simple, fresh and caused by hard blunt object.

13. The witness has testified that these injuries are capable of being caused

by a blunt object. This witness also stated that he cannot say that injury no. 1 and 2 caused to Manoj Kumar were caused by bullet though the injury no. 1 is under the right side of the ear and is semi-circular. He also stated that normally a bullet is round in shape but pellets can be in any form and shape.

14. The investigating officer S.I. Radhey Shyam, P.W.-7 conducted the investigation of the case and prepared the inquest report (Ext. Ka-6), the recovery memo of empty cartridges and half burnt strings (Ext. Ka-8), prepared site plan (Ext. Ka-9), photo lash, dead body challan, letter to R.I. and letter to C.M.O. (Ext. Ka-10, 11, 12 and 13 respectively). The dead body was sealed and sent for postmortem examination through constables Tulsiram and constable Ram Kripal. The investigating officer in his testimony has stated that F.I.R was noted in his presence and registered as Case Crime No. 294 of 2991 under sections 147, 148, 149, 307 and 302 I.P.C. by Head Moharrir Shyam Babu Shukla and the G.D. was also prepared by him. He has proved the chik F.I.R Ext. Ka-1 as well as F.I.R. Ext. Ka-2. He has also stated that the informant Akhilesh met him around 10.30 a.m. and thereafter he went to the site which is an agricultural plot. There was no temple on the plot. He has also stated that the residences of two of the accused was situated to the south of the village Bhaisai. He prepared the chauhaddi of the site and marked it in the site plan. As per the site plan to the north is the plot of Surendra Yadav and Prem Singh. The actual site where the incident occurred has been marked as 'C' under red line. It is the field of Rama Shanker and Uma Shanker. The informant in his statement informed that with regard to this very plot he had won a case and there was a conflict between the parties with regard to this very plot. According to the informant this plot was of Nathu Ram and his sons. The investigating officer has also stated that the informant had told him that they were attacked not only with *lathi* and sticks but also by fire arm i.e. country made pistols and guns and pharsa as well as hand bomb. The investigating officer has stated that he has prepared the site plan on the disclosure and pointing out by the informant Akhilesh. Blood was also found on the ***Medh*** on the field of Nirbal Singh, which has been marked in the site plan as '+'. The investigating officer could not remember as to whether at the site there was any plough. The investigating officer has denied that the dead body of the deceased Ramesh Chandra was first brought to the police station and then sent for post mortem examination. The investigating officer has also identified the handwriting and signature of S.I. P.K. Mishra. He has further stated that subsequent investigation was carried out by S.H.O. himself.

15. In his cross examination he has deposed that after completion of investigation the charge sheet, Ext. Ka-14 has been submitted by P.K. Mishra, Inspector.

16. In order to prove its case during trial, the prosecution has examined 8 witnesses in all.

17. **P.W. 1 Akhilesh** is the first informant and injured witness of the incident and has reiterated the version of the F.I.R. stating that on 14.11.1991 at about 6 a.m. in the morning he alongwith Prahlad Singh, Govind Singh, Sovaran Singh, Malkhan Singh, Ajmer Singh, Manoj Kumar and Babloo had gone to the agricultural plot in question where the

incident occurred to plough the same. He has stated that he had won a court case with regard to this plot recently and had anticipated and also feared that some quarrel may take place with regard to this plot. At the same time Nathu Ram with whom the court case had been contested came to the site alongwith Diwari Lal, Dinesh Chandra, Viresh Chandra, Shiv Singh, Sarvesh Chandra, Nihal Singh and Kusum Singh. Nath Ram was armed with a *Kanta* and country made pistol, Diwari Lal was armed with spear and country made pistol, Dinesh Chandra was armed with country made pistol, Viresh Singh was armed with a *Kanta* and Pharsa, Nihal was armed with gun and Kusum was carrying a *Jhola* (bag) and armed with *Lathi*/Danda. On reaching the spot Nathu Ram exhorted the other accused persons to kill the informant and other persons and immediately thereafter all the accused persons started assaulting the informant and others and also opened fire in which Prahlad Singh, Kripal Singh, Govind and Manoj as well as informant Akhilesh received injuries. In the end accused Kusum threw a hand bomb which hit Ramesh Chandra who died on the spot. The informant has also stated that on hearing the hue and cry, Subhash Chandra, Jaiveer and several other persons of the village reached there and on their challenge the accused persons ran away from the spot. The informant has proved the report which was scribed by Rajveer which was also signed by him. The informant also stated that the medical examination of the injured persons was carried out and Prahlad and Kripal being more seriously injured were sent to Gwalior for treatment. In his cross examination he has stated that Nathu Ram's father is Bachchan Lal but he does not know the name of the father of Bachchan Lal. Raj Kumar was not the uncle of Nathu Ram but belonged to the same family. Jodha and ....(sic) also belong to the same family. Ameer Singh's father was Ram Chandra. Ameer Singh was resident of Kunjpura which is near Jaswant Nagar. Kunjpura is about 50 km. away from the village of the informant, P.W. 1. The informant also stated that he does not know whether Jodha is the brother of Ram Chandra or not. Babloo is the son of Hawaldar. Ajmer and Malkhan are real brothers and are sons of Sovaran. Sovaran and Hawaldar are real brothers. Prahlad and the deceased Ramesh Chandra and the P.W. 1 Akhilesh are real brothers. Govind's father is Iqbal. The accused Diwari Lal, Viresh, Shiv Singh, Sarvesh and Dinesh are real brothers and sons of Nathu Ram. P.W. 1 then stated that Raj Kumar was blind, he was married but had no children. His wife had predeceased him. Raj Kumar had executed a sale deed of his land in favour of one Badan Singh. Prior to execution of this sale deed Raj Kumar had executed a sale deed in favour of Lakhan Singh. Lakhan is the resident of Kunjpura. P.W. 1 stated that he does not know where Badan Singh resides. Lakhan Singh's father is Pyarey Lal. Badan Singh used to come to the house of Raj Kumar. The plot in dispute was chak no. 580. P.W. 1 has further stated that the land which Raj Kumar had given to Lakhan through sale deed was resold by Lakhan Singh to Raj Kumar through a sale deed. This witness has further stated that it is wrong to say that Lakhan Singh had got executed the sale deed of this land executed in his favour by playing fraud on Raj Kumar and on fear of being exposed and on objection being raised by Raj Kumar he had returned the same to Raj Kumar through a sale deed. This witness also stated that Badan Singh after three days of execution of the sale deed took the same land through a sale deed in favour of his

son Uma Shanker. He also stated that half of this land was thereafter sold by Uma Shanker to his brother Rama Shanker through a sale deed. This fact was in the knowledge of Raj Kumar who did not raise any objection. This witness also stated that he did not know whether any part of this land was given by Raj Kumar to a school or to a temple of Mahaveerji though he has stated that on chak no. 580 there is a temple of Mahaveerji which was got constructed by Raj Kumar. To the west of this temple there is a primary school but he does not know the number of plot but he has stated that this land also belonged to Raj Kumar. Raj Kumar had died about 15 years ago. The primary school was got constructed by Raj Kumar. He has also stated that with regard to the disputed plot no. 580 civil proceedings are still pending. Raj Kumar for the purposes of management of temple and primary school had constituted committees of which the President was the accused Nathu Ram. He has also stated that civil proceedings in respect of plot in dispute was between the accused Nathu Ram and the informant's father Latoori Singh, Sovaran Singh, Kripal, Malkhan Singh, Ajmer etc. The sale deed of the same disputed land relating to the temple and school was got executed by Latoori Singh, father of the informant, Anarkali, Malkhan Singh, Ajmer, Kripal Singh from Uma Shanker and Rama Shanker. Uma Shankar and Rama Shankar got executed the sale deed of house of Raj Kumar in favour of Latoori, Anarkali and Prem Singh upon which Dinesh accused, instituted proceedings under section 107/116 Cr.P.C. against Latoori Singh, Prahlad, deceased Ramesh Chand, Kripal Singh, Sovaran, Malkhan and Ajmer. Rajveer was the scribe of this report. The informant has denied that he and the others had purchased the land in dispute through a fraudulent sale deed. He could not remember since what time the court proceedings were going on between him, Uma Shanker, Ameer Singh and others and Nathu Ram though he has stated that at the time when he purchased the land there was already a dispute going on with Nathu Ram. He has also denied that Nathu Ram was residing in the temple and has stated that instead he was residing in his house.

18. The informant P.W. 1 in his cross examination stated that accused Kusum used to sell milk and he has no enmity against him. The informant also stated that house of Nathu Ram was situated in the west and the temple was also situated in the west and the house was about 30 steps from the temple and Nathu Ram used to reside in the said house. He also stated that prior to purchase of the house by the informant, Ameer Singh used to reside therein and this house originally belonged to Raj Kumar and has been built on chak no. 580. The informant was not aware as to whether Raj Kumar had executed a fraudulent sale deed in favour of Ameer Singh but it is wrong to say that Raj Kumar always resided in the house. The informant also stated that he alongwith 9 - 10- persons had gone to the plot no. 580 to plough the same for the first time. There were two ploughs. He also stated that he had no apprehension that any conflict will ensue but stated that so many people had gone there with him because their help was required. He also stated that one person used one plough and it is incorrect to say that they had gone there with the intention to pick up a quarrel. He also stated that prior to the prosecution party ploughing the land Nathu Ram was in his house. Adjacent to plot no. 580 is the field of Himmat Singh and adjacent to that is the field of Nirbal Singh. He further deposed that he alongwith his companions

started ploughing the land concerned from the east at that time the sun had already arisen and prior to start of the conflict they had already ploughed about 20 **Koorh**. Both the ploughs were being used. Ramesh was sitting in the field of Nirbal Singh and others were sitting in the field Chak No. 580. The informant and Govind were operating the two ploughs. The informant has also stated that those who were ploughing were carrying small sticks whereas the others were not carrying any weapon of any kind. He also stated that accused on reaching the field asked the informant and others to stop ploughing the field and immediately started assaulting them. The informant had seen the accused coming to the field with weapons and he alongwith his companions were frightened. Though they made an attempt to run away and some persons managed to run away but they could not escape. The informant ran towards his brother Ramesh, Govind ran towards Kripal Singh and before running they had released the bullocks and buffaloes from the ploughs. When he reached near Ramesh he was also assaulted by the accused persons. By that time Kusum had taken out a bomb from the *Jhola* (bag) and thrown it at Ramesh as a result of which Ramesh died on the spot. The informant had not been able to reach Ramesh and he was still 70 - 80 steps away when he saw accused Kusum throwing the bomb at Ramesh. The informant also stated that he was assaulted by Shiv Singh. Shiv Singh was armed with Pharsa and Sarvesh was armed with *Kanta*. The informant further stated that though in his examination in chief he had stated that Shiv Singh and Sarvesh were armed with *Lathi* and Danda but that is not correct as they were armed with Pharsa and *Kanta*. Kusum was armed with hand bomb in a *Jhola* and also had a *Katta* (country made pistol). He also stated that injuries caused to him were caused by the wooden part of the *Kanta*. He also stated that Kusum had no concern with the land in dispute. The informant also stated that his companions had gone with him because their help was required in leveling the field and also for preparing the small boundaries and to remove the grass. The informant also stated that he had recently won a case regarding this land and therefore his companions also came with him by way of precaution. The informant also stated that injuries of Prahland and Manoj were caused by fire arm. Accused Dinesh and Nihal Singh were firing from their guns and no one else was firing. Injuries of Kripal Singh were caused by Nathu Ram by Pharsa and *Kanta*, Sarvesh by *Katta* and *Kanta* and Diwari by *Ballam* (Spear) and Govind was also assaulted. The informant stated that it is wrong to say that they had gone to the land in dispute to seize the same. He also stated that neither of his companions carried a Phawda (spade) and they were not possessing any *Kudal* or *Khurpi*.

19. This witness in cross examination has further stated that plot in question Chak no. 580 measured about 11 bighas in which there was a banyan tree standing. He also stated that he had gone with his companions to plough the said land but he had no apprehension that Nathu Ram would fight over it although there was enmity between him and Nathu Ram. After this ***marpeet*** the informant and others went to the police station in a Bullock Cart, the body of the deceased was lying in the field. One Har Vilas had brought the bullock cart from the village and another bullock cart was brought by Vishundara. The entire ***marpeet*** lasted about 10-12 minutes. The informant was medically examined in P.H.C. Bharthana at about 1 p.m. alongwith

his injured companions. The injuries of Kripal and Prahlad being serious in nature, they were referred to Etawah for treatment but the informant did not go with him and instead Rajesh and Satyendra had gone with them. After medical examination the informant and others came to the police station and met the Daroga and gave him the entire information.They reached the police station after the medical examination at about 2 p.m. Other than the injured nobody had come with the informant to the police station. At one place the informant has stated that prior to his medical examination he had gone with his father Latoori to the police station but he could not remember whether anybody else had gone with him. After the dead body came to the police station the informant had gone to Etawah with the dead body for post mortem examination. He stayed in the night at Etawah as the post mortem was conducted on the next day. He also stated that no fire arms were used against him but Nihal Singh was carrying a gun with which he had fired at Ramesh.

20. **P.W. 2 Kripal Singh** is the injured witness and in his deposition he had stated that at about 7 O'clock in the morning his son Govind Singh was ploughing the field no. 580 and Sovaran Singh, Ajmer Singh, Malkhan Singh, Ramesh, Prahlad, Manhoj, Babloo alias Ramakant were present there alongwith him. He deposed that they were preparing the ***Medh*** and cleaning the grass of the said plot. At the same time accused Nathu Ram, Diwari Lal, Sarvesh, Shiv Singh, Viresh, Dinesh, Kusum Singh, Nihal Singh reached there. Nathu Ram and Sarvesh were armed with ***Kanta*** and country made pistols, Shiv Singh was armed with Pharsa and country made pistol, Viresh was armed with Pharsa and *Katta*, Diwari Lal was armed with *Ballam* (spear) and *Katta*, Dinesh was armed with gun, Nihal Singh was armed with gun and Kusum was armed with hand bombs and country made pistol. Nathu Ram asked them to stop ploughing otherwise all will be killed but they protested and did not stop ploughing, whereupon the accused persons started assaulting them and the P.W. 2 alongwith Prahlad, Akhilesh, Manoj, Govind Singh received injuries. Ramesh was also injured and died on the spot. He also stated that since he received injuries in the beginning, therefore, he could not see as to who has caused injuries to Ramesh but he clearly stated that injuries to him were caused by Sarvesh and Diwari Lal with ***Kanta***. Nathu Ram wanted to purchase the land in question which was purchased by him, Ajmer Singh, Malkhan Singh ....(sic), Latoori for which a consolidation case was won by them and mutation was also carried out in their favour. Accused Dinesh thereafter made a false report (Istgasa) but for want of witnesses this case also ended in favour of the P.W. 2 (Kripal Singh). He further deposed that on hearing the hue and cry Subhash, Jagveer Singh, Ramanath, Nathuram and other villagers reached on the spot and witnessed the incident.

21. In the cross examination P.W. 2 Kripal Singh stated that Raj Kumar was the resident of his village and he was blind. Nathu Ram accused was the uncle of Raj Kumar (Chacha). In the plot no. 580 of Raj Kumar there is a primay school and a Hanuman temple. To the west of the temple in this plot there was a house of Raj Kumar. He does not know whether Raj Kumar had made separate committees for the primary school and the Hanuman Temple but these properties were being looked after by Ajmer Singh. P.W.-2 also stated that the house of Raj Kumar is to the west of the

temple and very close to it and in this house Nathu Ram and his sons reside. Nathu Ram used to do pooja in the temple. The primary school was got constructed by Raj Kumar and he had donated the school and the land to the Government with the intention that the Government would run the school. The Government had also constructed a new school on this plot no. 580. Raj Kumar had no children. The house of Raj Kumar in which Nathu Ram was residing was sold by Uma Shanker and Rama Shanker in favour of Anarkali wife of Hawaldar. He has also stated that Uma Shanker and Rama Shanker were sons of Ameer Singh. Kusum Singh was running a pan shop and was also selling milk. Kusum Singh used to collect milk from the village and sell the same in Bharthana, Etawah. Kusum Singh is the resident of Dadiyan which is about one and half kms away from village Bhasai. No member of his family resides in the village of P.W. 2. The witness also stated that there was a consolidation case between Nathu Ram and his family and also a civil dispute.

22. In cross examination this witness further stated that at the time of incident alongwith him the other legitimate title holders were removing grass from the ploughed field but they were not carrying any ***Kudal*** or ***Khurpi.*** It is incorrect to say that on that day he did not go to the field to prepare the ***Medh*** (small boundary). He has also stated that he had informed the investigating officer that his son Govind and informant Akhilesh were ploughing the field whereas he alongwith others was removing the grass from the ploughed field by hand. He also stated that before assaulting them the accused had fired in the air. They were not carrying *Lathi* or Sticks but they came with the common intention to kill. He has stated that he was assaulted by *Kanta* and not with any fire arm by Sarvesh and Diwari Lal. He has stated that Diwari Lal had assaulted him with the wooden part of the *Ballam* (spear). He has clarified that he had been assaulted by the wooden part and not from the sharp edge of the *Ballam* as a result of which he has received injuries. At the time when he was assaulted he was standing towards the south of the temple at a distance of about 200 steps, to the south of which there is the field of Nirbal Singh. He stated that for the first time when he saw the accused persons they were to the north south near the temple and he was not frightened seeing the accused persons otherwise he would have run away. Nathu Ram asked them to stop ploughing but they did not stop. Deceased Ramesh was standing behind him on the southern ***Medh***. He has denied that any hand bomb was thrown from his side at Nathu Ram or that they were injured by any hand bomb thrown by them at Nathu Ram. He has also deposed that it is incorrect to say that they had received injuries while they were throwing bomb at Nathu Ram and that Ramesh has also received bomb injuries in this process. He had gone in a buffalo cart alongwith his son Govind and wife to Bharthana. He had gone from the village to the hospital and from there he had gone to a hospital in Gwalior for treatment. He met the Daroga 9 - 10 days after returning from Gwalior. He also stated that it is wrong to say that a false report has been lodged against the accused persons with the connivance of the police and by changing the time in the F.I.R. It is also incorrect to say that no such incident as narrated by him had occurred and it is also incorrect to say that there was firing from both sides.

23. **P.W. 3 Manoj Kumar** s/o Prahlad Singh is also an injured eye witness of the incident and has deposed that on

14.11.1991 at about 7 a.m. in the morning he had gone to the field alongwith Kripal Singh, Govind, Prahlad Singh, Ramesh Singh, Akhilesh, Sovaran Singh, Malkhan Singh, Ajmer Singh and Ramakant. They had won a case in respect of the land in question and therefore, they had all gone to the field and at the time of the incident some persons were removing grass of the field. At that time, Nathu Ram armed with *Katta* and *Kanta*, Diwari Lal armed with *Ballam* and country made pistol, Sarvesh armed with *Katta* and *Kanta*, Viresh armed with *Katta* and Pharsa, Shiv Singh armed with *Katta* and Pharsa and Kusum, who was carrying a *jhola* containing hand bombs and a *Katta*, Nihal Singh armed with country made pistol and Dinesh armed with gun reached there and surrounded them and started assaulting them. In this assault Ramesh, Manoj, Prahlad, Akhilesh, Kripal Singh and Govind had received injuries. He alongwith Prahlad was injured by fire arm which were used by Nihal and Dinesh. He stated that he received pellet injuries on his ear and neck. He further stated that perhaps Kripal Singh had received injuries by Pharsa and his uncle Ramesh had died on the spot on receiving the injuries caused to him by Pharsa and hand bomb. Hand bomb was thrown by Kusum Singh at Ramesh which had badly injured Ramesh. After that this witness got his medical examination done of his injuries.

24. In his cross examination this witness further stated that with regard to plot no. 580 there was a court case with Nathu Ram and even at that time there was some civil case was going on. Between the house of Nathu Ram and temple there may be a distance of 10 - 15 ft. The house of Nathu Ram is situated to the west of the temple. He does not know whether Raj Kumar resides in the same house in which Nathu Ram alongwith his family was residing. Raj Kumar had no other house in the village. He does not know whether Raj Kumar is the uncle of accused Nathu Ram. The house in which Nathur Ram's family resides is in the name of Nathu Ram of which a sale deed was got executed by the wife of Hawaldar, and Prem Singh but he does not know from whom this sale deed was got executed. Till the date of the incident the vendor had not taken possession of the said plot no. 580. He stated that he alongwith others had gone to the plot no. 580 for the first time to take possession of the same. He had no apprehension that there would be any quarrel with the accused or that the accused Nathu Ram would try to prevent them from taking possession of the plot. They had taken two pairs of ploughs to the field alongwith 10 persons who were not armed with any weapon. Two people were ploughing the field and rest were removing the grass from the field. He had given statement to the Daroga on the date of the incident but after that the Daroga had not examined him. The witness has denied that he alongwith others had gone to the field in question, plot no. 580, with arms or hand bombs to plough the field. This witness has clearly stated that accused Viresh was armed with pharsa and *Katta*, Sarvesh was armed with *Katta* and *Kanta*, Shiv Singh was armed with Pharsa and *Katta*. When the witness first saw the accused they were carrying arms, they came from all sides. Nathu Ram was on the north west corner of the field.

25. The witness also deposed that he saw the accused persons only when they were about 5-6 ft. away and were on all sides of the field. He also stated that he along with others did try to run away but

they could not escape and were assaulted by the accused appellants. Ramesh died on the spot after the incident. Subhash and Jaiveer alongwith other villagers came to the spot after the injuries were caused to him and the accused persons ran away seeing the villagers. On hearing the sound of firearm the bullocks ran away with the plough. The injured were taken by bullock cart to Barthana. He also stated that from the Thana they came to Etawah for treatment. From the Thana the witness Manoj along with Prahalad Singh, Kripal Singh and Govind Singh had gone to the hospital in a jeep. The witness remained admitted in the hospital for two days. The witness also stated that accused Dinesh and Nihal were carrying guns, the rest of the accused were carrying two weapons each. The accused had fired using both hands. This witness has stated that first the hand bomb was thrown and thereafter, the accused attacked with pharsa and then started firing from the firearms. The witness has stated that it is incorrect to say that he alongwith others had gone to the plot no. 580 in question to take forcible possession or that they had not won the case and had gone to the said plot with hand grenades and guns etc., to take forcible possession of the same through a fraudulent sale deed and that on accused Nathu Ram remonstrating with them, they threw hand grenades at Nathu Ram. The witness has also stated that it is incorrect to say that other than accused Nathu Ram no other accused was present at the spot and it is also incorrect to say that the time of the F.I.R. has been changed in collusion with the police.

26. **P.W.-4 Head Constable Shyam Babu Shukla** is the Head Muharir and he has proved the filing of the written report by the informant Akhilesh Kumar and has also affirmed that on the said basis he has registered the Chik F.I.R. being Case Crime no. 273. He has also proved his signature on the F.I.R. which is Ext.Ka.2 as well as the time of 10:35 am and date 14/11/1991 mentioned therein. The witness has also stated that General Diary (GD) has been weeded out. It is maintained in the Thana for one year and thereafter sent to the record room and after five years it is weeded out.

27. **P.W.-5 Dr. H.N. Singh** has conducted the postmortem of the deceased Ramesh Chandra. This witness has proved the injuries as per the postmortem report Ext.Ka.4.

28. **P.W-6 is Dr. K.K. Sharma** who has examined the injured Akhilesh. This witness has proved the injury report Ext.Ka.5, caused to Akhilesh Kumar, the informant.

29. **P.W.-7 is Radhey Shyam Verma,** who has conducted the investigation of the case. His deposition has already been narrated above.

30. **P.W.-8 is Dr. B.S. Bisaria** who has medically examined the injured Manoj and injured Govind and also proved the injury report Ext. Ka.13.

31. On the basis of the evidence brought on record by the prosecution the trial court has convicted and sentenced the appellants, as aforesaid.

32. Sri Vimlendu Tripathi, learned counsel for the accused-appellants submitted that the copy of the FIR was sent to the Magistrate on 18.11.1991 i.e. after four days of the incident and was not sent

promptly, therefore, the FIR itself is ante-timed.

33. Rebutting the submissions of the learned counsel for the appellants on the question of the FIR being forwarded to the Magistrate belatedly, learned A.G.A. has submitted that even though Section 157 Cr.P.C. requires such report to be sent by the police officer to the Magistrate empowered to take cognizance of such evidence forthwith but that is only for purposes of keeping control of the investigation and if necessary to give appropriate directions under Section 159 Cr.P.C. The learned AGA submitted that if the FIR is otherwise promptly recorded and there is nothing on record or even a whiff of suspicion to show that there was a possibility of it being anti-timed, the mere fact that the report was forwarded to the Magistrate belatedly would not vitiate the trial nor can it be conjectured on that ground that the F.I.R. is anti-timed. Reliance has been placed on the judgment of the Supreme Court in **Pala Singh and others Vs State of Punjab, (1972) 2 SCC 640**. Paragraph 7 of the said judgment reads as under:-

"7. Shri Kohli strongly criticised the fact that the occurrence report contemplated by S. 157, Cr.P.C. was sent to the magistrate concerned very late. Indeed, this challenge, like the argument of interpolation and belated despatch of the inquest report, was developed for the purpose of showing that the investigation was not just, fair and forthright and, therefore, the prosecution case must be looked at with great suspicion. This argument is also unacceptable. No doubt, the report reached the magistrate at about 6 p.m. Section 157, Cr. P.C. requires such report to be sent forthwith by the police officer concerned to a magistrate empowered to take cognisance of such offence. This is really designed to keep the magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under s. 159. But when we find in this case that the F.I.R. was actually recorded without delay and the investigation started on the basis of that F.I.R. and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report by the magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the appellants case that they have been prejudiced by this delay."

34. The judgment of the Supreme Court in Pala Singh (supra) has been followed by a Division Bench of this Court in **Criminal Appeal no. 2525 of 1978, Chhotey Lal and others Vs State of U.P.** reported in **1990 (2) Crimes (HC) 531**. Paragraph 14 of the said judgment reads as under:-

"14. It is true that Sec. 157 Cr.P.C. was not properly complied with inasmuch as the Special Report was not sent forthwith to the Court concerned but this by itself, without any other circumstance, is nothing to come to a conclusion that the investigating was tainted or that the F.I.R. was not in existence at the time when it is alleged to have come into existence. In the case of Pala Singh and another Vs. State, it has been held that mere delay in receipt of report of occurrence by the Magistrate will not make the investigation tainted without any other conclusion which may lead to that conclusion. In the present case since

the prosecution evidence has been found to be reliable, this delay in sending of the special report to the Magistrate will have no bearing on the prosecution case."

35. Reliance has also been place on the judgment of the Supreme Court in **Bhajan Singh Alias Harbhajan Singh Vs State of Haryana, (2011) 7 SCC 421** wherein it was held by the apex court that the Cr.P.C. provides for internal and external checks, one of them being the receipt of copy of the F.I.R. by the Magistrate concerned. This is to ensure that the F.I.R. may not be anti-timed or anti-dated. The purpose of prompt reporting to the Magistrate is that Section 159 Cr.P.C. empowers the Magistrate to hold investigation or preliminary enquiry of the offence either himself or through a Magistrate subordinate to him. Explaining the word "forthwith" in Section 157 Cr.P.C., the Apex Court held that the word "forthwith" does not mean that the prosecution is required to explain the delay of every hour in sending the F.I.R. to the Magistrate. If in a given case, the number of dead or injured persons is very high delay in dispatching the report is natural. Paragraphs 28, 29, 30 and 31 of the judgment read as under:-

"28. Thus, from the above it is evident that the Cr.P.C *provides for internal and external checks: one of them being the receipt of a copy of the FIR by the Magistrate concerned. It serves the purpose that the FIR be not anti-timed or anti-dated. The Magistrate must be immediately informed of every serious offence so that he may be in a position to act under* Section 159 *Cr.P.C., if so required.* Section 159 *Cr.P.C. empowers the Magistrate to hold the investigation or preliminary enquiry of the offence either himself or through the Magistrate subordinate to him. This is designed to keep the Magistrate informed of the investigation so as to enable him to control investigation and, if necessary, to give appropriate direction.*

29. It is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been anti-timed or anti-dated or investigation is not fair and forthright. Every such delay is not fatal unless prejudice to the accused is shown. The expression `forthwith' mentioned therein does not mean that the prosecution is required to explain delay of every hour in sending the FIR to the Magistrate. In a given case, if number of dead and injured persons is very high, delay in dispatching the report is natural. Of course, the same is to be sent within reasonable time in the prevalent circumstances.

30. However, unexplained inordinate delay in sending the copy of FIR to the Magistrate may affect the prosecution case adversely. An adverse inference may be drawn against the prosecution when there are circumstances from which an inference can be drawn that there were chances of manipulation in the FIR by falsely roping in the accused persons after due deliberations. Delay provides legitimate basis for suspicion of the FIR, as it affords sufficient time to the prosecution to introduce improvements and embellishments. Thus, a delay in dispatch of the FIR by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when the prosecution furnishes a cogent explanation for the delay in dispatch of the report or prosecution case itself is proved by leading unimpeachable evidence.

31. In view of the above, we are in agreement with the High Court that there was no delay either in lodging the FIR or in sending the copy of the FIR to the Magistrate. It may be pertinent to point out

that defence did not put any question on these issues while cross-examining the Investigating Officer, providing him an opportunity to explain the delay, if any. Thus, we do not find any force in the submissions made by the learned counsel for the appellants in this regard."

36. The Supreme Court in ***1998 SCC (Crl) 1055, Shiekh Ayub Vs State of Maharashtra*** has held as under:-

".....It was urged by the learned counsel that the fact that copy of the FIR had reached the Magistrate on 10.2.1995 creates a serious doubt regarding the date and time when the FIR was prepared. He also drew our attention to the evidence of PW.3 Aslam who had stated that the police had prepared some writing after coming to the village and had taken his thumb expression on it. We do not find any substances in this contention because after recording the FIR at 7.30 a.m. the Investigating Officer had proceeded to the place to the place of the incident and prepared inquest reports. The evidence of Panch witness PW.6 and the inquest reports show that work of preparing inquest reports had started at 8 a.m. The inquest reports and other Panchnamas also contain the number of FIR. Therefore, there can be no doubt that the FIR had come into existence before 8 a.m. on 6.2.1995. Even though it had reached the Magistrate after three days that delay cannot, in view of the other evidence, create any doubt regarding its genuineness."

37. From the record we find that the FIR was registered on 14.11.1991 and there is also a date of 15.11.1991 mentioned on the side. It is to be noted that the date of 18.11.1991 is also mentioned in the FIR (Ext.Ka.2) but from that alone we are not inclined to take the view that the F.I.R. is anti timed. No doubt the information ought to have been communicated to the concerned Magistrate promptly but there is nothing on record to lead to the presumption that if it was sent on 18.11.1991, the F.I.R. itself would be anti timed. At the most it may be lapse on the part of the police.

38. In the present case, we may further note that the incident occurred on 14.11.1991 at about 7:00 am. Ten people were present from the prosecution side on the plot no. 580; they had gone to plough the field and clean the grass when they were attacked by the accused persons who were eight in number. The accused were carrying lethal weapons like *farsa, kanta, ballam (spear), tamancha and hand bomb*. Large number of persons from the members of the prosecution party were injured and some were sent to Etawah for treatment while some were sent to Gwalior for treatment. In spite of this, the F.I.R. was lodged on 14.11.1991 itself at 10:35 am. The written report has been proved by the informant P.W.-1 and the F.I.R. has also been proved by Investigating Officer, P.W.-7 and P.W.-4 Head Constable Shyam Babu Shukla who was the Head Muharir at the relevant point of time. In the inquest report held on 14.11.1991 itself at 11:00 am(Ext.Ka.6), the time and date of F.I.R. is mentioned as 10:35 am dated 14.11.1991. Thus, it was a prompt F.I.R. In the circumstances, in our opinion, merely because the report was forwarded to the Magistrate on 18.11.1991 if true, would not be fatal to the trial. However, we may at the same time, hasten to caution the Government on this aspect of the matter to ensure that copy of the F.I.R. in all such cases is forwarded to the Magistrate promptly and that the provisions of Section

157 Cr.P.C. are complied with in letter and spirit.

39. The learned counsel then submitted that there is a contradiction in the description of injuries by the informant Akhilesh (P.W. 1) and that in his cross examination the informant P.W-1 has stated that injuries were caused to him by *Lathi and Danda* whereas in his examination-in-chief he has stated that injuries caused to him was of a *kanta*. We find that in his examination-in-chief the informant has stated that the injury was caused to him by the stick portion which is attached to a *kanta*. His injury report, as verified by the Doctor K.K. Sharma, P.W.-6 also mentions that the injuries have been caused by a blunt object. Therefore, we do not accept the submissions of the learned counsel for the appellants that there is any contradiction in the statement of informant Akhilesh with regard to injuries received by him.

40. The next submission of the learned counsel for the appellants is that the witnesses are wholly unreliable since they are interested witnesses being related to one another. We find that the witnesses P.W.-1 and 3 are fact witnesses and though they are related to each other in the sense that P.W.-1 Akhilesh complainant is the son of Latoori Singh and P.W.-3 Manoj Kumar is the son of Prahlad Singh, who is the brother of informant Akhilesh Singh. Thus the witness Manoj Kumar is the nephew of the informant Akhilesh Singh. All these witnesses have testified with regard to weapons being carried by each of the accused and there is no contradiction in that regard in their statements. It is relevant to note here that it is the admitted case of the prosecution from the inception that on the date of the incident they had gone to the field in question, measuring 11 bighas, for cultivating the same alongwith two ploughs, bullock and buffalo and started cultivating the field. The witnesses of fact have also very clearly deposed that while two persons were ploughing the field, rest of the persons were cleaning the field and removing grass from the field whereas some persons were sitting, may be waiting for their turn since the plot in question was big in size. The prosecution witnesses have also very specifically deposed that it is the accused persons who reached the spot armed with deadly weapons and challenged them to stop cultivating the field and when they did not oblige, the accused persons started assaulting them with their weapons. The prosecution witnesses have also received injuries in the incident and have been medically examined by the doctors, who have proved their injuries during trial. Otherwise also the incident took place at about 7.00 a.m. in the morning and it is a day light incident and therefore, in the absence of any major contradiction in the testimonies of the prosecution witnesses, we are not inclined to disbelieve their testimony merely on the ground that they happened to be related to each other. The mere fact that prosecution witnesses are related to each other is no ground to discard their testimony, which is otherwise unimpeachable, merely on a false notion that the related witnesses would have colluded to given false evidence to deliberately implicate the accused more so when the related witnesses are also injured witnesses.

41. The Supreme Court in the case of ***Waman and others Vs State of Maharashtra, (2011) CrLJ 4287 (SC)*** in paragraphs 7,8,9,10,11 and 12 has held as under:-

"7) In view of the stand of the counsel for the appellants that since PWs 1-4, eye-witnesses are closely related to the deceased and complainant, conviction can not be based on such evidence, let us state the law on the admissibility/acceptability or

otherwise of their evidence as considered by this Court.

8) In Sarwan Singh and Others vs. State of Punjab, (1976) 4 SCC 369, a three-Judge Bench of this Court, while considering the evidence of interested witness held that it is not the law that the evidence of an interested witness should be equated with that of a tainted witness or that of an approver so as to require corroboration as a matter of necessity. The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinized with a little care. Once that approach is made and the court is satisfied that the evidence of the interested witness has a ring of truth such evidence could be relied upon even without corroboration. The fact of being a relative cannot by itself discredit the evidence.

In the said case, the witness relied on by the prosecution was the brother of the wife of the deceased and was living with the deceased for quite a few years. This Court held that "but that by itself is not a ground to discredit the testimony of this witness, if it is otherwise found to be consistent and true".

9) In Balraje alias Trimbak vs. State of Maharashtra, (2010) 6 SCC 673, this Court held that the mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. It was further held that when the eye-

witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically and the court would be required to analyze the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. After saying so, this Court held that if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

10) The same principles have been reiterated in Prahalad Patel vs. State of Madhya Pradesh, (2011) 4 SCC 262. In para 15, this Court held that "though PWs 2 and 7 are brothers of the deceased, relationship is not a factor to affect credibility of a witness. In a series of decisions this Court has accepted the above principle (vide Israr vs. State of U.P., (2005) 9 SCC 616 and S. Sudershan Reddy vs. State of A.P., (2006) 10 SCC 163)

11) The above principles have been once again reiterated in in State of U.P. vs. Naresh & Ors., (2011) 4 SCC 324. Here again, this Court has emphasized that relationship cannot be a factor to affect the credibility of an witness. The following statement of law on this point is relevant:

"29. .... The evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the Court has to analyse the evidence of related witnesses carefully to find out whether it is cogent and credible. [Vide Jarnail Singh vs. State of Punjab (2009) 9 SCC 719, Vishnu & Ors. v. State of Rajasthan, (2009) 10 SCC 477; and Balraje @ Trimbak (supra)]"

12) It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be

consistent and true, the fact of being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the courts have to scrutinize their evidence meticulously with a little care."

42. The Supreme Court in the case of ***Gangabhavani v. Rayapati Venkat Reddy, AIR 2013 SC 3681***, on the issue of related witnesses has held as under:-

"EVIDENCE OF A RELATED/INTERESTED WITNESSES:

11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(Vide: Bhagalool Lodh & Anr. v. State of U.P., AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308).

12. In State of Rajasthan v. Smt. Kalki & Anr. AIR 1981 SC 1390, this Court held:

"5A. As mentioned above the High Court has declined to rely on the evidence of P.W. 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased".....For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True it is she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested'. In the instant case P.W.1 had no interest in protecting the real culprit, and falsely implicating the respondents." (Emphasis added) (See also: Chakali Maddilety & Ors. v. State of A. P., AIR 2010 SC 3473).

13. In Sachchey Lal Tiwari v. State of U.P., AIR 2004 SC 5039, while dealing with the case this Court held:

"7. .....Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence."

14. In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed

the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased."

43. Therefore, in such circumstances though the prosecution witnesses are related to each other but on the ground of their relationship alone it cannot be accepted that the testimonies of the prosecution witnesses are tainted and unreliable and they are interested witnesses. The contention of the learned counsel for the appellants is thoroughly misconceived and is rejected.

44. The learned counsel for the accused-appellants next submitted that the incident was triggered on account of grave and sudden provocation offered by the prosecution witnesses and therefore, the accused were entitled to the benefit of exception to sub section (2) of Section 300 I.P.C. The submission is that P.W.-1 in his testimony has stated that on the date of the incident i.e. 14.11.1991 he alongwith his other companions had gone to plot no. 580 for the first time to cultivate the same. He has also referred to the statement of P.W.-3 Manoj Kumar wherein the P.W.-3 has also stated that till the date of the incident the informant and others had not taken possession of the plot no. 580 in question and therefore, submits that on the date of the incident itself the informant and his companions had gone to the plot in question for the first time with the intention to take possession of the same and it was to prevent them from taking forcible possession that the incident occurred in the heat of the matter. Reference has been made to the provisions of Section 101, 103 and 105 of the Evidence Act, 1872 which read as under:-

"101. Burden of proof.--Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102.....

103. Burden of proof as to particular fact.--The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

104.....

105. Burden of proving that case of accused comes within exceptions.--When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

45. We may also note that what emerges from the testimony of the witnesses of fact (P.W.-1 and P.W.-3) is that there was some litigation with regard to plot no. 580 between members of the prosecution party on one hand and Nathu Ram and accused appellants on the other, and that the prosecution had won a case with regard to the said plot. No doubt the testimony of both the prosecution witnesses P.W.-1 and P.W.-3 would indicate that they had gone to the said plot for the first time to take possession thereof. P.W.-1 has stated he along with his companions went to the plot in question for the first time to plough the same and P.W.-3 has stated that prior to the incident they were not in possession of the said plot but having won a case with regard to the said land it can be expected of them to have gone to the field to plough the same on the basis of such decision. The fact

that when the informant and the witnesses of fact were ploughing the field the accused persons came to the plot armed with weapons has been clearly narrated by the prosecution witnesses in their testimonies. The witnesses have stated that Nath Ram was armed with a *Kanta* and country made pistol, Diwari Lal was armed with *ballam* (spear) and country made pistol, Dinesh Chandra was armed with country made pistol, Viresh Chandra was armed with a *Kanta* and Pharsa, Sarvesh was armed with *Kanta* and tamancha, Nihal was armed with gun and Kusum was carrying a *Jhola* (bag) and armed with *Lathi*/Danda. The injuries sustained by the P.W.-1, P.W.2, P.W.-3 and the deceased Ramesh Chand, have been proved by prosecution witnesses Dr. H.N. Singh, Dr. K.K. Sharma and Dr. B.S. Bisaria, and in the opinion of the doctors the injuries sustained by the injured and the deceased could have been caused by the weapons carried by the accused persons. At this point we may refer to the statement of the accused persons recorded under section 313 Cr.P.C. None of the accused-appellants in their statement have taken the plea of private defence. It is clearly notable that none of the accused in their statement have anywhere stated that the informant and the others were also carrying *lathi*s, dandas or even lethal weapons. Nowhere in their statement under Section 313 Cr.P.C. have they stated that they were first attacked by the informant and other prosecution witnesses or by the deceased.

46. The learned counsel for the accused-appellants at this stage, referred to the judgment of the Supreme Court in the case of Yogendra Morarji Vs State of Gujarat, (1980) 2 SCC 218. The relevant paragraphs 14, 15 and 16 of the said judgment read as under:-

"14. Before coming to the facts of the instant case, the principles governing the burden of proof where the accused sets up a plea of private defence, may also be seen, Section 105, Evidence Act *enacts an exception to the general rule whereby in a criminal trial the burden of proving everything necessary to establish the charge against the accused beyond reasonable doubt, rests on the prosecution. According to the section, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in* the Indian Penal Code*; or within any special exception or proviso contained in any other part of* the Code *or in any other Law, shall be on the accused person, and the Court shall presume the absence of such circumstances. But this Section does not neutralise or shift the general burden that lies on the prosecution to prove beyond reasonable doubt all the ingredients of the offence with which the accused stand charged. Therefore, where the charge about the accused is one of culpable homicide, the prosecution must prove beyond all manner of reasonable doubt that the accused caused the death with the requisite knowledge or intention described in* Section 299 *of the Penal Code. It is only after the prosecution so discharges its initial traditional burden establishing the complicity of the accused, that the question whether or not the accused had acted in the exercise of his right of private defence, arises. As pointed out by the Court in* Dahyabhai v. State of Gujarat , *under* Section 105, *read with the definition of "shall presume" in* Section 5, Evidence Act, *the Court shall regard the*

absence of circumstances on the basis of which the benefit of an Exception (such as the one on which right of private defence is claimed), as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. The accused has to rebut the presumption envisaged in the last limb of Section 105, by bringing on record evidential material before the Court sufficient for a prudent man to believe that the existence of such circumstances is probable. In other words, even under Section 105, the standard of proof required to establish those circumstances is that of a prudent man as laid down in Section 3, Evidence Act. But within that standard there are degrees of probability, and that is why under Section 105, the nature of burden on an accused person claiming the benefit of an Exception, is not as onerous as the general burden of proving the charge beyond reasonable doubt cast on the prosecution. The accused may discharge his burden by establishing a mere balance of probabilities in his favour with regard to the said circumstances.

15. The material before the Court to establish such a preponderance of probability in favour of the defence plea may consist of oral or documentary evidence, admissions appearing in evidence led by the prosecution or elicited from prosecution witnesses in cross-examination presumptions, and the statement of the accused recorded under Section 313 *of the CrPC, 1973.*

16. Notwithstanding the failure of the accused to establish positively the existence of circumstances which would bring his case within an Exception, the circumstances proved by him may raise a reasonable doubt with regard to one or more of the necessary ingredients of the offence itself with which the accused stands charged. Thus, there may be cases where, despite the failure of the accused to discharge his burden under Section 105, the material brought on the record may, in the totality of the facts and circumstances of the case, be enough to induce in the mind of the Court a reasonable doubt with regard to the mens rea requisite for an offence under Section 299 of the Code (See Dahyabhai v. State of Gujarat (ibid) State of U. P. v. Ram Swarup , Pratap v. State of U.P. .

47. What is laid down in that judgement is that the prosecution must first prove its case before a plea of private defence can be set up by the accused and then examined by the court. In the present case, we find that the informant along with other injured as well as the deceased had gone to the plot no. 580 to plough the same. They were ten in number. A question has been raised by the defence as to why so many persons were required to plough the field and that this alone would show that their intention was to create disturbance and take forcible possession of the said plot and that they had gone to the field well prepared for eventuality.

48. We are not inclined to believe the submission of the learned counsel for the appellants for the reason that the plot in question measured 11 bighas which is a very large plot, as stated by prosecution witnesses and therefore, it can be accepted that ten people had gone there to plough the field in question. It is also to be noted that the prosecution witnesses have very specifically and clearly stated in their testimonies that they had gone to the field in question to plough the same alongwith

two ploughs, bullocks and buffalo. They have further deposed that while two persons were ploughing the field by two ploughs other persons were cleaning the field and removing the grass and some persons were there to help them since the field was measuring 11 bighas.

49. From the statement of P.W.-1, P.W.-2 and P.W.-3 it is clear that none of them or their companions were carrying any weapons and in fact they have clearly stated that they had absolutely no apprehension that they would be stopped from ploughing the field or that an incident of the kind would ensue since so far as they were concerned they had already won the litigation in their favour with regard to the said land. We may also note that the accused in their statements recorded under Section 313 Cr.P.C. have nowhere stated that the prosecution party was carrying weapons and offered resistance and that therefore, they had to defend themselves and they exercised their right of private defence.

50. The learned counsel for the appellants at this stage, referred to the judgment of the Supreme Court in **Moti Singh Vs State of Maharashtra, (2002) 9 SCC 494** and submitted that right of private defence cannot be denied to the accused even if the plea to that effect has not been taken in the examination of the accused under Section 313 Cr.P.C. Reference has been made to paragraphs 4, 9, 10, 11 and 12 which read as under:-

"4. Though the appellant did not adopt the right of private defence as a plea in the statement recorded under Section 313 *of the Criminal Procedure Code, his co-accused (fifth accused - Jai Singh) put forward a case that the prosecution witnesses and the deceased marched towards their house in retaliation for the earlier incident and launched an attack on the inmates including him.*

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9. Section 102 *of the Indian Penal Code says that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or even a threat to commit any offence though the offence may not have been committed and the right continues as long as such apprehension of danger to the body continues.* Section 100 *of the Indian Penal Code confers the right of private defence of the body upto the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right, be of any of the acts as may reasonably cause the apprehension that grievous hurt be the consequence of such assault.*

10. Regarding the contention that the appellant is disentitled to get the benefit of right of private defence as he failed to make out a plea in that regard we may point out that it would be quite unjust to deny such a right to the accused merely on the ground that he adopted a different line of defence.

If the evidence adduced by the prosecution would indicate that the accused were put under a situation where they could reasonably have apprehended grievous hurt even to one of them, it would be inequitable to deny the right of private defence to the accused merely on the ground that he has adopted a different plea during the trial. The crucial factor is not what the accused pleaded, but whether the accused had the cause to reasonably apprehend such

danger. A different plea adopted by the accused would not foreclose the judicial consideration on the existence of such a situation.

11. This Court has stated the above legal position time and again. A three judge bench of this Court in State of U.P. v. Lakhmi *has stated thus:*

"The law is that burden of proving such an exception is on the accused. But the mere fact that the accused adopted another alternative defence during his examination under Section 313 *of the Code without referring to exception I of* Section 300 *of IPC is not enough to deny him of (he benefit of the exception, if the court can cull out materials from evidence pointing to the existence of circumstances leading to that exception. It is not the law that failure to set up such a defence, would foreclose the right to rely on the exception once and for all. It is axiomatic that burden on the accused to prove any fact can be discharged either through defence evidence or even through prosecution evidence by showing a preponderance of probability".*

12. A two judge bench of this Court in Periasami and Anr. v. State of Tamil Nadu *has stated thus:*

"We may point out that the appellants have not stated, when examined under Section 313 *of the Code, that they have acted in exercise of such right. Of course, absence of such a specific plea in the statement is not enough to denude them of the right if the same can be made out otherwise."*

51. We find that facts of that case as put forth by co-accused Jai Singh (therein) is that the prosecution witnesses and the deceased marched towards their (accused) houses in retaliation for an earlier incident and launched an attack on the community including him. In that case, it has also been noted that the injuries sustained by accused Jai Singh was caused by the prosecution party armed with blunt objects. We may note that, it is in that context, that even though the plea of private defence was not raised in Section 313 of the Code but the Hon'ble Supreme Court admitted the plea of private defence in view of the grievous injury inflicted to one of the accused. Paragraph 14 of the said jugement reads as under:-

"14. In our considered opinion, the appellant, even if the prosecution version that it was he who inflicted the fatal stab on the deceased is to be accepted as correct, it ended in the exercise of right of private defence.

As the reasonable apprehension that the grievous hurt would have been inflicted to one of the accused cannot be ruled out on the broad probabilities, delineated by the prosecution to the evidence, we are disposed to extend the said right to this appellant. Resultantly the conviction and sentence passed on him cannot be sustained."

52. In the present case, what we find is that neither the plea of private defence has been taken by the accused appellants in their testimony recorded under Section 313 of the Code of Criminal Procedure nor is it the case of the accused that any of the prosecution witnesses were carrying weapons or were otherwise armed and that any injuries had been caused to the accused persons which resulted in retaliation by the accused persons by way of private defence and which resulted in injuries to the prosecution witnesses and death of Ramesh Chand. There is no injury report on record to show any injury being caused to or sustained by any of the accused persons to support the theory of an attack or assault

having been launched by the prosecution side which resulted in a retaliation by the accused. In such circumstances, the plea of private defence is neither available nor can be allowed to be raised by the accused in the facts and circumstances of the present case.

53. The learned counsel for the appellants has also referred to the judgement of the Supreme Court in the case of **Vajrapu Sambayya Naidu and others Vs State of Andhra Pradesh and Others, (2004) 10 SCC 152.** Paragraphs 20 and 21 of the said judgement read as under:-

"20. The trial court came to the conclusion that the members of the defence party though they had a right of private defence of property, had exceeded that right by causing injuries which ultimately resulted in the death of one of the members of the prosecution party. This was on the assumption that the members of the defence party had only a right of private defence of property, which did not entitle them to cause the death of any person in the exercise of that right. Rut the facts of this case disclose that when they sought to exercise their right of private defence of property, they were attacked by the members of the prosecution party and three of them suffered incised wounds. The case of the defence in this regard appears to be probable and therefore though initially the appellants had only the right of private defence of property; once the members of the prosecution party started an assault on them with sharp cutting weapons, that gave rise to the right of private defence of person as well. Since in the circumstances, they must have apprehended that atleast grievous injury may be caused to them, if not death, they were certainly entitled to use reasonable force to resist the members of the prosecution party and their right of private defence extended to causing death of any of the aggressors if that became necessary. Unfortunately, the courts below have not viewed the case from this angle. We are of the view that the appellants were entitled to exercise their right of private defence of property as well as of person in the facts and circumstances of the case.

21. Even assuming that the right of private defence of persons did not accrue to the appellants and that, in fact, they exceeded their right of private defence of property, it has to be seen as to which of the accused exceeded that right. It is well settled that in a case where the court comes to the conclusion that the members of the defence party exceeded the right of private defence, the court must identify and punish only those who have exceeded the right. Section 34/149 IPC will not be applicable in the case of persons exercising their right of private defence. [See : State of Bihar v. Mathu Pandey and Subramani v. State of Tamil Nadu]. For the same reason, the appellants cannot be held guilty of the offence under Section 148 IPC, because nothing is an offence which is done in the exercise of the right of private defence."

54. The facts of the said case itself disclose that the defence party was actually attacked and assaulted by the prosecution with sharp cutting weapons and this gave a reasonable apprehension to the appellants that at least grievous injury may be caused to them if not, death and therefore, they were entitled to use reasonable force to resist the members of the prosecution party which gives the appellants the right to private defence. We find that the facts of the said case are totally different from the facts of the present case and have no application to the present case as we have already noted hereinabove that it is

nobody's case herein that the members of the prosecution party were armed with weapons of any kind which may have raised a reasonable apprehension in the minds of the accused-appellants that grievous injury resulting in possible death to one of them would have been caused if they had not exercised their right of private defence. The facts of the case on the other hand are that the prosecution party had gone to the plot no. 580 in question to plough the same, may be for the first time, on the basis of some judgement in their favour and it is when they were ploughing the field that the accused-appellants armed with farsa, *ballam (spear), kanta*, *country made guns, tamancha and hand bomb* assaulted the prosecution party resulting in the death of one of the members of the prosecution party namely, Ramesh Chandra and injuries to the other prosecution witnesses. Further the case was decided in favour of prosecution therefore prosecution party was rightful owner of the land as such no question of right of private defence regarding the property arises for the defence.

55. The next judgment relied upon by the learned counsel for the appellants is **(2014) 5 SCC 744, State of Rajasthan Vs Manoj Kumar**. Relevant paragraphs 15, 15.1, 15.2 and 15.3 read as under:-

"15. The learned counsel for the State next contended that when the accused persons had exceeded their right of private defence and caused the death of the deceased, all of them should have been convicted under Section 302/34 IPC. In this regard, we may refer with profit to certain authorities before we advert to the facts unfurled in the case at hand:

15.1. In Munshi Ram v. Delhi Administration, AIR 1968 SC 702, while dealing with right to private defence, this Court has observed that law does not require a person whose property is forcibly tried to be occupied by trespassers to run away and seek the protection of the authorities, for the right of private defence serves a social purpose and that right should be liberally construed. The Court further stated that such a right not only will be a restraining influence on bad characters but it will encourage the right spirit in a free citizen, because there is nothing more degrading to the human spirit than to run away in the face of peril.

15.2. In Mohd. Ramzani v. State of Delhi, 1980 SCC (Cri) 907 the Court has observed that:

"19. ....It is further well-established that a person faced with imminent peril of life and limb of himself or another, is not expected to weigh in "golden scales" the precise force needed to repel the danger. Even if he in the heat of the moment carries his defence a little further than what would be necessary when calculated with precision and exactitude by a calm and unruffled mind, the law makes due allowance for it."

15.3. In Bhanwar Singh and others v. State of Madhya Pradesh (2008) 16 SCC 657 it has been ruled to the effect that for a plea of right of private defence to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death and if the court were to reject the said plea, there are two possible ways in which this may be done, i.e., on one hand, it may be held that there existed a right to private defence of the body, however, more harm than necessary was caused or, alternatively, this right did not extend to causing death and in such a situation it would result in the application of Section 300 Exception 2."

56. In our opinion, the said judgment also has absolutely no application to the facts of the present case. That was a State appeal and the plea of the State was that since all the accused persons had exceeded their right of private defence and caused the death of the deceased all of them should have been convicted under Section 302/34 IPC. The judgment of the Supreme Court in the case of Manoj Kumar has no application to the facts of the present case and is therefore, clearly distinguishable.

57. The learned counsel for the appellants has referred to the judgment of the Supreme Court in **Kashi Ram and others Vs State of Madhya Pradesh, (2002) 1 SCC 71**. In our opinion, the said judgment has no application to the facts of the present case.

58. The learned counsel for the appellants has also referred to the judgment of the Supreme Court in **Bhawar Singh and others Vs State of Madhya Pradesh, (2008) 16 SCC 657**. Paragraphs 51 and 52 of which read as under:-

"51. To put it pithily, the right of private defence is a defence right. It is neither a right of aggression or of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. Necessity must be present, real or apparent.

52. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the state machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot, his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence. {See Dharam v. State of Haryana [2006 (13) SCALE 280]}."

59. In our opinion, the judgment of the Supreme Court in the case of Bhawar Singh (Supra) pithily states the law that right of private defence cannot be treated as a right of aggressor or of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. In our opinion, the said judgment supports the case of the prosecution more than the case of the appellants.

60. The learned counsel for the appellants has also placed reliance on the

judgment of the Supreme Court in **Munshi Ram Vs Delhi Administration, AIR (1968) SC 702** particularly paras 18 and 19 wherein it was held that if the complainant party had invaded the land of the accused and the accused were taken by surprise, law does not require a person whose property is forcibly tried to be occupied by trespassers to run away and seek the protection of the authorities. The right of private defence serves a social purpose and that right should be liberally construed. The said judgment in our opinion has no application to the facts of the present case particularly in view of the ratio of Bhawar Singh (Supra).

61. With regard to the plea of private defence claimed by the accused appellants, the learned AGA has relied on the judgment of the Supreme Court in **Rajinder and others Vs State of Haryana, (1995) 5 SCC 187**. Paragraphs 19, 20, 21 and 22 of the said judgments read as under:-

"19. Having drawn the above inferences we have now to ascertain whether the unauthorised entry of the complainant party in the disputed land, which according to the trial Court was in settled possession of the accused party legally entitled the latter to exercise their right of private defence and, if so, to what extent. The fascicule of Sections 96 to 106 I.P.C. codify the entire law relating to right of private defence of person and property including the extent of and the limitation to exercise of such right. Section 96 provides that nothing is an offence which is done in the exercise of the right of private defence and Section 97 which defines the area of such exercise reads as under:

"97. Every person has a right, subject to the restrictions contained in section 99, to defend-

First. - His own body, and the body of any other person against any offence affecting the human body:

Secondly, - The property, whether moveable or immoveable, of himself or of any other other person. against any act which is an offence falling under the definition of theft. robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass. (emphasis supplied)

On a plain reading of the above section it is patently clear that the right of private defence, be it to defend person or property, is available against an offence. To put it conversely, there is no right of private defence against any act which is not an offence. In the facts of the instant case the accused party was entitled, in view of Section 97 and, of course, subject to the limitation of Section 99, to exercise their right of private defence of property only if the unauthorised entry of the complainant party in the disputed land amounted to "criminal trespass", as defined under Section 441 I.P.C. The said Section reads as follows:

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

Or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

21. It is evident from the above provision that unauthorised entry into or upon property in the possession of another or uniawfully remaining there after lawful entry can answer the definition of criminal trespass if, and only if, such entry or unlawful remaining is with the intent to

commit an offence or to intimidate insult or annoy the person in possesion of the property. In other words, unless any of the intentions referred in Section 441 is proved no offence of criminal trespass can be said to have been committed. Needless to say, such anintention has to be gathered from the facts and circumstances of a given case. Judged in the light of the above principles it cannot be said that the complainant party committed the offence of "criminal trespass" for they had unauthorisedly entered into the disputed land, which was in possession of the accused party, only to persuade the latter to withdraw thereupon and not with any intention to commit any offence or to insult, intimidate or annoy them. Indeed there is not an iota of material on record to infer any such intention. That necessarily means that the accused party had no right of private defence to property entitling them to launch the murderous attack. On the contrary, such murderous attack not only gave the complainant party the right to strike back in self defence but disentitled the accused to even claim the right of private defence of person.

22. We hasten to add, that even if we had found that the complainant party had criminally tresoassed into the land entitling the accused party to exercise their right of private defence we would not have been justified in disturbing the convictions under Section 302 read with Section 149 I.P.C., for Section 104I.P.C. expressly provides that right of private defence against "criminal trespass" does not extend to the voluntary causing of death and Exception 2 to Section 300 I.P.C. has no manner of application here as the attack by the accused party was premeditated and with an intention of doing more harm than was necessary for the purpose of private defence. Which is evident from the injuries sustained by the three deceased, both regarding severity and number as compared to those received by the four accused persons. However, in that case we might have persuaded purselves to set aside the convictions for the minor offences only: out then that would have been, needless to say, a poor solace to the appellants."

62. We find that the Supreme Court in the said judgment has held that even if the complainant party has committed criminal trespass in the land entitling the accused to exercise their right of private defence, the court would not have been justified in disturbing the convictions under Section 302 read with Section 149 IPC particularly in the light of the provisions of Sections 104 IPC which expressly provides that right of private defence against criminal trespass does not extend to voluntarily causing of death.

63. We may also refer to the judgment of the Supreme Court in the case of **Abid Vs State of U.P., 2009 (66) ACC 737 (SC)**. The facts in that case were that the accused persons were aggressors. D-1 and D-2 were unarmed when they asked the accused persons as to why they had harvested the standing crop. **Assuming** that the accused persons therein had purchased the agricultural land from one Gheesey through a registered sale deed and they were in possession but there was no justifiable reason for them to attack D-1 and D-2 with deadly weapons like *ballam*, gandasa and *lathi*s even if, D-1 and D-2 had questioned them about harvesting the crop. The Supreme Court held that in the circumstances, the trial court as well as High Court could not be said to have committed any error in not accepting the plea of private defence. Paragraphs 24, 25,

26 and 27 of the said judgment reads as under:-

"24. That it is for the accused to establish plea of private defence is well settled. The plea of self-defence, is not required to be proved by the accused beyond reasonable doubt. What is required of the Court is to examine the probabilities in appreciating such a plea. Nevertheless, the accused has to probablise the defence set up by it. In the present case, the accused has miserably failed to establish, much less probablise, right of private defence. As a matter of fact, the evidence on record shows that the accused persons were aggressors. D-1 and D-2 were unarmed when they asked accused persons as to why they had harvested the standing crop. Assuming that the accused persons had purchased the agricultural land from Gheesey by registered sale deed and they were in possession but there was no justifiable reason for them to attack D-1 and D-2 with deadly weapons like ballam, gadasa and lathis, even if D-1 and D-2 questioned them about harvesting the crop. In the facts and circumstances of the case, there is no scope for any right of private defence as D-1 and D-2 had neither put the person nor the property of the accused in peril.

25. In our considered view, the trial court as well as the High Court cannot be said to have committed any error in not accepting the plea of private defence.

26.The deadly weapons with which appellants were armed and large number of injuries inflicted on D-1 and D-2 clearly show that the appellants shared common object of committing murder. That the accused persons were more than five and formed unlawful assembly is amply established. D-1 and D-2 died on the spot. The conviction of the accused under Section 302 read with 149 IPC does not suffer from any legal flaw.

27. The result of the foregoing discussion is that both appeals must fail and are dismissed."

64. In the present case, we find that though the prosecution party were ten in number but they were completely unarmed. They had gone to the field in question may be for the first time, to plough the same. It was a very big plot measuring about 11 bighas and therefore, two ploughs drawn by bullocks and buffaloes were required and other members of the party were involved in cleaning the ground and removing the grass. The prosecution party had gone there as they had won a case against the accused. The witnesses of fact have stated that as there was a judgment in their favour they had no apprehension of any assault from the accused party or from anybody. The accused appellants came there armed with deadly weapons like *farsa, kanta, ballam (spear), guns, tamancha and hand bomb*s and immediately on arriving on the plot the accused Kusuma Appellant no.6 threw a hand bomb on Ramesh Chandra resulting in his instantaneous death. Rest of the prosecution witnesses were assaulted by other weapons which is borne out from their injury report. Not a single injury is reported to have been caused to the accused party (appellants) to even remotely suggest that the members of the prosecution party were also armed with weapons. No such injury report has been brought on record by the accused appellants, therefore, in the circumstances the plea of private defence raised by the accused appellants must necessarily be rejected.

65. The Supreme Court in **Avtar Singh Vs State of Haryana, 2012 (79) ACC 699,** held that the role played by the

accused in causing serious injuries on the deceased and the injured witnesses and the other persons being found proved, the same does not call for any interference. If once that conclusion is irresistible the only other question to be considered was the plea of self-defence raised on behalf of the appellants and in this context the conclusion of the trial court in holding that it was the accused party who had attacked the complainant party and thereby the complainant party cannot be held to be aggressors was perfectly justified.

66. The learned counsel for the appellants next submitted that the deceased Ramesh Chandra died as a result of bomb injuries sustained by him thrown by Kusuma and therefore, the case of Kusuma should have been distinguished and separated from that of the other accused and that the accused-appellants other than Kusuma ought not have been convicted under Section 302/34 IPC as they had no such intention to cause the death of Ramesh Chandra.

67. In the present case, we may refer to certain facts of the case. The accused persons were armed with weapons as attributed to them in the testimony of the prosecution witnesses. The accused Kusuma was carrying a hand bomb in a bag and it was he who threw the bomb which struck Ramesh Chandra resulting in his instantaneous death. It has come in the testimony of the witnesses that Kusuma was in no way related to any of the accused or any of the members of the prosecution party. There is no enmity between the prosecution party and Kusuma. Kusuma used to purchase milk from the village and take it to sell it in Barthana, Etawa. He also used to run a Pan shop in the village. The submission of the learned counsel is not acceptable and is liable to be rejected for the reason that none of the members of the prosecution party was carrying any arms at the time when the incident happened. They had gone to the field to plough the same may be for the first time, on the basis of a judgment in their favour. The accused came their armed with *pharsa, ballam (spear), kanta, country made guns, tamancha* and one of the accused Kusum Singh was also carrying hand bomb in a bag (*jhola*). In the given facts and circumstances, it could hardly be assumed that the accused did not come to the field at 7:00 in the morning, armed with weapons as mentioned above, not to cause grievous injuries which would likely result in death of one or other members of the prosecution party. It is another matter that the injury no.1 sustained by the deceased Ramesh Chandra is a blast injury, injury no. 2,3 and 5 are lacerated wounds and injury no.4 is an abrasion. The Doctor who conducted the postmortem P.W.-5 testified that the cause of death was due to shock and excess bleeding due to injuries sustained by the deceased. To a question put by the defence counsel the witness P.W.-5 has stated that it is possible that the blast injury could have been caused by a hand bomb. The injury no. 1 is a blast injury which has caused fatal injuries to the deceased on his head and that his bone of the nose and the frontal bone of the head has been completely broken. In the circumstances, it also cannot be presumed that injuries no. 2,3,4 and 5 could not have been caused to the deceased by the weapons being carried by the other accused other than accused Kusuma Singh. The fact that all the accused came to the plot armed with such weapons as they were carrying and the fact that they also used those weapons and assaulted the members of the prosecution party with the same, resulting in the death of Ramesh Chandra

and injuries to other prosecution witnesses clearly shows that they came with the common intention to cause grievous injuries and even death and therefore, in the circumstances, in our opinion, the case of the other accused is in no manner distinguishable from the act of the accused Kusuma Singh.

68. We may look at the matter from another angle. The accused Kusuma, appellant no. 6 was in no way concerned with the plot no. 580; he was in no way concerned with the members of the prosecution party, yet the other accused brought him at 7:00 am armed with hand bomb; the intention could only have been to use the same with the full knowledge that the same can cause death and therefore, in our opinion, the particular act of the other accused cannot be distinguished from the act of accused Kusuma and therefore, the judgement of the Supreme Court in the case of State of Rajasthan Vs. Manoj Kumar(supra) has no application to the present case.

69. The learned counsel for the appellants next referred to the judgment of the Supreme Court in **Samsul Haque Vs State of Assam** passed in Criminal Appeal no. 1905 of 2009 with Criminal Appeal no. 246 of 2011 and submitted that incriminating material was not put to the defendant appellants during trial, therefore, the defendants did not have adequate opportunity to rebut such material. Paragraphs 21, 22 and 23 of the judgment read as under:-

"21. The most vital aspect, in our view, and what drives the nail in the coffin in the case of the prosecution is the manner in which the court put the case to accused No.9, and the statement recorded under Section 313 *of the Cr.P.C. To say the least it is perfunctory.*

22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in Asraf Ali v. State of Assam (2008) 16 SCC 328. *The relevant observations are in the following paragraphs:*

"21. Section 313 *of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.*

22. The object of Section 313 *of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in* S.

Harnam Singh v. The State *(AIR 1976 SC 2140), while dealing with* Section 342 *of the Criminal Procedure Code, 1898 (corresponding to* Section 313 *of the Code). Non- indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under* Section 313 *is not a purposeless exercise."*

23. While making the aforesaid observations, this Court also referred to its earlier judgment of the three Judge Bench in Shivaji Sahabrao Bobade v. State of Maharashtra*(1973) 2 SCC 793 , which considered the fall out of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under* Section 313 *of the Cr.P.C., the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed."*

70. The learned counsel submitted that the questions put to the accused during trial and their statement under Section 313 Cr.P.C. are absolutely identical in nature and no question has been put to any of the accused with regard to causing the death of Ramesh Chandra and therefore, a vital question in this regard has not been put to any of the accused. In support of these submissions, the learned counsel has also relied upon a judgment of the Supreme Court in **Asraf Ali Vs State of Assam, (2008) 16 SCC 328.** Paragraphs 15, 16, 17 and 18 of which read as under:-

"15. What is the object of examination of an accused under Section 313 *of the Code? The section itself declares the object in explicit language that it is "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him". In Jai Dev v. State of Punjab (AIR1963 SC 612) Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:*

"The ultimate test in determining whether or not the accused has been fairly examined under Section 342 *would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity."*

16. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

17. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The word "may" in clause (a) of sub-section(1) in Section 313 *of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well*

settled that a circumstance about which the accused was not asked to explain cannot be used against him.

18. In certain cases when there is perfunctory examination under Section 313 *of the Code, the matter is remanded to the trial Court, with a direction to re-try from the stage at which the prosecution was closed."*

71. The submission is that questions which have been put to the accused under section 313 Cr.P.C. is that the accused carried out the assault on the members of the prosecution party with the intention to cause the death of Akhilesh Kumar. The submission of the learned counsel is that no question was put to any of the accused with regard to death of Ramesh Chandra being caused by any of them and therefore, there was a vital lapse in the entire trial and that the accused were denied an opportunity to defend themselves since it was not Akhilesh Singh who had died but it was Ramesh Chandra who had died whereas the question put to the accused during trial was that the act of accused had resulted in the death of Akhilesh Singh. In this context, we may refer to the question no.1 which was actually put to the accused Brijendra under Section 313 Cr.P.C and we are not quoting the questions put to the other accused since the questions put to all the accused are of identical wordings.

"प्रश्न 1:- अभियोजन के साक्ष्य में आया है कि दिनांक 14.11.1991 को समय करीब 7 बजे सुबह व स्थान वादी अखिलेश कुमार के हार स्थिति ग्राम भैसई थाना भरथना जिला इटावा में एक विधि विरुद्ध जमाव के सदस्य थे जिसका सामान्य उद्देश्य रमेश चन्द्र की हत्या करना था और उस समय घातक आयुध से लैस थे तथा आपने वादी अखिलेश कुमार आदि पर जान से मारने की नियत से फायर किया जिससे उसकी मृत्यु हो गयी। इस सम्बन्ध में आपको क्या कहना है।

उत्तर:- गलत है।"

72. A reading of the question no.1 would show that the question which was put to the accused was that 'had they not come to the disputed plots in question on 14.11.1991 at 7:00 in the morning with the common object alongwith other co-accused persons to commit murder of Ramesh Chandra armed with lethal weapons and had fired upon the informant Akhilesh Kumar with the intention to kill him and that they had assaulted Akhilesh Kumar, the informant and others with the intention to cause his death. It is these lines "cause his death" which is being interpreted by the learned counsel for the appellants to submit that the question which was put to the appellants was that they came to cause the death of Akhilesh Kumar although Akhilesh had not died but had only received injuries with a blunt object as per medical report. The submission of the learned counsel can be out-rightly rejected for the reason that the question put to the accused-appellants specifically was that 'they had come on the date and time of the incident at the disputed site with a common object to cause the murder of Ramesh Chandra armed with lethal weapons and had also fired upon Akhilesh Kumar and others resulting in the death of Ramesh Chandra.' This clearly indicates that the question put to the accused related to the murder of Ramesh Chandra and does not suggest that Akhilesh Kumar was the person who had been murdered because with reference to Akhilesh Kumar the word "aadi" has also been used and it is not to suggest that all the members of the prosecution party had died but that the

murder was of Ramesh Chandra and the intention was to cause the murder of Ramesh Chandra. The question put to the accused has to be read as a whole and not by splitting it to distort its intent and meaning. Therefore, in our opinion, the judgement referred to by the learned counsel for the appellants in the case of Samsul Haq (supra) and Asraf Ali (supra) have no application to the facts of the present case.

73. The learned counsel for the appellants next submitted that the entire story of there being a dispute between the members of the prosecution party and the appellants is a concocted story and the land always belonged to Nathu Ram and other accused and therefore, there was no motive to commit the murder.

74. On the question of motive, we may reject the submission of the learned counsel for the appellants out right on the ground that this was a day light murder having being executed at 7:00 in the morning on 14.11.1991 and there were also injured eye witnesses of the said incident and they have specifically and very clearly narrated the incident in their testimony. Therefore when there are injured and impeachable eye witness account of a day light incident motive becomes irrelevant.

75. In the case of ***Shardul Singh Vs. State of Haryana (2002) 8 SCC 372***, it has been held that :-

"motive', which is not always capable of precise proof, if proved, may lead additional support to strengthen the probability of the commission of the offence by the person accused but the absence of motive does not ipso facto warrant an acquittal."

76. Similarly, in the case of ***Ravindra Kumar Vs. State of Punjab, (2001) 7 SCC 690***, the Apex Court has held that-

"It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. It is therefore not possible to change the tide on account of the inability of the prosecution to prove the motive aspect to the hilt.

77. Similarly in the case of ***State of U.P. Vs. Baburam (2000) 4 SCC 515*** it has been held that-

"It is not possible to accept the view that motive may not be very much material in cases depending on direct evidence whereas motive is material only when the case depends upon circumstantial evidence. There is no legal warrant for making such a hiatus in criminal cases as for the motive for committing the crime. Motive is a relevant factor in all criminal cases whether based on the testimony of eyewitnesses or circumstantial evidence. The question in this regard is whether the prosecution must fail because it failed to prove the motive or even whether inability to prove motive would be weaken the prosecution to any would be well and good for it, particularly in a case depending on circumstantial evidence, for such motive could then be counted as one of the circumstances. However, it is generally in a difficult area for any prosecution to bring on record what was in the mind of the respondent. Even if the investigating officer would have succeeded in knowing it through interrogations that cannot be put in evidence by them due to the ban imposed

by law. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of offender to such a degree as to impel him to commit the murder cannot be construed as a fatal weakness of the prosecution."

78. Similarly, in the case ***Thaman Kumar Vs. State of Union Territory of Chandigarh, (2003) 6 SCC 380,*** it has been held that-

"There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where the ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of the crime has not been proved. Hence in the facts and circumstances of the case, the absence of any evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which unerringly establishes the guilt of the accused."

79. Similarly, in the case of ***Yunis alias Kariya Vs. State of M.P. (2003) 1 SCC 425,*** it has been held that-

"Failure to prove motive for crime in our view is of no consequence. The role of the accused persons in the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is settled law that establishment of motive is not a sine qua non for proving the prosecution case."

80. In ***(1973) 3 SCC 219 (Shivaji Genu Mohite Vs. The State of Mahrashtra)*** the Supreme Court in paragraph 12 has held as under:

"12. As stated earlier, the fact that the prosecution in a given case has been able to discover a sufficient motive or not cannot weigh against the testimony of any eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such case if a motive is properly proved such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if a motive is not established the evidence of any eye-witness is rendered untrustworthy."

81. In ***(2017) 11 SCC 120 (Rajagopal Vs. Muthupandi alias Thavakkalai and Others)*** the Supreme Court in paragraph 14 has held as under:

"14. Equally, it is well established that motive does not have to be established where there is direct evidence. Given the brutal assault made on PW-1 by criminals, the fact that witnesses have turned hostile can also cut both ways, as is well known in criminal jurisprudence."

82. Learned counsel for the appellants then submitted that the description of injuries by injured Akhilesh Kumar, informant P.W.-1 is contradictory. We may note here that minor discrepancies in statements of witnesses will not vitiate the trial. The Supreme Court in the case of ***State of U.P. Vs M.K. Anthony, (1985) 1***

SCC 505, in paragraph 10 has held as under:-

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer. Having examined the evidence of this witness, a friend and well-wisher of the family carefully giving due weight to the comments made by the learned Counsel for the respondent and the reasons assigned to by the High Court for rejecting his evidence simultaneously keeping in view the appreciation of the evidence of this witness by the trial court, we have no hesitation in holding that the High Court was in error in rejecting the testimony of witness Nair whose evidence appears to us trustworthy and credible.

83. The Supreme Court in the case of ***Gangabhavani v. Rayapati Venkat Reddy, AIR 2013 SC 3681***, on the issue of contradictions in evidence has held as under:-

"CONTRADICTIONS IN EVIDENCE:

9. In State of U.P. v. Naresh, (2011) 4 SCC 324, this Court after considering a large number of its earlier judgments held:

"In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the

witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited." A similar view has been re-iterated by this Court in Tehsildar Singh & Anr. v. State of U.P., AIR 1959 SC 1012; Pudhu Raja & Anr. v. State, Rep. by Inspector of Police, JT 2012 (9) SC 252; and Lal Bahadur v. State (NCT of Delhi), (2013) 4 SCC 557).

10. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence.

84. The learned counsel for the appellants lastly submitted that the Site Plan Ext. Ka.9 does not show where the accused were alleged to be standing and therefore, the entire prosecution story is manufactured and concocted.

85. The Investigating Officer has proved the site plan Ext.Ka.9 prepared on 14.11.1991 itself which clearly shows the plot "C" where the quarrel occurred and just below it to the South is the plot "D" which is the plot of Nirbal Singh and the plot where the body of the deceased was found is marked by "+". The arrows which come from North in the Southerly direction show the same to be coming from Shiv Mandir and houses to the North therein which are marked as "houses of the accused" and after crossing the entire plot "C" which is a large plot, the arrows turn to the east to plot "C". Thus, we find no reason to doubt the site plan although the submission of the learned counsel for the appellants is that the places where the accused persons were standing have not been indicated in the site plan but we may add that in a case of this nature where a sudden attack and assault was launched by the accused persons upon the members of the prosecution party and the prosecution witnesses of fact have also stated that accused were standing all around the field and moving and attacking and they were eight in number, the mere fact that the presence of individual accused persons at a particular spot has not been shown in the site plan would not be fatal to the trial or to induce us to disbelieve the prosecution case.

86. For reasons aforesaid, we do not find any illegality or infirmity in the judgment of the trial court and the same is upheld.

87. The appeal lacks merit and is accordingly **dismissed.**

88. The appellants Diwari Lal, Dinesh Chandra, Viresh Chandra, Shiva Singh, Nihal Singh and Kusuma are on bail.

C.J.M. Etawah is directed to take them into custody in the aforesaid case and send them to jail to serve out the sentences, awarded by the trial court and affirmed by us.

89. Office is directed to send a copy of this order to the court concerned within a week for compliance. The compliance report shall be sent by the court concerned to this court within a further period of fifteen days.

(2020)03-05ILR A1956
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DEEPAK VERMA, J.

Criminal Appeal No. 1435 of 1997

Smt. Sohbatti ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri I.K. Chaturvedi, Sri Hanuman Deen Verma, Sri S.B. Singh, Sri S.K. Pandey

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

Criminal Law-Indian Penal Code-1860- Section 302/201 - Appeal against conviction.

Circumstantial Evidence :–The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. (Para-33)

Motive in Circumstantial Evidence –
Motive cannot be ignored in the circumstantial evidence. In the instant case, the motive narrated by the prosecution but is not found to be an existing circumstance from the deposition of the prosecution witnesses. (Para-33)
The impugned judgment is not sustainable in the eyes of law and is liable to be set aside. (Para-40)

Criminal Appeal allowed. (E-2)

List of cases cited:-

1. Bhagat Ram vs. St. Of Pun., AIR 1954 SC 621

2. Bodhraj Alias Bodha and others vs. St. of J & K, 2002 (8) SCC 45

3. Babu vs. St. of Kerala, 2010 (9) SCC 189

4. Ramreddy Rajesh Khanna Reddy and another vs. St. of A.P., 2006 (10) SCC 172

5. Rameshbhai Chandubhai Rathod vs. St. of Guj., 2009 (5) SCC 740

6. St. of U.P. vs. Kishanpal and others, 2008 (16) SCC 73

7. Pannayar vs. St. of T.N. by Inspector of Police, 2009 (9) SCC 152

8. Babu vs. St. of Kerala, 2010 (9) SCC 189

9. Sahadevan and another vs. St. of T.N., 2012 (6) SCC 403

10. Balwinder Singh vs. St. of Punjab, 1995 Supp (4) SCC 259

11. Kavita vs. St. of T.N., 1998 (6) SCC 108

12. St. of Rajasthan vs. Raja Ram, 2003 (8) SCC 180

13. Aloke Nath Dutta & Ors vs. St. of W.B., 2007 (12) SCC 230

14. Shankarlal Gyarasilal Dixit vs. St. Of Maha., 1981 (2) SCC 35

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Deepak Verma, J.)

1. Heard Sri Surendra Bahadur Singh learned Advocate on behalf of the appellant, Sri L.D. Rajbhar and Sri Prem Shankar Mishra learned Additional Government Advocates on behalf of the State and perused the record.

2. The present appeal is directed against the judgment and order dated 28.7.1997 in Sessions Trial No. 185 of 1996 (State vs. Smt. Sohbatti Devi), arising out of Case Crime No. 07 of 1996, under Section 302/201 I.P.C., Police Station-Bakhira, District- Basti by which the appellant Smt. Sohbatti wife of Sri Ram Nath, resident of Village Bardad, Police Station Bakhira, District Basti has been convicted for offence under Section 302 I.P.C. and sentenced for life imprisonment and for the offence under Section 201 I.P.C. convicted and sentenced for five years. Both the sentences are directed to run concurrently.

The events in the prosecution story go on as under:-

3. A missing report dated 13.1.1996 was lodged by Smt. Kumari Devi wife of Phoolbadan, resident of Village Bardad, Police Station Bakhira, District Basti to state that her son Rajendra aged about 5 years had gone missing around 6:00 PM on 12.1.1996. She alongwith other villagers had searched for the child but they could not find him.

4. A first information report dated 16.1.1996 scribed by Rajdev Yadav son of Ramkewal Yadav was lodged by Smt. Kumari Devi wife of Phoolbadan to state that his missing son was found dead and his dead body was recovered after much efforts from a pond behind her house at around 10:00 AM on 16.1.1996 itself. The body was recovered with the help of villagers named as Janardan son of Ram Bachan, Ram Chandra son of Shiv Baran, Pradhan Sundar @ Chunnur son of Ghisai and Up-pradhan Jayram son of Manohar. She raised suspicion that her sister-in-law Sohbatti wife of Ram Nath had murdered her son Rajendra and concealed his dead body in the pond. The motive for murder as narrated therein was to grab all landed property of the first informant. It is stated that whenever there was altercation between the first informant and her sister-in-law, the accused used to threaten that she would kill both the first informant and her son. The report further states that body of the child (her son) after recovery had been kept besides the pond. The said written report was exhibited as Exhibit 'Ka-1'. The first information report was registered as Chik report (Exhibit Ka-2) at around 02:00 PM on 16.1.1996 under Sections 302/201 IPC. The date and time of the incident as reported therein is 12.1.1996 around 6:00 PM. The search memo dated 16.1.1996 (Exhibit Ka-14) indicates that search was conducted for the accused/appellant but no incriminating article was found nor the accused/appellant was found. 'Exhibit Ka-15' is the memo of receipt of the torch belonging to the witness Phoolmati who stated that she had witnessed the accused with the child (deceased) alive on the day of missing in the light of the torch. The postmortem was conducted on 17.1.2996 at around 3:00 PM. The Doctor had opined the estimated time of murder about three days back.

5. The findings on external examination of the dead body are:-

Average build body of the child about five years. Body covered with dry mud and sand particle. Wrinkles are

present on skin at both palm and sole & foot, face cyanosed, Eyes congested, Bloody froth coming from both the nostrils, mud & sand under nails of hand and foot absent rigor mortis passed off from all the four limbs.

Ante mortem injuries:-

(1) Abrasion 1x0.5 cm on bridge of nose 0.5 cm below root of nose, horizontal;

(2) Abrasion 1x0.5 cm on bridge of nose obliquely present 1.0 cm below injury no. 1;

(3) Multiple abrasion in area of 6x1.5 cm on left side of face 2c.m. front of left ear tragus.

(4) Abrasion 2.5 cmx0.5cm on lower lip both sides;

(5) abraded contusion 5x2.5 cm in front of neck 1.5 cm above sternal notch in mid & both sides.

The conditions of internal organs indicated in the report shows the cause of death due to asphyxia as a result of strangulation. The postmortem examination of the deceased child, thus, ruled out possibility of death due to drowning. The homicidal death of the child is proved from the report.

6. As the events go on, the inquest was conducted on 16.1.1996, started around 15:30 hours and ended at 17:10 hours. The clothes found on the dead body were a half shirt, one kurta over it and girdle of black thread (करधनी) tied in the waist.

The police had submitted charge sheet against the appellant after completion of the investigation. The charges framed against the accused were of committing murder and concealing the dead body. The accused denied both the charges and demanded trial. The accused was committed to the Sessions Court for trial.

7. The prosecution had examined 13 witnesses. Amongst them, PW-1, PW-2, PW-3, PW-6, PW-7, PW-9 and PW-10 are witnesses of facts.

8. PW-4 is the constable Prem Shankar Tripathi who was posted in Thana Bakhira at that point of time. He proved that the police reached the spot of the incident on 16.1.1996 at around 4:15 PM and when they reached, dead body was outside the pond (गड़ही). After inquest was completed at around 4:00 PM, he moved from the place of incident with the dead body to the Mortuary. The entry in GD of police lines was made on 16.1.1996 at 11:00 PM and body was handed over to the Doctor in the District Hospital on 17.1.1996 at around 10:00 AM. The postmortem was conducted at around 3:30 PM and till that time, the dead body was intact in the sealed cover and no one had touched the same.

9. PW-5 is the Constable/Moharrir working in the Police Station Bakhira who prepared Chik report and GD entry Rapat No. 19 (time around 14:00 hours) on 16.1.1996 which were exhibited as 'Exhibits Ka-2 and Ka-3'. He states that special report of the case was sent through Rapat No. 20 time at 14:30 hours on 16.1.1996 by another Constable. With regard to the missing report dated 13.1.1996, this witness states that the said report was given by the first informant in writing at the Police Station and was entered in GD Rapat No. 35 at 19:05 hours. He, however, did not prove the GD entry of the said report as it was not brought by him. He states that after the written report of missing dated 13.1.1996, no one was arrested by the police though the Station House Officer visited the place of incident. At the time of lodging of the first information report dated 16.1.1996, Sri Manju Singh Yadav, the S.I. was present.

He moved to the place of occurrence soon after the report was entered in the G.D. He denied any suggestion of report being a result of deliberation by the police. S.I. Manju Singh Yadav, the Investigating Officer who had been examined as PW-11. PW-12 is the Investigating Officer who on transfer of PW-11 had completed the investigation and submitted the charge sheet in the Court.

10. PW-13 is the Doctor who conducted postmortem of the dead body. The Doctor in his deposition proved that he received the dead body on 17.1.1996 and conducted postmortem. He proved the injuries indicated in the report. He states that the dead body was brought to the hospital by two constables. As per his findings, during strangulation, both the neck and nose of the child were pressed. To explain the condition of the dead body found near the pond, he stated that no water was found in the lungs that means the child was first murdered and then thrown in the water. There were no traces of sand and mud in his nails, which means that the child was not thrown alive in the water or it was not a case of death due to drowning. Estimated time of occurrence as per his report was around mid-night of 13/14.1.1996. He denied suggestion of death being caused in the night of 12.1.1996 or that it was a result of accident by drowning. He further clarified that semisolid food was present in the stomach which could be identified by him as Rice, Dal, Potato, Gobhi. As the food was undigested, in all probability, death had been caused within 2 to 2½ hours of the deceased child consuming food. On a suggesting given by the defence, only this was stated that there was possibility of occurrence of injury no. 3 and injury no. 4 had the child fallen on a rough ground. However, injury no. 4 could only occur because of pressing of mouth. Injury no. 5 came due to strangulation either by hand or a round stick. The Doctor states very categorically that had the child fallen in the pond (गड़ही), the injuries nos. 3, 4 and 5 could not have come.

From the statement of the postmortem Doctor, it is, thus, proved that the death of the child was caused due to strangulation and not by drowning. Someone had killed him and then threw his body in the pond. Amongst the formal witnesses, only PW-11 remains who is an important witness, his deposition would be seen at the appropriate stage.

11. We would next proceed to appreciate the evidence of witnesses of facts:-

PW-2 Smt. Kumari Devi is the first informant, the mother of the deceased child and sister-in-law of the accused/appellant Smt. Sohbatti. In her deposition, she states that her husband Phoolbadan was three brothers. One of his brother was residing in Ahemadabad. Phoolbadan had gone missing 5 to 6 years ago and his whereabouts were not known. Ram Nath, husband of Sohbatti (the appellant) is her brother-in-law. She had two children, one son Rajendra who was aged about five years and a daughter of about 10 to 11 years old. After her husband had gone missing, she started living in her Maika (parental home). Her agricultural land was being managed by Smt. Sohbatti. One month before the incident, she came back to the village and asked her land back from Sohbatti. She was then threatened by Sohbatti that his son would be killed. Her son Rajendra had gone missing at around 6:00 PM on 12.1.1996. When all efforts to fetch him went in vain, she reported the

matter on the next day, i.e. on 13.1.1996 in the Police Station. On 16.1.1996, during day time, the dead body of her son was recovered from the pond behind her house in the presence of Sundar Pradhan, Jayram, Janardan and Ramchandra. After the dead body was taken out from the pond, the first information report scribed by Rajdev was lodged in the Police Station. She proved the written report bearing her thumb impression in the writing of Rajdev (Exhibited as Exhibit 'Ka-1'). The clothes of deceased were identified by her and exhibited. She stated that the appellant had murdered her son to grab her landed property. In the cross-examination, PW-2 states that after her husband had gone missing, she stayed in her 'Maika' for about 5-6 years. Thereafter, she returned to the village (her matrimonial home) few months back. Her daughter stayed back with her maternal grand-parents. In the Village, she started living in the house of Ram Nath husband of Sohbatti. She did not have cordial relations with Sohbatti and earlier had to go back to her 'Maika' because Sohbatti was fighting with her. She did not have cordial relationship with Ram Nath either. On a suggestion given by the defence that she was residing with Ram Nath as husband and wife, she states that after Sohbatti was lodged in jail, she started cooking food for him and looks after his children as no one else was there to do that. She then admitted that for about two to three months, she was residing with Ram Nath as husband and wife but then stated that since Ram Nath did not want to leave his wife, she would not reside with him anymore.

Then she goes on to say that 2-3 days before her son had gone missing, she had an altercation with Sohbatti. It was not because of Ram Nath but because of land. At that time, Ram Nath was present and he also supported Sohbatti. On the fateful day, when the child had gone missing, Ram Nath was not at home and only Sohbatti was present. Ram Nath had gone elsewhere.

12. About the scribe of the written report Rajdev Yadav son of Ramkewal Yadav, she states that she did not know him earlier and she could know him only while searching for her missing child. She went to search her son with the villagers who were collected at a common place namely Chamanganj Chauraha. All of them came to her house and she told everyone loudly that Sohbatti had killed her son. They then took her to the Police Station to lodge the missing report. She states that she told the police that Sohbatti had kidnapped her child but the police did not record this fact in the missing report. The police did not reach the Village on the next day of the missing report. After the dead body was found, she went to the Police Station, lodged the report written by Rajdev with her thumb impression; the police, thereafter, came to the Village with them. She then states that after her child had gone missing and before the dead body could be found, Smt. Phoolmati wife of Ram Saware and Smt. Gujrati Devi wife of Kamal Lohar though met her in the night and told that they heard the cries of her son shouting "mai mai", but they did not tell her that Sobhatti had killed the child.

13. She then states that Rajdev PW-3 told her that Sohbatti confessed her guilt and that from the next day of the incident itself, Sohbatti was pleading everyone in the village with whom she had good relations to save her. PW-2 denied having knowledge of whether Sohbatti was at home or not when the dead body was recovered from the pond. She then states

that the police took Smt. Sohbatti to the Police Station from the pond itself where the dead body was recovered. Ram Saware was also taken to the Police Station for interrogation.

14. PW-3 Rajdev is the scribe of the first information report. He states that after four days of the child gone missing, the dead body was found in the pond behind the house of the first informant and the appellant. Pradhan and Up-pradhan and other villagers were present when the dead body was taken out from the pond at around 11:00 AM. The report of the incident was written by him on the dictation of Kumari (PW-2). He further states itself that one day after the recovery of the dead body, at around 10:00 AM, Sohbatti (the appellant) met him at Chamanganj Bazar and confessed that she had killed the child and pleaded him to save her.

This witness states that his house was at a distance of half kms. from the house of the first informant (PW-2) in another purva. He knew both Kumari (PW-2) and Sohbatti (the appellant) prior to the incident. During altercation between them two-three times prior to the incident he went to pacify. He then said that these ladies must have fought two-three times in one year, last being about 2-4 months back. Kumari, Sohbatti and wife of Shivpujan, another brother (three ladies of the house) were not going out to work but they used to remain in their houses.

He denied having knowledge that Kumari was living with Ram Nath. But says that Kumari was living in the village around one year prior to the incident. Ram Nath, husband of Sohbatti was a labour and worked outside the village. On the date of incident, Ram Nath was not in the village and had gone to visit some relative one or two days prior to the incident.

15. He further states that after the child had gone missing, for about three-four days, he continuously went to the house of Kumari. On the next day of missing, PW-2 Kumari came to his house at around 7-8 PM to inform that her son was missing and also told him that Sohbatti was behind all that, but no report was written by him about missing of the child. He did not go to the Police Station to lodge the missing report. Rather on the next day of missing, he went to the house of Kumari, stayed there for about half hour and then went back to his house around 10:00 PM. He refused having any knowledge of the missing report lodged by Kumari (PW-2). He states that he did not have any information of police reaching the spot after the missing report was lodged.

16. He further states that on the next day of missing when he went to the house of Kumari Devi, Sohbatti and Phoolmati met him but he did not meet Gujrati. He made enquiry from them about the missing child. Both of them expressed ignorance. Sohbatti met him consecutively on the second, third, fourth and fifth day after missing of the child. He then states that after the dead body was found, Sohbatti confessed her guilt and and pleaded him to save her. The witness explains that he used to mediate on small issues between villagers; and that was why Sohbatti pleaded him to help her. But Sohbatti did not visit his house. He did not meet Ram Nath during the days when the child had gone missing and the dead body was found. He met Sohbatti at her home after the dead body was found. The day when dead body was recovered, Sohbatti was at her home. On the second day, Sohbatti met him near

the Nandaur Marg Chauraha, around 1 km. away from her house.

17. He then states that when he reached the house of Kumari at around 9-10 AM, body was still in the water and was being taken out. They proceeded to the Police Station when the dead body was still seen in the pond. Police came in the afternoon and then body was taken out from the water by two young men. The report was written by him on the dictates of Kumari before the police came and body was seen. He states that Daroga Ji (the SHO) interrogated Sohbatti but deny having any knowledge that she was taken to the Police Station. Thereafter, the SHO called him, Pradhan, and other respectable persons of the Village to the Police Station. He was not interrogated by the police on the day of recovery of the dead body rather they were called to the Police Station two-three days, thereafter. When police made inquiries, he told about the confession by Sohbatti. He then states that the news of the incident had travelled in the entire Block and everyone knew that Sohbatti had murdered the child.

He denied having personal acquaintance with the SHO Manju Singh Yadav. He states that all the BDC members and elected Gram Pradhan were called to the Police Station by the SHO.

18. PW-1 was the Gram Pradhan who states that the dead body of child Rajendra was found behind the house of the appellant and the first informant after four days when he had gone missing. They could not find the child despite best efforts. Kumari, the first informant (PW-2) was living in her 'Maika' after her husband had gone missing and Sohbatti was ploughing her fields. One month prior to the incident, Kumari came back to the village and asked for her land. Altercation ensued on refusal by Sohbatti as she wanted to grab the land. On 16.1.1996, Janardan came to him in the morning and told that Sohbatti sent him to convey the message that *''कि प्रधान से कहो की लाश खोजवाये लाश तालाब में मिलेगी''*. Janardan and Ram Nath had entered the pond (Pokhar) and then the dead body was recovered from the North-East corner of the pond, behind the house of the first informant and the appellant. After the dead body was taken out, the report was lodged by Kumari, police came and inquest was done. PW-1 is the inquest witness. He goes on to say that when he got message of Sohbatti through Janardan, he went to the house of Sohbatti, she also told him to look for the dead body in the pond behind her house.

19. In cross-examination, this witness states that after Phoolbadan (husband of Kumari), his wife and children had left the village, his landed property was shared by both his brothers Shivpujan and Ram Nath. Ram Nath and Shivpujan both had divided the share of the Phoolbadan amongst them and were ploughing his field as Kumari went to her 'Maika'. One month prior to the incident, Kumari came back to the village and earlier also she used to come to the village. When he was elected as Gram Pradhan, share of Phoolbadan was returned to Kumari by his intervention. Shivpujan gave it willingly. He categorically states that four months prior to the incident, share of land of Phoolbadan was handed over to Kumari.

He denied the suggestion of any enmity of the first informant or her husband Phoolbadan with any of the villagers. He states that on the day when the child gone missing, he was in the Police Station for his

own work. He went to the house of Kumari hearing noise in the night at around 08:00 PM. He got to know there that Ram Nath went to his in-laws house around 4:00 PM. Sohbatti was in the village but he did not meet her. Kumari was crying, house of Sohbatti was open and her one son was playing near the door, another younger child of Sohbatti was sleeping on the Cot in 'Osara'. PW-1 states that he went to the Police Station on the next day alongwith other villagers to lodge the missing report.

20. He then states that on the same day, on his instructions a net was thrown in the pond at around 9:00 PM. Kumari told him then also that Sohbatti was the perpetrator of the crime. They all, however, were busy in fetching the missing child but no one looked for him in the house, Bhusoula, Dhari or Charani of Sohbatti. No inquiry was made from the neighbours Phoolmati and Gujrati. Wife of Shivpujan was in the post delivery stage and hence she was not questioned. No one was there in the house of Shivpujan apart from his wife.

On 13.1.1996, a report was scribed by Rajdev Yadav at the police station when and he alongwith Kumari and Rajdev went to the Police Station to lodge the missing report. But, the said report was not taken by the S.H.O. rather he told by PW-11 to make good efforts to search the child. He states that Kumari then told the S.H.O. that Sohbatti had done all that but the police did not come to the village.

21. He then says that after coming back, they searched for the dead body in the pond. 20 persons had entered in the pond but dead body could not be found. He also interrogated Sohbatti but she denied. Sohbatti did not help them in finding the child, she rather tried to flee from the village but was caught thrice. After she was threatened and scolded, she sent the above said message through Janardan to PW-1. He denied use of any physical force or doing any 'maar-peet' with Sohbatti but told that Sohbatti was threatened that she would be lodged in jail. On the third day, after receipt of message of Sohbatti, the dead body was recovered.

PW-1 then deposed that Sohbatti also told him that Ramsaware was roaming near the pond during the night and when she looked at him, he hid inside his house. Sohbatti told him that had efforts be made that day, body would be found in the pond. PW-1 has denied any suggestion of enmity between Kumari and Ramsaware, but admits that on 14.1.1996 police had taken both Ramasware and Sohbatti to the Police Station for interrogation. He states that statement of Phoolmati and Gujarati were recorded in the village in front of many villagers. He denied that he went to the Police Station, after the dead body was taken by the police. He denied that they were called by the SHO to the Police Station after recovery of the dead body.

22. There are two more witnesses of fact, PW-9 Ram Briksha and PW-10 Jayram, both residents of the same village. PW-9 Ram Briksha denied that he had seen Sohbatti (the appellant) with the child on 16.1.1996 at around 9:00 AM near her house or she made any confession to him.

P.W.10 Jayram states that Sohbatti did not meet him in the morning nor she gave any message to him to search the dead body behind her house. Both PW-9 and PW-10 were cross-examined by the A.D.G.C., but nothing could be elicited from their statements.

23. Two more witnesses to assert the theory of last seen, PW-6 and PW-7, have been examined. Both had been declared hostile. PW-6 Phoolmati states that she did not witness Sohbatti strangulating the child in the torch light with Gujrati (PW-7). She only heard the cries of the child. In the cross-examination by A.D.G.C., she states that she did not tell the police that she last witnessed the accused with the child alive and how it was written in her statement was not known to her.

PW-7 Smt. Gujrati also states that she had no knowledge about the incident. She did not witness Sohbatti strangulating the child in the torch light.

Thus, the witnesses of last seen PW-6 and 7 and two more witnesses PW-9 and PW-10 of extra judicial confession did not support the prosecution case.

24. Only three prosecution witnesses of the fact, thus, remained who are PW-1 (the Gram Pradhan), PW-2 (the first informant) and PW-3 (the scribe of the first information report). Relevant part of their statements in the examination-in-chief and in cross-examination have been extracted above in detail to assess their testimony. The deposition of PW-11, the Investigating Officer is also to be appreciated at this stage.

25. PW-11, S.I. Manju Singh Yadav stated that Chik FIR (Exhibit Ka-2) was signed by him as he was present in the Police Station on 16.1.1996 at around 14:00 hours. The missing report dated 13.1.1996 given by Kumari Devi was endorsed with her thumb impression and proved as 'Exhibit Ka-4'. The entry of the said report had been made in the General Diary Rapat No. 35 dated 13.1.1996 in the handwriting and signature of Kanhaiya Prasad which PW-11 had identified. He states that after missing report was lodged, on 14.1.1996, he went to the Village in search of the missing child. The Entry in G.D. Rapat No. 10, Time 07:45 dated 14.1.1996 was stated to be proof of the said fact.

26. He further stated in the examination-in-chief that the investigation was commenced by him after registration of the first information report. He went to the place of incident after recording statement of Kumari Devi in the Police Station itself. Dead Body was taken in police custody and inquest was prepared in the handwriting of S.I. Ravindra Chandra Bhadauriya on his dictation. All the reports were carrying his signature and proved as 'Exhibit Ka-6 to Ka-12'. After completion of formalities, body was sent for the postmortem. The site map of the place of incident was drawn by him as Exhibit 'Ka-13'. Thereafter, he recorded statements of Sundar @ Chunnur (PW-1), Janardan and Jayram. The search of the accused was conducted and the search memo was prepared in his own handwriting bearing his signature exhibited as Exhibit 'Ka-14'.

27. He further states that on 17.1.1996, statements of Phoolmati (PW-6) and Gujrati (PW-7), Rajdev Yadav (PW-3), Ram Briksha Chaudhary (PW-9) were recorded and torch of Phoolmati was checked and memo 'Ka-15' was prepared to note that it was found in working condition. The statements of all four witnesses have been filed in the court in his own handwriting and signature entered in the CD, as 'Exhibits 'Ka-16' to 'Ka-18'. On 20.1.1996, Smt. Sohbatti was arrested and her statement was recorded. The said fact had been noted in GD Rapat No. 24 dated 20.1.1996 at 18:15 hours in the handwriting

of Head Constable Ram Badai and signed by him, which was exhibited as Exhibit 'Ka-20'. After arrest of the accused, another site plan was prepared on the pointing of the accused which bears his signature. He proves the same to be correct according to the spot, which is exhibited as Exhibit Ka-21.

PW-11 denied suggestion of any acquaintance with Gram Pradhan (PW-1) or Rajdev (PW-3).

28. He further states in the cross-examination that he did not know as to why during lodging of the missing report, name of Smt. Sohbatti was not disclosed by Kumari Devi. The special report of missing was also sent on 13.1.1996 itself as entered in GD No. 35, Time 17:05 hours. He goes on to say that thereafter, he went to the village in the night on 13.1.1996, but as no offence was made out from the missing report, no first information report was registered. On 13.1.1996, when he reached the village around 11:00 PM, he made search for the child but did not meet anyone in the neighbourhood. The Gram Pradhan, Jayram and others were not there and there was no reason for him to look for the dead body in the pond. Thereafter, he went to other places under his jurisdiction and returned to the Police Station only on 14.1.1996. He further states that he might have told the Gram Pradhan to search for the child as he told that to everyone. Intimation to other police stations were also given on remote sets; requisition was also sent for "Kashti Talash" (search through boat) which was issued.

29. He further states that on 16.1.1996, Kumari Devi came to the Police Station at around 14:00 hours (2:00 PM) alongwith Rajdev Yadav and Sundar @ Chunnur and her statement was recorded in the Police Station but statements of Sundar @ Chunnur and Jayram were not recorded in the Police Station. Kumari Devi intimated him that she came back to the village around six months prior to the incident alongwith his five year old child. The motive for murder, according to her, was to grab her land. After registration of the first information report and recording of statement of the first informant (PW-2), he proceeded to the place of incident and reached at the place at around 3:15 PM. When he reached, he found the dead body besides the pond as it was already taken out from the water. The accused did not meet him nor she was present in her house. He searched for the accused and then prepared the search memo. Gujrati and Phoolmati were not interrogated. Janardhan and Ramchandra were interrogated. The statement of Sundar Pradhan was taken but he did not disclose the name of Ramsaware being one of the suspects. PW-11 completely denied arrest of Ramsaware for interrogation. He did not meet husband of accused Smt. Sohbatti either prior to or after the incident. He also did not meet the accused/appellant between the date of missing of the child till recovery of his dead body. The appellant was arrested only on 20.1.1996 and then for the first time, he met her.

PW-11 categorically denied that he took the accused and Ramsaware both to the Police Station on 16.1.1996 for interrogation and denied that they were detained in the Police Station uptil 20.1.1996 and thereafter, Ramsaware was released and Smt. Sohbatti was illegally challaned. He denied that statement of Gujrati, Phoolmati was wrongly recorded by him at the instance of Rajdev in order to save Ramsaware or statement of Sohbatti was recorded in order to give false colour to the case.

30. At this stage, the evidence of Prem Shankar Tripathi PW-4 is also to be

appreciated. He states that he took the dead body to the District Hospital for postmortem from the place of incident. In cross-examination, he states that he was present in the Police Station Bakhira on 16.1.1996. The first informant had reached the Police Station at around 12:00 noon. He did not remember whether S.H.O. was present in the Police Station at that point of time. He, however, states that he alongwith S.I. Ravindra Chandra Bhadauriya and S.H.O. left the Police Station at 3:30 Hours to go to the place of incident. They reached there within one and a half hour. The body was outside the pond and when for the first time he looked at the body, it was being sealed as all the paper work was done by Constable Bhadauriya. The dead body was, thereafter, brought to the Police Station and was taken to the Mortuary by him. It was handed over to the Doctor on 17.1.1996. He denied that the paper work was done by the Investigating Officer while sitting in the Police Station and not at the place of crime.

31. The accused/appellant Smt. Sohbatti in her statement under Section 313 Cr.P.C denied that Kumari was residing in her 'Maika' after her husband had gone missing. She also denied that there was any dispute between them regarding share of Kumari in the landed property rather she stated that Kumari was living in the village and managing her own property. She denied any information of lodging of the missing report on 13.1.1996. She, however, admits that the dead body of child Rajendra was found from the 'Garhi' at the back side of their house after seven days of missing at around 10:00 AM. She denied herself keeping the dead body concealed for those days. She also specifically denied the versions of witnesses Phoolmati, Jayram, Gujrati, Ram Briksha recorded under Section 161 Cr.P.C. She denied G.D. entry no. 20 regarding her arrest and stated that it was a forged paper. Her answer to question no. '16' is relevant to be noted hereunder:-

प्रश्न–16:– क्या आपको और कुछ कहना है।

उत्तर– दरोगा जी गांव पर आये गडहे से लाश निकलवाये व उसी समय उसे व मेरे गांव के राम सवारे को थाने पर पकड़कर ले गये। मुझे 4–5 दिन तक थाने में रोके रखे। तथा मेरा गलत ब्यान दर्ज कर के राम सवारे को छोड दिया तथा मेरा चालानन कर दिया। मै वेकसूर हूँ। मेरे दो छोटे बच्चे है।

बयान सुनकर तसदीक किया

32. It can, thus, be seen that the accused/appellant categorically stated that she and Ramsaware both were detained in the Police Station for 4 to 5 days. She then states that the police had falsely implicated her and she is innocent. She produced defence witnesses DW-1 and DW-2. DW-1 Gorakhnath is a police officer who brought both GD dated 13.1.1996 and 16.1.1996 of the Police Station Bakhira. In GD entry dated 13.1.1996 at Rapat No. 35, Time 19:05 hours, though there was an entry of the missing report of Kumari Devi but there was no entry of movement of S.I. Manju Singh Yadav for the village-in-question, whereas, the entry of his movement dated 13.1.1996 at Rapat No. 41, Time 21:45 hours was for "Dabish Abhiyukt" but the name of Village had not been mentioned there. He was not cross-examined by the prosecution.

DW-2 S.C. Ehsaan Ullah, C.O. Peshi Khalilabad states that he was posted as C.O. Peshi, Khalilabad and proved the photo copy of Special report of Case Crime No. 07 of 1996 under Sections 302/201 IPC as Exhibit 'Kha-1'.

33. Having a threadbare discussion of the statements of the prosecution witnesses

and defence of the appellant in her statement under Section 313 Cr.P.C. as well as the evidence of defence witnesses, the circumstances of the case as culled out are under:-

(i) There is no evidence of last seen. Both the witnesses of last seen produced by the prosecution had turned hostile. From a reading of their entire testimony, it cannot be ascertained that they had last seen the accused/appellant with the deceased child alive.

(ii) No one had seen the deceased child alive before or near the time of his missing. The first informant though lodged a missing report stating that she did not see her child since around 6:00 PM on 12.1.1996 but there is complete silence in her statement as to where and when was she last with her child on 12.1.1996. She did not name the appellant in the missing report being even a suspect. The first informant and the appellant being members of one family were living in adjacent houses. Semisolid food was found in the stomach of the deceased child and as per the description in the postmortem examination, the food inside the stomach could be identified being full meal comprising of Dal, Rice and vegetables. As per the opinion of the Doctor based on the condition of food in the stomach, the time gap between taking of food and death of child could be two to three hours. There is nothing in the statement of the first informant who is mother of the child as to when she had last fed her child or someone else in the house had given him food on the fateful day, i.e. 12.1.1996.

(iii) The appellant stayed in her house for all those seven days till she was arrested by the police after the dead body was found. She was neither the suspect nor was interrogated at any point of time by the police prior to 16.1.1996, before the dead body of the child was found in the pond.

(iv) Only circumstance put forward by the prosecution to suspect the appellant is that she used to quarrel with the first informant over a piece of land belonging to the husband of the first informant. This is stated to be the motive to commit the crime. If we examine the alleged motive in the facts and circumstances placed before us, we find that the first informant though states that the accused appellant was ploughing her field but nothing more has been brought on record. PW-1 who was Gram Pradhan, on the other hand, stated that the dispute pertaining to the disputed land was settled with his intervention and the piece of land was already handed over to the first informant. The motive to commit the crime, therefore, did not appear to be present at the relevant point of time.

Altercations between two ladies, who are sister-in-law living in the adjacent houses is the most common circumstance. Occasional altercations on one or other occasion, cannot be taken as a sound reason to assign motive for committing such a heinous offence. The name of the appellant appeared in the first information report (lodged after four days) after the dead body was recovered from the pond.

(v) The statement of PW-1 and PW-3 of extra judicial confession made by the appellant to them is also not convincing. There are material contradictions/embellishments and improvements in their depositions. It cannot be said that they were having a relationship of trust and confidence with the accused/appellant which may have prompted her to disclose her guilt to them. On the other hand, from the statement of the Gram Pradhan PW-1, it appears that the confession of the appellant, if any, was a

result of coercion and threat given to her that if she did not accept her guilt, she would be lodged in jail. The confession of the appellant before the Gram Pradhan (PW-1) and Rajdev (PW-3), therefore, cannot be said to be voluntary.

(vi) In the present case, the prosecution story rests squarely on circumstantial evidence. It has been consistently laid down by the Apex Court that the inference of guilt, in a case of circumstantial evidence, can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principle fact sought to be inferred from those circumstances.

It was laid down in **Bhagat Ram vs. State Of Punjab1** that when the case depends upon the conclusion drawn from the circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

The principles for dealing with circumstantial evidence discussed by the Apex Court in **Bodhraj Alias Bodha and others vs. State of Jammu and Kashmir2** are as under:-

"11. We may also make a reference to a decision of this Court in C Chenga Reddy and Ors. v. State of A,P,, [1996] 10 SCC 193, wherein it has been observed thus:

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn would be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

12. In Padala Veera Reddy v. State of A.P. and Ors.. AIR (1990) SC 79, it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests;

"10. (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly esablished;

(2) those circumstances. should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances. taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any. other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

13. In State of U.P. v. Ashok Kumar Srivastava, (1992) Crl.L.J.l 104, it was pointed out that great case must be taken in evaluating circumstantially evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. h was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

14. Sir Alfred Wills in his admirable book "Wills" Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in

the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum, (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability, (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits, (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

15. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

16. In Hanumant Govind Nargundkar and Anr. v. State of' Madhya Pradesh, AIR (1952) SC 343, wherein it was observed thus:

"It is well to remember that in cases where the evidence is of a circumstantial nature. the circumstances from which the conclusion of guilt is to be drawn the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words. there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

17. A reference may be made to other decision in Sharad Birdhichand Sarda v. State of Maharashtra, AIR (1984) SC 1622. Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of the this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused. that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should excludee very possible hypothesis except the one to be proved;

(5) there must be a chain of evidence so compete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Same principles have been reiterated in **Babu vs. State of Kerala3** reads as under:-

"22. In Krishnan v. State represented by Inspector of Police (2008) 15 SCC 430, this Court after considering large number of its earlier judgments observed as follows:

'15....This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence,

such evidence must satisfy the following tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra, AIR 1982 SC 1157)".

23. In Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are:

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned `must or should' and not `may be' established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

A similar view has been re-iterated by this Court in State of U.P. v. Satish, (2005) 3 SCC 114; and Pawan v. State of Uttaranchal (2009) 15 SCC 259.

24. In Subramaniam v. State of Tamil Nadu, (2009) 14 SCC 415, while considering the case of dowry death, this Court observed that the fact of living together is a strong circumstance but that by alone in absence of any evidence of violence on the deceased cannot be held to be conclusive proof, and there must be some evidence to arrive at a conclusion that the husband and husband alone was responsible therefor. The evidence produced by the prosecution should not be of such a nature that may make the conviction of the appellant unsustainable. (See Ramesh v. State of Rajasthan (2009) 12 SCC 603)."

(vii) In the instant case, the prosecution tried to prove its story from three circumstances; (i) firstly the theory of last seen by two witnesses (PW-6 and PW-7) who had turned hostile; (ii) Secondly, the extra judicial confession of the accused/appellant before PW-1, Gram Pradhan and PW-3, Rajdev (who was also scribe of the first information report); (iii) Thirdly, the motive to commit the crime as stated was the dispute pertaining to a piece of land belonging to the husband of the first informant.

(viii) As noted above, the prosecution has not been able to prove the evidence of last seen. We may also note that the last seen theory comes into play where the time gap between the point of

time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. The burden is on the prosecution to prove by positive evidence that the deceased and accused were seen alive together. In absence of any positive evidence in the instant case, it cannot be concluded that the accused and deceased were together or were last seen alive together before the child had gone missing. It would be hazardous to come to a conclusion of guilt of the appellant in absence of any such evidence. [Reference **Ramreddy Rajesh Khanna Reddy and another vs. State of A.P.4 and Rameshbhai Chandubhai Rathod vs. State of Gujarat5]**

(ix) As far as motive is concerned, its importance in cases of circumstantial evidence cannot be ignored. The motive may be considered as a circumstance which is relevant for assessing the evidence. The absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. However, if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. **[State of Uttar Pradesh vs. Kishanpal and others6, Pannayar vs. State of Tamil Nadu by Inspector of Police7 and Babu vs. State of Kerala3]**

In the instant case, the motive though narrated by the prosecution but is not found to be an existing circumstance from the deposition of the prosecution witnesses.

As noted above, the Gram Pradhan PW-1 states that the dispute relating to the land belonging to the husband of the first informant had been settled with his intervention prior to the commission of the crime. The motive in the instant case as stated in the deposition of the first informant (PW-2), therefore, seems to have been obliterated at the time of commission of the crime. It, therefore, becomes a very weak evidence. In absence of any other positive evidence to corroborate, the motive cannot be taken as the sole circumstance, based on the statement of the first informant, to hold that it is the appellant who could only be the perpetrator of the crime as she used to quarrel with the first informant over a piece of land which was earlier in her possession.

(x) The last circumstance is the extra judicial confession of the appellant in the narration of PW-1 and PW-3, the prosecution witnesses. As far as the law relating to extra judicial confession, it is held in **Sahadevan and another vs. State of Tamil Nadu8** that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence.

In **Balwinder Singh vs. State of Punjab9 and Kavita vs. State of Tamilnadu10,** it is held that an extra-judicial confession by its very nature is rather a weak piece of evidence and requires appreciation with the great deal of care and caution. It is to be proved just like any other fact and the value thereof depends upon the veracity of the witness to whom it is made.

While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra judicial confession, the Apex Court in **State of Rajasthan vs. Raja Ram11** stated the following principle:-

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The Court further expressed the view that such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.xxxxxxxxxxxxxxx"

In **Aloke Nath Dutta and others vs. State of West Bengal12,** it was held that the reliance placed by the Court on extra judicial confession in absence of other corroborating material would be unjustified:-

"87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; and (iii) corroboration.

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89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof."

While analyzing the principles for accepting the admissibility of extra judicial confession, it was noted in **Sahadevan8** as under:-

"15.6. Accepting the admissibility of the extra-judicial confession, the Court in the case of Sansar Chand v. State of Rajasthan [(2010) 10 SCC 604] held that :-

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore, Mulk Raj v. State of U.P., Sivakumar v. State (SCC paras 40 and 41 : AIR paras 41 & 42), Shiva Karam Payaswami Tewari v. State of Maharashtra and Mohd. Azad v. State of W.B. 2008 (15) SCC 449]

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."

15.7. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in the case of Rameshbhai Chandubhai Rathod v. State of Gujarat [(2009) 5 SCC 740], held as under :

"53. It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true."

15.8. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. Sk. Yusuf v. State of W.B. [(2011) 11 SCC 754] and Pancho v. State of Haryana [(2011) 10 SCC 165]."

It was further held as under:-

"16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra- judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

The Principles

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law."

Section 24 of the Indian Evidence Act, 1872 states as under:-

***"24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.**--A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise,1 having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.--A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise,2 having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."*

In the instant case, extra judicial confession has been made to two persons who both were in authority being Gram Pradhan and a BDC member in the Village. We may not conclude that they had any kind of ill will or motive of attributing an untruthful statement to the accused but it cannot be ruled out that the confession by the accused/appellant may have been made as a result of inducement, threat or promise and it cannot be said to be voluntarily.

34. From a conspectus of the circumstances put forth by the prosecution, in the light of the analysis of the legal position pertaining to each circumstance brought before us, we find that the prosecution has utterly failed to bring the relevant material, i.e. those circumstances which definitely and unerringly point towards guilt of the accused. All the circumstances, taken cumulatively, do not form a chain so complete that there is no escape from the conclusion that in all probabilities, like a prudent man, the crime was committed by the accused and no one else. The circumstantial evidence brought forward by the prosecution are not such which would form a complete chain and are incapable of explanation of any other hypothesis than that of the guilt of the accused. In the broken chain of circumstances, we do not find any clinching evidence against the appellant to hold her guilty.

35. We also think it pertinent to note that it was a murder or death of the child which was homicidal in nature. The dead body was found in a pond which was a public pond accessible to one and all in the village. It may said that it was easily accessible to the appellant being situated behind her house and taking advantage of the location, she might have succeeded in committing the crime. But we cannot ignore that the first informant was also residing in the adjacent house and no material circumstance could be brought before us by any of the prosecution witness which would cast any burden on the appellant to explain the homicidal death of the child. The possibility of someone else committing the crime cannot be ruled out.

36. There is one more circumstance which goes in favour of the accused. In her statement under Section 313 Cr.P.C., the appellant categorically stated that she was detained in the Police Station for about 3-4 days alongwith one Ram Saware, a neighbour for interrogation. Ram Saware was, however, released and the appellant was implicated. The arrest of the appellant was shown to have been made on 20.1.1996, though her name had figured in the first information report and she was present in her house as per the prosecution witnesses. There is no explanation by the Investigating Officer (PW-11) as to why the arrest of the appellant was delayed for four days. The search Memo Exhibit Ka '14' indicates that search was conducted in the absence of the accused but no incriminating material was found. The statement of the appellant that she was detained in the Police Station for four days without any arrest, therefore, appears to be true and the possibility of her false implication on the pressure of the influential persons of the village like Gram Pradhan and BDC member (PW-1 and PW-3) at the behest of the first informant (PW-2), can be ruled out.

37. There are other circumstances for which prosecution has not given any explanation:-

(i) Nothing can be culled out from the investigation as to where was the dead body for 3-4 days and why was it not searched thoroughly near the house of the appellant when she was a prime suspect form the beginning as per the deposition of PW-2 (the first informant);

(ii) The Gram Pradhan PW-1 states that he conducted search for the dead body of the child in the pond on the day when missing report was lodged and a net was thrown in the pond and

also 20 persons had entered in the pond to search for the dead body;

(iii) From the site plan, it appears that the Pond is a large water body accessible to everyone in the village.

(iv) The medical report of the dead body also indicates that it was not immersed in the water for a long time.

(v) Rigor mortis had passed off from all the four limbs and there was no indication of rotting (सड़न) in the medical report;

(vi) Ramnath, the husband of the appellant, is completely missing from the whole scene though as per the deposition of the first informant, he was present during altercation between the appellant and the first informant about 2-3 days prior to the date of missing of the child.

(vii) It seems surprising that the police did not even interrogate Ramnath, husband of the appellant who was also a resident of the same house during the entire investigation.

(viii) Who had last seen the child alive, when and where, is completely missing from the prosecution evidence.

38. The role of Investigating Officer in the present scenario also becomes questionable. It is evident that the Investigating Officer did not make any sincere effort to find out the truth of the story narrated by the witnesses of facts. It appears that the appellant was implicated in a zeal to solve the crime by the Investigating Officer in a hurried manner. The trial court has also committed the same error while holding the appellant guilty of murder of the child.

39. The present is not a case where putting all circumstances together, the Court can reach at the conclusion that "no one else than the appellant could be the perpetrator of the crime". Another question which comes in the mind of the Court is "if not the appellant then who else could be the perpetrator of the crime?". We are not finding answer to the question either way, in negative or in affirmative. We are also afraid to give answer to the said question in absence of any cogent material before us. For mere reason that we are not finding the real culprit, we cannot draw the inference that the appellant must have committed the crime.

In support of our above view, we would be benefited by the observations of the Apex Court in **Shankarlal Gyarasilal Dixit vs. State Of Maharashtra13,** where the Apex Court was in the same position as we are today.

Relevant paragraph is quoted hereunder:-

"32. The High Court, it must be said, has referred to the recent decisions of this Court in Mahmood v. State of U.P. [1976 (1) SCC 542] and Chandmal v. State of Rajasthan [1976 (1) SCC 621] in which the rule governing cases of circumstantial evidence is reiterated. But, while formulating its own view the High Court, with respect, fell into an error in stating the true legal position by saying that what the Court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond the "shadow of doubt". In the first place, 'shadow of doubt', even in cases which depend on direct evidence is shadow of "reasonable" doubt. Secondly, in its practical application, the test which requires the exclusion of other alternative hypothesis is far more rigorous than the test of proof beyond reasonable doubt.

33. Our judgment will raise a legitimate query: If the appellant was not present in his house at the material time, why then did so many people conspire to involve

him falsely ? The answer to such questions is not always easy to give in criminal cases. Different motives operate on the minds of different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions. In the instant case. the dead body of a tender girl, raped and throttled, was found in the appellant's house and, instinctively, everyone drew the inference that the appellant must have committed the crime. No one would pause to consider why the appellant would throw the dead body in his own house, why would he continue to sleep a few feet away from it and whether his house was not easily accessible to all and sundry, as shown by the resourceful Shrinarayan Sharma. No one would even care to consider why the appellant's name was not mentioned to the police until quite late. These are questions for the Court to consider."

40. For the reasons as aforesaid, we find that the impugned judgment is not sustainable in the eyes of law and is liable to be set aside.

41. Accordingly, the judgment and order dated 28.7.1997 passed by the Special Judge, Basti in Sessions Trial No. 185 of 1996 (State vs. Smt. Sohbatti Devi), arising out of Case Crime No. 07 of 1996, Police Station- Bakhira, District-Basti, convicting and sentencing the accused-appellant Smt. Sohbatti, under Section 302/201 I.P.C. is set aside and the accused-appellant is acquitted of all the offences/charges.

42. The appeal is **allowed.**

43. The accused-appellant Smt. Sohbatti is in jail. She shall be released from jail forthwith.

44. The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary compliance.

45. The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad.
